

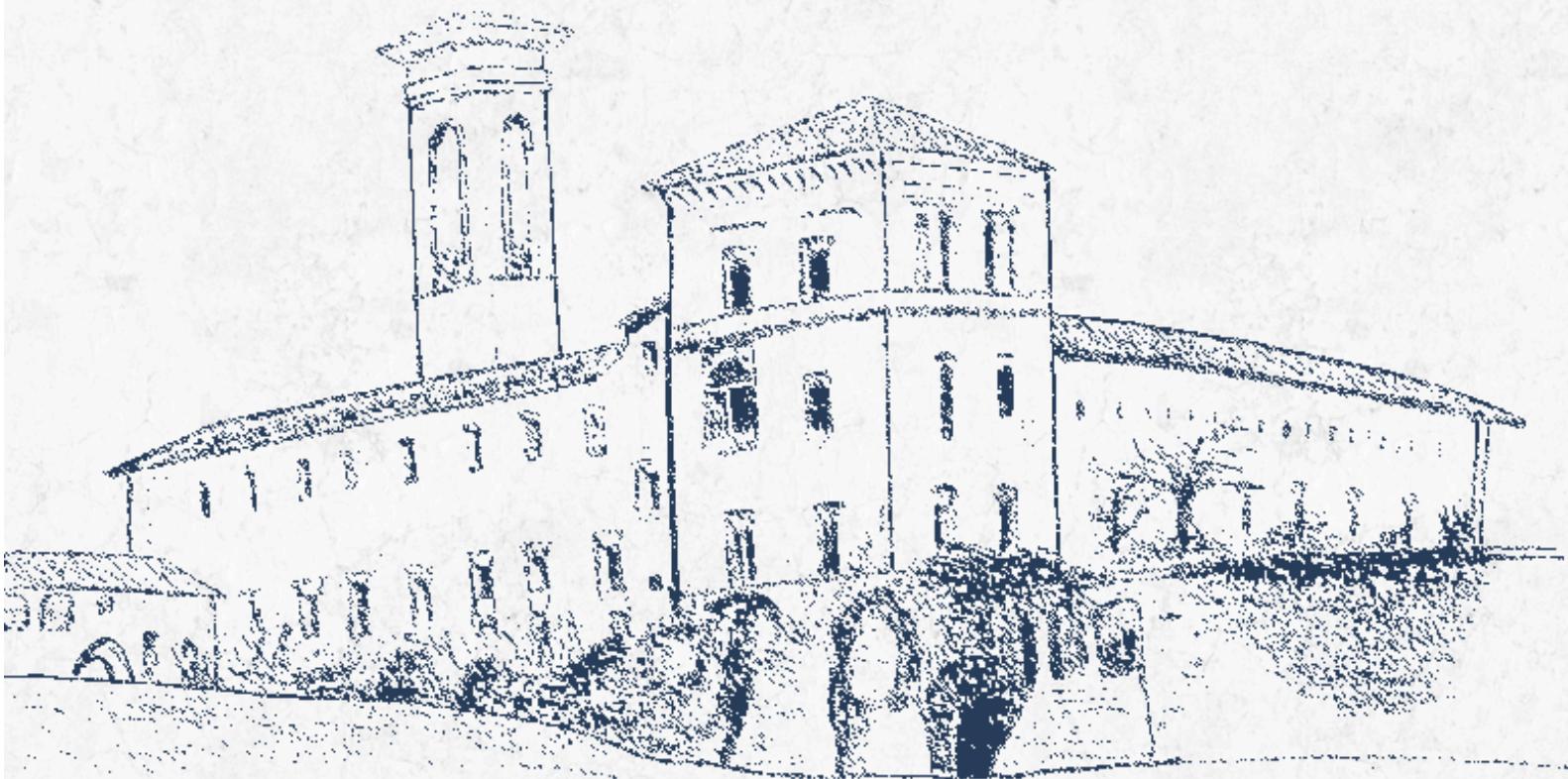
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# **EU Principles of Workers' Participation in the Management of Businesses and the Employee Shareholder in Britain: Rules, Interpretation and *Lacunae* of a New Subcategory of the Contract of Employment**

Pierre de Gioia-Carabellese \*

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## **1. Introduction**

In light of the Employment Rights Act 1996, as amended by the Growth and Infrastructure Act 2013, this work is aimed at providing a practical perspective of the employee shareholder contract, albeit through a doctrinal methodology that critically examines the possible flaws and inconsistencies of this new legislation.

First and foremost, the paper discusses the rights that the employee shareholder renounces in accepting the new status.

Furthermore, the contribution highlights the fact that a *numerus clausus* of employer may offer the new contract. Employers authorised to offer this personal work relationship to their workforce are not the same as those permitted to enter into an ordinary contract of service. Companies are the sole eligible employers for the purposes of this specific contractual relationship, although the shares can be allotted to the employee

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shareholder by the parent company of his employer. In this respect, an analysis of the combinations that these legal provisions engender will be illustrated.

Moreover, the paper discusses and analyses the process with which the employer must comply in offering the new status. Emphasis is placed on the advice that the individual is expected to receive according to the new legal provisions. As far as this aspect is concerned, an issue that is addressed through rules of legal reasoning, is whether the lack of advice may give rise to either an obligation to reengagement or, merely, an action for damages.

Additionally, based on a purposive interpretation of the recently introduced legislation, the employee shareholder contract may constitute either the conversion of a previously existing contract of service or a brand-new contract offered from the outset to a newly hired individual. In light of these two underpinning philosophies of employee shareholder, the article undertakes a discussion and doctrinal analysis, which is concerned with the legal provisions of the new legislation, with particular attention drawn to the means by which the contractual relationship comes to fruition. Here, a conundrum shall be tested and hopefully resolved: when the original contract of service is modified by the employer with the consent of the employee (the employee shareholder by conversion), some statutory protections are made mandatory to the benefit of the weaker party, namely the written statement of particulars where the relinquished rights are specified, independent advice from a suitably qualified external advisor and a cooling-off period before the new contract can take effect. Conversely, should the new contract be offered to a new member of staff, for instance to a newly hired individual as a result of an *ad hoc* job advert (the employee shareholder since the beginning or *ab initio*), the legislature would appear to have offered little by way of clarity.

## **2. The Employee Shareholder within the Broader Sphere of the Contract of Service and the Worker Contract**

A simple way of understanding the new category of employee shareholder (ES) would be to describe it as a relationship characterized by the swapping of shares for rights.<sup>1</sup> This is the main principle around which

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<sup>1</sup> Interestingly, although the terminology ‘employee shareholder’ is the one officially given to the new category in the final version of the legislation, the Growth and Infrastructure Bill initially referred to ‘employee owner’. See HC Deb 18 October 2012, col 516.

the concept has been configured: any employee, upon request from his employer,<sup>2</sup> can agree to sign a contract to become an employee shareholder with the resulting gain of tax-free shares.<sup>3</sup> The minimum amount of shares that can be issued is set at £2,000. In return, the employee retains some of the main statutory rights, although these are significantly watered down and, in some cases, they are sacrificed altogether.

The focus of this contribution is not to discuss whether, ideologically, this new status is legal and consistent with the established rights conferred on employees.<sup>4</sup> Rather, this work will explore and clarify, by means of a doctrinal methodology and in the light of rules of statutory interpretation, the essence of the recent legal provisions applicable to the employee shareholder, including the procedures that should be followed by the employer when making such an offer. More specifically, the research will analyse the rights that the employee shareholder is going to renounce, as a result of the acceptance of the offer to become an employee shareholder. Additionally, emphasis will be placed on the nature of the employer who is entitled to offer the employee shareholder contract, according to the new legislative provisions. Furthermore, the legal provisions aimed at protecting the employee shareholder when he accepts the new status will be discussed, with particular reference to the requirement for independent advice and the cooling off period. Finally, from a theoretical and speculative perspective, a possible demarcation line between two types of employee shareholder contract, the ES by conversion and that *ab initio*, will be presented and assessed.

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<sup>2</sup> It will be clarified later in Section 3 below that not any employer can offer to an employee a contract to become an employee-shareholder; only an employer (or its parent undertaking) issuing shares may do so.

<sup>3</sup> For the tax implications of this share issue and, more generally, on the new scheme, see Department for Business, Innovation & Skills, 'Guidance Employee Shareholders'(1 September 2013, last update 7 February 2014) <<https://www.gov.uk/employee-shareholders>>accessed 16 December 2014.

<sup>4</sup> In this respect, the new category confirms a de-regulation in the employer-employee relationship. MR Freedland and PL Davies, *Towards a Flexible Labour Market: Labour Legislation and Regulation since the 1990s* (Oxford Monographs on Labour Law, OUP 2007) 242-243.

### **3. The Statutory Employment Rights Renounced by the Employee Shareholder**

#### *3.1. The Right Not to be Unfairly Dismissed*

The employee must realise that there are certain statutory rights which he/she will renounce in deciding to take up the offer of becoming<sup>5</sup> an employee shareholder. The first of these is the removal of ‘the right not to be unfairly dismissed’.<sup>6</sup> Accordingly, the employee must be aware that, by renouncing this right, he/she is deprived of the most significant statutory protection furnished on the termination of his/her contract of employment.<sup>7</sup> Nevertheless, there is still a degree of relative security for the employee shareholder, despite the waiver of his/her entitlement not to be unfairly dismissed. This is connected with two types of dismissal specified in section 205A(9) and section 205A(10) of the ERA 1996:

- Automatically unfair dismissals, in other words a dismissal for a reason such as that laid down in sections 103, 103A or 108 of the ERA 1996, for example where the employee is a member of a trade union, exercises his/her whistleblowing rights or for health and safety-related reasons. As a result of these additional automatic unfair dismissals, a new legal provision, conferred on the employee, rather than the employee shareholder, has been added to the ERA 1996, namely s 104G, specifically relating to the employee shareholder status.<sup>8</sup>
- A dismissal which is discriminatory in terms of the provisions of the Equality Act 2010 (EA 2010).<sup>9</sup>

#### *3.2. The Right To A Statutory Redundancy Payment*

Redundancy pay is also a right which is waived by the employee who becomes an employee shareholder. If an employee is made redundant under section 139 of the ERA 1996, a statutory redundancy package must

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<sup>5</sup> The position of a person recruited as an employee shareholder is considered below in Section 7.

<sup>6</sup> Employment Rights Act 1996 (ERA 1996) s 94(1).

<sup>7</sup> An employer can dismiss an employee in a comparatively short period of time, namely before the employee has two years’ continuous employment, without fear of being sued in an Employment Tribunal: section 108(1) of the ERA 1996.

<sup>8</sup> At scholarly level, this addition is regarded as ‘[r]ather ironic ...’ (Prassl J, ‘Employee Shareholder “Status”: Dismantling the Contract of Employment’ (2013)42 ILJ 307-308).

<sup>9</sup> Section 205A(9)(b) of the ERA 1996.

be provided.<sup>10</sup> In the case of an employee shareholder, he/she will have received shares from the employer worth at least £2,000 or the increased (or decreased) value achieved in the meantime. However, the employee must be wary that the value of shares he/she possesses does not correlate to the potential redundancy package, the latter being an amount that does not fluctuate according to the highs and lows of the market and is calculated on a mandatory basis according to a legislative formula.<sup>11</sup>

### *3.3. The Other Statutory Employment Rights Renounced by the Employee Shareholder*

Those accepting the status of employee shareholder must renounce two additional rights: (1) the right to request flexible working and (2) the right to request time off to study or undergo training. These rights are not as important as those referred to in the previous Sections 3.1 and 3.2; nevertheless, they should be taken into account by an individual when accepting an offer to become, or to be, an employee shareholder.<sup>12</sup> On the entitlement to request flexible working,<sup>13</sup> such a right conferred exclusively on employees (but also on some agency workers),<sup>14</sup> is prescribed under section 80F and section 80I of the ERA 1996, although the relevant norms have been significantly amended by the Children and Families Act 2014.<sup>15</sup> It is worth mentioning that, although this right is renounced, the employee shareholder does retain the entitlement to

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<sup>10</sup> '[A]n employer shall pay... a redundancy payment by reason of being laid off or kept on short-time'. See the ERA 1996, s 135(1)(b).

<sup>11</sup> At the time of writing, and effective as from 6 April 2015, the redundancy pay is the weekly pay of the employee concerned, capped at £ 475, multiplied by the years of service, albeit up to a maximum of twenty. However, for years of service where the employee was 41 or older, the redundancy pay is one and a half week's pay. Accordingly, the maximum amount of statutory redundancy pay is £ 14,250.

<sup>12</sup> See later in this contribution, at Section 7, the difference between employee shareholder by conversion and *ab initio*.

<sup>13</sup> Pursuant to s 205A(2), in particular s 205A(2)(b).

<sup>14</sup> See ERA 1996, s 80F(8)(b). D Cabrelli, *Employment Law. Texts, Cases, and Materials* (OUP 2014) 322.

<sup>15</sup> The new rules concerned with the flexible working entered into force on 30 June 2014. G Mitchell, 'Encouraging Fathers to Care: the Children and Families Act 2014 and Shared Parental Leave' (2015) 44 ILJ 123-123;

<[http://adapt.it/englishbulletin/wp/wp-content/uploads/2014/07/carabellese\\_colhoun\\_flexworking.pdf](http://adapt.it/englishbulletin/wp/wp-content/uploads/2014/07/carabellese_colhoun_flexworking.pdf)> accessed 1 February 2015.

request flexible working in the 14 days following his return from a period of parental leave.<sup>16</sup>

Additionally, the right to request time off to study or undergo training, legislated under section 63D of the ERA 1996, is also renounced by the employee shareholder.<sup>17</sup>

Although the right to request either flexible working or time off to study or undergo training are renounced, nothing prevents the employee shareholder and the employer initiating discussions, on a voluntary basis, for flexible working to be mutually agreed. As far as the option to negotiate flexible working is concerned, this notion is advocated by Michael Fallon, Minister of State, Department for Business, Innovation and Skills:

'While employee owners do not have the statutory right to request flexible working, it does not stop them having constructive conversations with their employers about how they work to best suit the needs of the individual and the needs of the company. ...'<sup>18</sup>

*Mutatis mutandis*, the same reasoning could be extended to the time off for study or training.

The rationale behind these two exclusions (both the right to request flexible working and the right to request time off to study or undergo training) is unclear. From a closer perspective, it may appear odd that the employee shareholder (heralded as a flexible category of job) cannot ask for flexible patterns of working under the prescribed statutory process. This right could have been the natural corollary of the new category, rather than an element regarded as not worthy of protection. Similarly, as far as the right to request time off for study is concerned, its nature (unpaid) and its limited impact, as well as the potential benefit for the employer, should have been motivators to include rather than exclude such an entitlement.

Although it is difficult to identify the rationale behind this choice, a possible explanation is that these rights are the only ones that, within the structure of the current British employment statute, can be displaced, as they are not the obvious outcome of the transposition of the mandatory

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<sup>16</sup> See ERA 1996, s 205A(8). As parental leave is an EU right, the British Parliament did not have any choice.

<sup>17</sup> In this case, the abolition stems from section 205A(2)(a) of the ERA 1996.

<sup>18</sup> HC Deb 6 December 2012, col 496.

EU legislation.<sup>19</sup> Nevertheless, there might be an explanation of a more theoretical nature: if it was demonstrated that the intention of the Growth and Infrastructure Act 2013 (GIA 2013) was to create a new *species* (the employee shareholder), the removal of two rights (the rights not to be unfairly dismissed and the right to receive a redundancy) may have been perceived as an inadequate measure. However, the removal of additional statutory rights, in comparison with the traditional employee, may render the novel employee shareholder a more credible autonomous character.<sup>20</sup>

#### **4. The Categories of Employers Offering a Contract of Service**

Although in common parlance there is an inclination to distinguish between private sector and public sector employers,<sup>21</sup> in reality the nature of the employer does not define *per se* the contract of employment. The contract of employment is treated as a unitary category. The contract conferring the stereotypical rights of an employee, may be created by any employer irrespective of its nature, either public or private.

##### *4.1. The Nature of the Employer Permitted to Enter into a Contractual Relationship with an Employee Shareholder*

The creation of the category of the employee shareholder would appear to alter the British approach to treating all public employees as engaged in a contractual relationship as close as possible to that existing in the private sector. Although section 205A of the ERA 1996 does not specifically refer to the nature of the employer, it can be inferred from the applicable legal provisions that individuals may not be hired as employee shareholders if the prospective employer (or the current employer, if an individual becomes an employee shareholder by the conversion of his/her existing

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<sup>19</sup> HC Deb 20 November 2012, col 123. Sarah Veale, Head of Equality and Employment Rights, Trade Union Congress, affirmed that '... [t]he areas that have been picked in this proposal [of Bill] are all domestic law'.

<sup>20</sup> The employee shareholder as a new autonomous category seems to be a fairly recurrent topic in the parliamentary debates on the Bill.(HC Deb 13 November 2012, col 7). See P de Gioia-Carabellese, 'The Employee Shareholder: the Unbearable Lightness of Being ... an Employee in Britain' (2015)22 Maastricht Journal of European and Comparative Law 81-95.

<sup>21</sup> For mere statistical purposes, the Government defines the public sector as an area of employment in central government (eg NHS), local authorities maintained education establishments (albeit not any longer universities), public corporations (eg Royal Mail). S Deakin and GS Morris, *Labour Law* (6th edn, Hart Publishing 2012) 192.

contract<sup>22</sup>) is located in the public sector and is not incorporated as a company. The position is identical if the employer is in the private sector, but it is a business entity that has no capacity to issue shares.

In this respect, what matters is the nature of the employing entity as a ‘company’. This is obvious from the terms of section 205A(1) of the ERA:

‘An employee who is or becomes an employee of a company...’ (emphasis added).

Section 205A(13) of the ERA goes on to define a company as ‘a company or overseas company (within the meaning, in each case, of the Companies Act 2006 (CA 2006)) which has a share capital’<sup>23</sup> or ‘a European Public Limited-Liability Company (or *Societas Europea*) within the meaning of Council regulation 2157/2001/EC of 8 October 2001 of the Statute for a European Company.’<sup>24</sup>

#### *4.2. Direct or Indirect Offer of an Employee Shareholder Contract*

On the basis of section 204A(1) of the ERA, it is stipulated that employee shares may be either the shares issued by the employer or, alternatively, the shares issued by the parent company of the employer itself, seemingly in cases where the subsidiary of the latter had to be the employer of the prospective employee shareholder.<sup>25</sup> The outcome of this is that the legislation draws an obvious demarcation line between an employee shareholder, whose shares are issued by a company directly as the employer, and an employee shareholder whose shares are issued by the parent company on behalf of the subsidiary employing the individual. Also in this latter case, the issuer will be necessarily a company, according to the outcome of the analysis contained in Section 4.2.2 of this paper.

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<sup>22</sup> It will be clarified later in this contribution that, ontologically, there are two categories of employee shareholder agreement, those created by conversion on one hand and *ab initio* on the other. A recent and meditated analysis of the multiple employer can be read in J Prassl, *The Concept of the Employer* (Oxford Monograph on Labour Law, OUP 2015).

<sup>23</sup> ERA 1996, s 205A(13)(a). The CA 2006, s 3, refers to either a ‘limited company’ (limited by shares or by guarantee) or an ‘unlimited company’; in the latter case, there is no limit on the liability of its members.

<sup>24</sup> ERA 1996, s 205A(13)(b).

<sup>25</sup> Namely, s 205A(1)(b).

#### *4.2.1. Shares Issued Directly to the Employee Shareholder by the Employer*

Entities issuing shares are exclusively commercial entities, i.e. companies registered under the CA 2006 as private or public limited companies such as 'limited' and/or 'plc'. Therefore, they can be regarded as the eligible entity employing, directly or indirectly (through a parent company), an employee shareholder. Nevertheless, in cases where the capital of these entities was limited by a guarantee, rather than shares, practically also 'limited' and 'plc' would be prevented from using the ES scheme, as they would not be able to offer shares in exchange for the waiver of rights.

Furthermore, although they can be adopted as a means of running a business or a commercial activity in general terms, additional businesses and/or organisations, such as partnerships, limited liability partnerships and sole traders cannot and do not issue shares. First and foremost, they do not have a share capital, as required by the legislation. Secondly, pursuant to British Law,<sup>26</sup> partnerships cannot be regarded as companies, because they are not bodies corporate.<sup>27</sup> Accordingly, employers organised as partnerships, either limited partnerships or limited liability partnerships, do not have access to this category of contract. Such organisations are not in a position to offer to the employee shareholder what the legislation requires the employer must offer, ie shares.

An additional category of employer that seems to be banned from offering a contract of employee shareholder, is that of public organisations, such as local authorities. First and foremost, they are not 'companies'. Secondly, they do not issue shares; therefore, they cannot offer what an employer is required to give in return for the loss of rights pursuant to the ES scheme.

Nevertheless, the legislation on this point could lend itself to possible avoidance on the part of employers operating in the public sector. More explicitly, a local authority (Employer A), the memorandum of which allows that organisation to own or incorporate limited companies, might decide to proceed to such an end and therefore to use a subsidiary (Employer B) which is already part of that organisation. At this point, the contract of employee shareholder could be offered to the workforce of

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<sup>26</sup> Partnership Act 1890, as regards Partnerships, and Limited Partnerships Act 1907, as far as Limited Partnerships are concerned. Both these pieces of legislation extend to the England and Wales jurisdiction and to Scotland, but not to Northern Ireland.

<sup>27</sup> However, see limited liability partnership under the Limited Liability Partnerships Act 2000. This specific partnership is a body corporate, pursuant to section 1(2) of this specific piece of legislation.

that public sector employer,<sup>28</sup> not through Employer A – simply because it does not have shares to offer - rather via the newly established commercial entity, Employer B. It goes without saying that, in this scenario, the shares of the employee shareholder shall be the shares of the direct employer, Employer B, although it is incontrovertible that the *dominus* of the relationship, the actual master, will not be the ostensible employer (Employer B), rather the factual one (Employer A).

Given the tenor of the legislation, it appears that the employer organised as an individual shall not be able to offer this contract to its workforce. An individual is not entitled to issue shares, nor securities in general terms. As such, there is no possibility for an employee shareholder contract between a worker and an employing individual to arise.

#### *4.2.2. Shares issued by the Parent Company of the Employer*

The second possibility for the employer is to offer to the employee shares which are not issued by that employer itself but rather – indirectly – by its parent company. This offer, which can be referred to as an ‘indirect offer of shares’, gives rise to particular questions.

First, a clarification is offered by the same legislation in respect of the concept of parent undertaking; the reference is made to the CA 2006.<sup>29</sup> Indeed, this piece of legislation provides definitions of both ‘undertaking’ and ‘parent undertaking’. According to section 1162(2) of the CA 2006, the latter shall be categorised as such, in relation to another undertaking, if one of four alternative circumstances are met: (1) the holding of the majority of the voting rights in the undertaking; or (2) the entitlement, as a member of the undertaking, to appoint or remove a majority of the board of directors of the subsidiary; or (3) the right to exercise a dominant influence over the undertaking either in force of provisions contained in the undertaking’s articles or as a result of a control contract; or (4) the undertaking shall be a parent undertaking if it is its member and ‘controls alone, pursuant to an agreement with other shareholders or members, a majority of the voting rights in the undertaking.’<sup>30</sup>

Of similar importance, though, is the concept of undertaking, clarified at the previous section 1161(1) of the CA 2006: either a body corporate or

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<sup>28</sup> The status could be also offered to new employee shareholders recruited *ab initio*. See later (Section 7) the definition of the ES by conversion and the ES *ab initio*.

<sup>29</sup> S 205A(13).

<sup>30</sup> S 1162(3) of the CA 2006.

partnership, or an unincorporated association carrying on a trade or business, with or without a view to profit.

As a result of the combined reading of the applicable employment law and company law legislation, a company has the capacity to offer shares of its parent company<sup>31</sup> and therefore to offer employee shareholder contracts to those employed by a subsidiary of the main organisation. This is due to the fact that there is a requirement in the legislation that the direct employer of the employee shareholder is a subsidiary organised as a company. Similarly, individuals employed by a partnership, when the partnership is owned by a company and the latter is a parent undertaking, may not be offered an ES contract. Although, according to the general theory of corporate law, a member of a partnership may be a company and although the company could be a parent undertaking of a partnership, the employing partnership would not fit into the concept of s 205A(1), which requires the contract of ES to be in place with a company.

Finally, because according to the new legal provisions under discussion, the parent company is required to issue shares, the entities coming within the definition of 'parent undertaking' does not include all such undertakings as are potentially allowed by the CA 2006, but only those undertakings issuing shares and with a share-capital. According to this line of reasoning, a parent undertaking which is a partnership, albeit potentially a parent undertaking of a subsidiary company, cannot be a useful parent undertaking for the purposes of the ES scheme; it may not issue shares, because it does not have a share capital. Similarly, 'an unincorporated association carrying on a trade or business, with or without a view to profit', that may be a parent company according to the CA 2006, shall not be a valid parent company for purposes of the ES scheme, again since it cannot issue shares.

#### *4.3. The Category of Shares that may be Offered to the Employee Shareholder*

##### *4.3.1. Statutory Provisions Regulating the Written Statement of Particulars*

Only shares which are fully paid-up may be offered to the ES. According to the ERA 1996, s 205A, the shares that the employee shareholder is able to receive (the employee shares) are not necessarily endowed with voting rights. From a company law perspective, non-voting ordinary shares represent a class the members of which are entitled to receive dividends

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<sup>31</sup> So long as, ontologically, it is a company and its capital is limited by shares.

and to share in surplus assets; however, they do not have any right to vote at members' meetings.

In this respect, the latest statute is not totally understandable; if the GIA 2013 heralds a new form of participation of the employee in the management of the employer, voting rights should have been a requirement, rather than merely an option. Voting rights confer the possibility of the shareholder to have his say in the general meeting; the lack of voting rights leads to the conclusion that the remuneration received by the ES is not for the purposes of participation, rather exclusively in exchange for a loss of rights.

Furthermore, according to what must be narrated in the written statement of particulars (WSP or WS of Particulars), employee shares may carry 'rights to dividends'. Similarly, the shares given to the employee shareholder may confer or not, depending on the indications of the WSP, 'any rights to participate in the distribution of any surplus assets', in case of winding-up of the company.<sup>32</sup> If one or all of the rights just referred to in this Section 4.3.1. (voting rights, rights to dividends, rights to participate in the distribution of any surplus assets as a result of winding up) had to relate to a category of shares different from the ordinary category, the WSP shall explain 'how those rights differ from the equivalent rights that attach to the shares in the largest class (or the next largest class if the class which includes the employee shares is the largest)'.<sup>33</sup> This may indirectly confirm that, if these rights were already attached to the ordinary category of shares, no explanation in the WS of Particulars will be required.

Moreover, some legal provisions of section 205A(5) relate to the concept of transferability of shares. In this respect, the employee shares, depending on the decision of the employer, could be either redeemable,<sup>34</sup> or subject to restrictions on the transferability.<sup>35</sup> Additionally, they can provide the employee shareholder with pre-emption rights,<sup>36</sup> or

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<sup>32</sup> ERA 1996, s 205A(e).

<sup>33</sup> ERA 1996, s 205A(f).

<sup>34</sup> Section 205A(g) of the ERA 1996. As emphasized at scholarly level, the redeemable shares are shares 'which are issued on the basis that they are to be or may be redeemed ... at a later date by the company. The terms of issue may be that the shares will be redeemed at a certain point or that they may be, and in the latter case the option to redeem may be allocated to the shareholder or the company or both.' PL Davies and S Worthington, *Gower and Davies. Principles of Modern Company Law* (9th edn, Sweet and Maxwell 2012) 324.

<sup>35</sup> ERA 1996, s 205A(h).

<sup>36</sup> ERA 1996, s 205A(i).

be subject, according to section 205A(j) of the ERA 1996, to drag-along right<sup>37</sup> or tag-along right.<sup>38</sup> As to the former, it is worth mentioning that in the general corporate law theory, the pre-emption right provided to existing shareholders allows them not to be diluted by the issue of new shares. The possibility that the shares to be given to the employee shareholder may be devoid of any pre-emption right is a further reason for concern; an unaware employee shareholder receiving shares without pre-emption rights could be potentially further damaged by the dilution of his - already limited - rights to co-manage the company.<sup>39</sup>

In this respect, there is a slightly different regime of the novel section 205A(i) of the ERA 1996 and the CA 2006, s 566: the latter legal provision stipulates that the existing shareholders' rights of pre-emption do not 'apply to the allotment of equity securities that would ... be held under or allotted or transferred pursuant to an employees' share scheme.' Ultimately, in the case of employees' share schemes, the pre-emption rights are excluded on mandatory basis, whereas for this particular class of shares (for the employee shareholder) it will depend on what the written statement of particulars indicates. Whatever the option is (pre-emption rights or not), one or more of these options shall be specified in the WSP.

#### *4.3.2. Voluntary Provisions of the Written Statement of Particulars*

The legislature does not require the WS of Particulars to specify whether the employee shares are required to be listed or not, in cases of both direct and indirect offers of employee shares. In this respect, there is no doubt that the employee shareholder scheme is permitted to 'employing entities' issuing listed shares; theoretically, the employee listed shares shall be those issued either by the same listed employer or by the listed parent company of the ES' employer.

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<sup>37</sup> The drag-along rights are defined in the same ERA 1996, s 205A(13), as amended by the GIA 2013: ultimately, the expression 'drag-along rights', in relation to shares in a company, 'means the right of the holders of a majority of the shares, where they are selling their shares, to require the holders of the minority to sell theirs'.

<sup>38</sup> The tag-along, according to the ERA 1996, s 205A(13), is conversely 'the right of the holders of a minority of the shares to sell their shares, where the holders of the majority are selling theirs, on the same terms as those on which the holders of the majority are doing so'.

<sup>39</sup> *Contra*, J Prassl (n 8) 320, according to whom it is difficult to say whether the class of share of the ES can be 'considered exempt under the provision for employees' share schemes ...'.

This aspect is not mandatory; however, it is suggested that nothing prevents the employer from referring to the status (listed or not) of the shares. Probably, a more prudent provision would have made mandatory the indication in the written statement of particulars that the employee shares are not listed. Listed shares may be more easily liquidated by any investor, whereas the non-listed financial instruments are less flexible. Accordingly, as to the latter ones, the employee shareholder could have been better protected. Interestingly, as a result of this axiom, there might be possible crossovers and combinations: a worker employed by a listed company, could receive non-listed shares of a parent company. According to the same line of reasoning, the employee shareholder of a non-listed company shall be able to receive shares of a listed company, if the latter were the parent company of the employer.

Whether or not the ES is going to receive shares from the employer or from the parent company, it is possible to suggest that the listed shares may represent, at least in the short term period, a better option for the employee shareholder; they can be realised and converted into money more quickly. In addition, the non-listed shares, (probably the majority of those offered by employers adhering to the ES scheme<sup>40</sup>) may give rise to serious problems of evaluation. Non-listed shares do not have a trading value, which means that the valuation advice can be very expensive.<sup>41</sup>

#### *4.3.3. Employee Shares and Miscellaneous*

Furthermore, the GIA 2013 fails to definitively settle some interesting matters of international private law that may originate from a cross-border offer of shares. Although it is assumed that the contract of employee shareholder shall be governed by English or Scots law, according to the general criteria, nothing seems to prevent the prospective employee shareholder from receiving shares issued by an employing entity incorporated in a different country and/or by a parent company which, through a British subsidiary, is located outside Britain and allots shares according to that country of incorporation. According to the general principles of private international law, the relevant contract shall be nonetheless a contract of employee shareholder in Britain, although any potential claim relating to the shares shall be governed by the jurisdiction where the parent company issuing shares is located.

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<sup>40</sup> Most employers in Britain are limited or private limited companies, the shares of which are not offered to the public. See J Prassl (n 8) 321.

<sup>41</sup> As regards the ‘independent advice’ and related issues, see below Sections 5.2 and 5.3.

## 5. The Contract, the Requirement for Independent Advice and the Cooling-off Period

The means by which an employee may become an employee shareholder are worthy of an in-depth analysis for two main reasons: firstly, the legal requirements radically diverge from those in place where an individual enters into a traditional contract of service; secondly, the new legislation has not entirely clarified all the steps involved in this procedure. It follows from this that there is both a need for a construction of the inconsistencies and/or flaws existing in the recently enacted legislative framework and for an opportunity to interpret, in a systematic way, the body of law affected by this new concept.

### *5.1. The Contract of Employee Shareholder and the Written Statement of Particulars of Employment*

In considering the relevant steps that must be taken when offering the new status of employee shareholder, there are statutory guidelines in place that indicate the correct course of action. Firstly, there must be an agreement between the employer and the individual to become an employee shareholder. The terminology adopted by the legislation refers to 'agreement' and 'to agree', rather than 'contract'.<sup>42</sup> This may be consistent with the general theory of the contract of employment which, except for specific exceptions, does not require to be in writing.

In terms of section 1 of the ERA 1996, an employer is statutorily bound to provide the employee with a WS of Particulars within two months from the commencement of the employment. In a contractual relationship existing between an employer and an employee, the WS of Particulars is the evidence of the contract, rather than the contract itself.<sup>43</sup> In a similar fashion, the legislature requires the employer to provide the prospective employee shareholder with a 'written statement of the particulars of the status of employee shareholder and of the rights that attach to the shares ...'.<sup>44</sup> In other words, it is possible to infer that the written statement of the employee shareholder borrows from the ordinary WSP of any employee the elements of which are prescribed under section

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<sup>42</sup> S 205A(1)(a): 'the company and the individual agree ...'; s 205A(6): 'Agreement between a company and an individual ...'.

<sup>43</sup> *System Floors (UK) Ltd. v Daniel* [1982] ICR 54.

<sup>44</sup> ERA 1996, s 205A(1)(c).

1 of the ERA 1996; this latter provision has not been derogated from, nor amended. Nevertheless, the WS of Particulars, if applied to the employee shareholder, should be adapted so as to encompass the specific remuneration given to the ES, particularly in the form of shares. The characteristics of the latter (whether affixed with voting rights or not, whether redeemable or not, etc., as already detailed in Section 4 above) shall be detailed in the ES written statement of particulars.

### *5.2. The Requirement for Independent Advice*

First, when making a decision about his prospective employee shareholder status, the employee must receive legal advice on the matter from an adequately qualified independent person:

'[T]he individual ... receives advice from a relevant independent adviser as to the terms and effect of the proposed agreement'<sup>45</sup>

However, the legal provisions are not entirely without problems, if observed from two angles of observation: the eligible professionals entitled to release the advice; and the scope of this advice.

As to the former aspect, the independent advice may come from a variety of professionals: (a) a qualified lawyer; (b) certified trade union officials; or (c) any other person that has been approved by the Secretary of State to give the relevant advice. Other categories, such as in-house lawyers or in-house professionals working for the same employer or its group, do not appear to fulfil the criteria to undertake this task, particularly because they would not fit into the requirement of independence. This clarification is not provided by the ERA 1996, rather by the guidance notes published by the Government on the same date when the GIA came into force.<sup>46</sup> The categories of professionals that the BIS Guidance regards as eligible for purposes of the employee shareholder category are somewhat correspondent to those indicated by the ERA 1996, s 203(3A); this latter legal provision refers to the independent advice relating to an agreement between employer and employee the purpose of which is the derogation from mandatory rights. It is worth mentioning that, in the parliamentary debates in the House of Lords, it was initially argued that the advice should be given by an independent solicitor or barrister.<sup>47</sup> Nevertheless,

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<sup>45</sup> ERA 1996, s 205A(6)(a).

<sup>46</sup> See Department for Business, Innovation & Skills, 'Guidance Employee Shareholders' (n 3).

<sup>47</sup> HL Deb 6 February 2013, col 266.

the British Government rejected this position.<sup>48</sup> As a result, in the employee shareholder scheme, advisers may lack a legal background.

In relation to what the advice involves, the wording in the legislation refers to ‘the terms and effect of the proposed agreement’. Although one particular interpretation seems to be that the advice is fundamentally of an employment law nature (it relates to the rights the employee is to renounce), for reasons of protection of the weaker party, it should also logically touch on tax law and company law aspects, such as the shares and their valuation. Furthermore, because the advice is not qualified as ‘legal’ in the legislation,<sup>49</sup> this may even suggest that factors that are non-legal in nature, such as purely financial matters, need to be included, simply because the latter are not expressly excluded.<sup>50</sup>

As such, taking into account general principles of legal theory,<sup>51</sup> the latter interpretation seems to be the most reasonable one. First and foremost, this interpretation is justified by a common law literal rule:<sup>52</sup> the advice, according to the ERA 1996, s 205A(6)(a), shall relate to ‘the terms and effect of the proposed agreement.’ In other words, the expression ‘terms and effect’ seems to cover a perimeter that goes beyond the matters of a legal nature. Secondly, also if it was conceded that there is no scope for a literal interpretation of section 205A(6)(a), the application of a common law mischief rule would probably lead to the same conclusion;<sup>53</sup> in looking at the general principles of the GIA 2013, the underlining philosophy of the piece of legislation under discussion is to protect the employee against

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<sup>48</sup> D Pannick, “‘Respect for Law and Sausages’: how Parliament Made Section 31 of the Growth and Infrastructure Act 2013 on the Sale of Employment Rights’ 2014(85) *The Political Quarterly* 43-49.

<sup>49</sup> See the ERA 1996, s 205A(6)(a), where reference is made to the ‘advice’ from a ‘relevant independent adviser’, without inclusion of the adjective ‘legal’.

<sup>50</sup> The matter may also impact on the connected issue of the reasonableness of the costs of the advice that the employer is required to bear (see later in this same Section 5.2).

<sup>51</sup> N MacCormick, *Rhetoric and the Rule of Law* (OUP 2005, reprinted 2010) 39-40.

The Author observes:

‘For each concept, each universal like “consumer”, “producer”, “product”, “injury” “cause”, we have to supply a particular instantiation in the case we put forward.

But each such term is subject to interpretation, and this is interpretation in the light of an understanding of the point of law, its fit with the surrounding law, and a sense of justice appropriate to the legal domain in question.’

<sup>52</sup> Among different Scholars, see more recently G Carney, ‘Comparative Approaches to Statutory Interpretation in Civil Law and Common Law Jurisdictions’ (2015)36 *Statute Law Review* 55.

<sup>53</sup> Ibid 55.

a too nonchalant loss of the main entitlement bestowed upon him/her, the right not to be unfairly dismissed.

Additionally, whether the advice is merely of an employment/company nature or extends to the financial aspects of the transaction too, it is stipulated that the employer is to reimburse to the employee the relevant costs incurred by the employee. The reimbursement is not unfettered, but rather subject to the criterion of reasonableness. This can be inferred from the tenor of the ERA 1996, s 205A(7):

‘Any reasonable costs incurred by the individual in obtaining the advice (whether or not the individual becomes an employee shareholder) which would, but for this subsection, have to be met by the individual are instead met by the company’.<sup>54</sup>

This parameter of reasonableness is not totally obvious. There is a lack of contributions on this specific aspect, also in light of the novelty of the ES notion. Despite this, it is possible to reason that the GIA 2013 may have borrowed the term from statutory provisions of a contract law nature passed in recent decades: an example of this is the Unfair Contracts Terms Act 1977 (UCTA 1977). In this framework, the term is used in order to assess the validity of a clause excluding or restricting the liability of a party to the detriment of the other who is, fundamentally, a consumer.<sup>55</sup> This happens particularly in standard forms where there is inequality in the bargaining power between the two contracting parties.<sup>56</sup> Interestingly, in the ES notion, the ‘consumer’ protected by the criterion under discussion is the employer, rather than the ES. In other words, the traditional strong party existing in the employment law theory (the employer) becomes, in the ES scheme, the weak party to protect against any potentially exorbitant cost of the advice.

Nevertheless, this term (reasonableness) does not contradict, nor is it inconsistent with, the theory, advocated by this work,<sup>57</sup> that the degree of advice to the prospective employee shareholder must be exhaustive and extended to any term and condition of the ES contract, rather than a partial one, limited to purely employment law/company law advice.<sup>58</sup> Because the former has been corroborated in this Section 5.2. (advice

<sup>54</sup> Emphasis added.

<sup>55</sup> Section 2 and 3 of the UCTA 1977.

<sup>56</sup> HG Beale (ed), *Chitty on Contracts*, vol I (31st edn, Sweet & Maxwell 2012)1086.

<sup>57</sup> See this same Section 5.2.

<sup>58</sup> According to this line of reasoning, a piece of advice not limited to employment/company law matters would be more expensive but still within the threshold of reasonableness.

relating to the ‘terms and effect’ of the ES agreement, rather than exclusively to the employment law/company matters), any cost relating to this exhaustive advice shall be borne by the employer, so long as it is reasonable.

### *5.3. Lack of Advice and Legal Consequences*

If the requirement for independent advice (as above qualified) is not adhered to, the agreement will not be binding. In this respect, section 205A(6)(a) stipulates that, in the absence of advice, the agreement would have no effect.

This point is not totally clear. There is a lack of scholarly work on it. On one hand, the dearth of advice may impinge on the ES’ entitlement to claim back the previous employee status, including the right not to be unfairly dismissed. On the other hand, it could be argued that non-compliance with the statutory steps would entitle the ES to merely claim damages.<sup>59</sup>

From an interpretative point of view, particularly through a systemic argument,<sup>60</sup> it can be deduced that the role played by the advice is central and necessary in the architecture of the new notion of ES. Despite the existence, from a merely contractual point of view, of a *consensus in idem* (ie the agreement on the new terms and conditions of the ES contract), the advice may be regarded as a condition precedent of a mandatory nature. The latter, if not met, does not allow the agreement to be effective. In these circumstances, the employee shareholder should be regarded as an individual who has never lost his/her previous status. As a result of this, the ES would be potentially entitled to claim unfair dismissal in cases where the circumstances under the ERA 1996, 94 ff, had to occur. Accordingly, he/she could obtain from the judiciary the potential re-engagement/re-instatement which is available to traditional employees.

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<sup>59</sup> A similar issue may be theoretically raised in connection with the consistency of the value of the shares. P Lokiec, ‘Le Contract de Salarié-actionnaire’ (2014)1 Revue de Droit du Travail 18.

<sup>60</sup> N MacCormick, *Rhetoric and the Rule of Law* (n 53) 127-128. See also S Veitch, E Christodoulidis and L Farmer, *Jurisprudence. Themes and Concepts* (2 nd ed, Routledge 2011); EE Savellos and RF Galvin, *Reasoning and the Law: the Elements* (Wadsworth 2001).

More recently, see R Ekins, ‘Statutes, Intentions and the Legislative – A Reply to Justice Hayne’ (2014)14 Oxford University Commonwealth Law Journal 3-20; K Hayne, ‘Statutes, Intentions and the Courts: What Place does the Notion of Intention (Legislative or Parliamentary) Have in Statutory Construction?’ (2014)13 Oxford University Commonwealth Law Journal 271-282.

#### *5.4. The Cooling-off Period*

Another step involved in the process is the length of time that must pass before the agreement between the employer and employee shareholder will be concluded. More specifically, the agreement ‘is of no effect unless... seven days have passed since the day on which the individual receives the advice’.<sup>61</sup> Once the offer has been put on the table for the employee, the latter has the right to withdraw it before seven days have elapsed from the date when the advice was administered. This should give the employee sufficient time to make a thoroughly informed final decision. Furthermore, section 205A(6) refers to the expression ‘before the agreement is made’. In reality, in order to give sense to the expression and to better coordinate it with the rationale behind the cooling-off period, it may be suggested that the law maker wished to say as follows: ‘before the agreement is effective’. Paradoxically, the original Bill of the GIA 2013 did contain a more consistent wording, namely:

‘Where a company makes an offer to an individual for the individual to become an employee shareholder, an acceptance by the individual of the offer is of no effect unless seven days have passed since the day on which the offer was made.’

In the end, a motion in the House of Lords encompassing the final wording prevailed.<sup>62</sup>

#### *5.5 Timing and Steps for the Effectiveness of The ES Agreement*

In light of the stipulations contained in section 205A(6) of the ERA 1996, it is possible to summarise the steps that the employer must take for an agreement to be concluded with an employee whereby the latter becomes an employee shareholder. These steps, if followed, should guarantee the validity of the arrangements and, therefore, should minimise the legal risk that the employee shareholder may subsequently challenge the previous arrangements in an employment tribunal.

The offer to the employee to become an employee shareholder, with an indication of the amount of shares the employee will receive in exchange, should be communicated to the employee. This phase would appear to still include an informal process; therefore, it is possible to envisage that a mere conversation between the employee and the employer should suffice

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<sup>61</sup> ERA 1996, s 205A(6)(b).

<sup>62</sup> HL Deb 24 April 2013, col 1442.

as a medium of communication in this respect. The conversation or communication to the employee should include the main aspects of the new contract, particularly the shares he/she is going to receive, and presumably a copy of the proposed contractual documentation. It is worth observing that an oral communication, which is not confirmed in writing, is unwise, for reasons of proof if there is a claim in the future that the communication never took place.

If the employee demonstrates an interest in the relevant proposal, an *ad hoc* agreement between the two parties should follow from the first meeting. In assuming that the employer may rely on a legal department and/or HR department, one could envisage that the agreement would be prepared by the employer, submitted to the employee and signed by the latter. However, in the case of a top professional who became the beneficiary of significant percentages of share capital in the company, it is possible to envisage negotiations between a legal team operating on behalf of the employer and a legal team representing the employee. Finally, because the legislation does not impose a limit on the number of individuals who may benefit from the offer of shares, a standard form may be prepared by the employer. The purpose of this would be an efficient way for the employer of creating the agreement.

## 6. Protection from Detriment and Unfair Dismissal

The legislature has adumbrated various provisions in the ERA which protect the employee shareholder from possible retaliatory conduct on the part of the employer. Sections 47G and 104G of the ERA 1996 provide the right not to be placed at a disadvantage in employment<sup>63</sup> and for the employee not to be unfairly dismissed on the grounds of rejection of the offer.<sup>64</sup> Understandably these provisions apply to current employees, rather than newly recruited employee shareholders.<sup>65</sup>

## 7. The Employee Shareholder by Conversion and *ab initio*

The legislation governing the employee shareholder status enables an employer to either convert an existing contract of service into an employee shareholder contract or to directly hire an employee shareholder

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<sup>63</sup> ERA 1996, s 47G, as amended.

<sup>64</sup> ERA 1996, s 104G, amended by the GIA 2013.

<sup>65</sup> See below in this paper, at the following Section 7, the difference between ES *ab initio* and ES by conversion.

as such, through a normal recruitment process. This dual channel of recruitment of the employee shareholder workforce seems to be confirmed by a plain reading of the applicable legal provisions. Section 205A of the ERA, in referring to the ‘employee shareholder’, cites an individual ‘who is or becomes an employee of a company’. The verbs ‘to be’ and ‘to become’ employed by the legislation may refer, respectively, to (a) the scenario of a conversion of the existing contract of service into a contract of ES (that is again applicable to an individual who already ‘is’ an employee) or (b) the individual becoming employed by the company as an employee shareholder, without being an employee of that company before. Commentators have focused on the first mode by which the employee shareholder relationship may be created (employee shareholder by conversion), whereby an existing employee agrees with the employer to become an employee shareholder. Nevertheless, it is clear from the legislative provisions that an individual can be hired directly as an employee shareholder in which case, the employee shareholder will be constituted *ab initio*.

### *7.1. Distinctions between the Employee Shareholder Contract *ab initio* and by Conversion*

There is no doubt that the employee shareholder contract *ab initio* is a feasible option. Despite the silence of the legislation in this respect, the recruitment market involves the employer advertising the post and/or posts, clarifying that the specific professional they are looking for is an employee shareholder, with, probably but not necessarily, the indication of the amount of shares the prospective ES is going to receive. It is unclear whether any advertising material for such a post should also clarify the rights that the ES to be recruited is not going to exercise, in comparison with those conferred on an orthodox employee.

### *7.2. Loopholes in the Current Section 205A of the ERA 1996*

The wording of section 205A(2), in mentioning the rights that the employee shareholder is going to lose<sup>66</sup> (as mentioned above, significantly the right not to be unfairly dismissed), refers to the ‘employee who is an employee shareholder’. Literally, this legal provision could be interpreted with a paradoxical consequence: the employee who has become an

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<sup>66</sup> As reminded above in this article, the right not to be unfairly dismissed.

employee shareholder does not lose any right, because this category (ES by conversion) is not mentioned at all in this provision. Probably, the most comprehensive wording should have been the following one:

'An employee who is or has become an employee shareholder does not have –

- a) the right to make an application under section 63D (request to undertake study or training),
- b) the right to make an application under section 80F (request for flexible working),
- c) the right under section 94 not to be unfairly dismissed, or
- d) the right under section 135 to a redundancy payment.'

In other words, the legislature, in phrasing section 205A(2) of the ERA 1996, did not resort to the same subtlety as the previous section 205A(1), where the difference between the initial employee shareholder and the ES by conversion has been clearly spelled out.

Yet, although the wording is not totally clear, it is not too speculative to affirm, from the general reading of the entire legal provisions and having in mind a 'commonsense construction rule'<sup>67</sup> that in both cases these rights are renounced. More specifically, the silence of the drafter does not prevent the interpreter from inferring that the missing expression (again 'or has become') shall be implied.

### *7.3. The Requirement for Independent Advice and the Cooling-Off Period for the ES ab initio*

Some additional sets of rules provided by the amended ERA 1996 seem to be more controversial and ambiguous, if applied to the ES *ab initio*. The requirement for independent advice and the cooling-off period, which are the foundations on which the protection of the employee shareholder lies, should apply- logically - to the employee shareholder *ab initio* too.

However, *prima facie*, it could be argued that this is not the case.

In essence, the literal terms of section 205A(6) of the ERA would suggest that the employee shareholder *ab initio* is not entitled to such protections: 'Agreement between a company and an individual that the individual is to become an employee shareholder is of no effect unless, before the agreement is made –

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<sup>67</sup> O Jones, *Bennion on Statutory Interpretation* (6th edn LexisNexis 2013) 512. See also J Bell and G Engle, *Cross Statutory Interpretation* (3<sup>rd</sup> edn Butterworths 1995) 21-47.

- a) the individual, having been given the statement referred to in subsection (1)(c), receives advice from a relevant independent adviser as to the terms and effect of the proposed agreement, and
- b) seven days passed since the day on which individual receives the advice.' (emphasis added)

Since section 205A(6) of the ERA 1996 refers exclusively to the employee who is to become an employee shareholder, both the advice and the cooling off period would not apply in the case of ES *ab initio*. It is not an employee who is to become an ES, he/she is already an ES.

This interpretation would lead to a binary system of employee shareholders: on the one hand, the employee shareholder by conversion, where the employee is protected before becoming an employee shareholder (advice and cooling-off period); on the other hand, the employee shareholder *ab initio*, who cannot avail himself of any of these legal safeguards.

In reality, this possible interpretation seems to be too speculative, and to a certain extent, contradicted by a more in-depth reading of the provisions under discussion. Therefore, there are strong arguments to say that both the independent advice and the cooling-off period do apply to the employee shareholder *ab initio* too.

Before justifying this conclusion, it is worth remembering that legal theorists authoritatively remind positivists of one of the most challenging tasks when interpreting a statute, i.e. ‘not all legal rules, not even all legislated rules “in fixed verbal form”, can always give a clear answer to every practical question which arises. Almost any rule can prove to be ambiguous or unclear ...’.<sup>68</sup> Additionally, the essential role played by the common law interpretation was already emphasised decades ago at the most authoritative level:

‘All legal systems require a cement to bind them into a coherent whole; and the question which the common law systems will very soon have to face is whether a better cement than rigid precedent cannot be found in more codification and in methodized reasoning from clear principles in accordance with the civilian tradition. This judge should not be the parties’ oracle, but he must be something more than an animated index to the law reports.<sup>69</sup> (emphasis added)

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<sup>68</sup> N MacCormick, *Legal Reasoning and Legal Theory* (Clarendon Press 1978, reprinted 2003) 65.

<sup>69</sup> Lord Cooper, ‘The Common Law and the Civil Law – A Scots’ View’ (1950) 63 Harvard Law Review 473-474. Among Scholars, see also BN Cardozo, *The Nature of the*

Bearing this in mind, general rules of interpretation, particularly a commonsense construction rule,<sup>70</sup> may help solve the conundrum.

In essence, from a broader perspective, if the real intention of the legislation had been to deprive the ES *ab initio* of any protection (advice and cooling-off period), it would have shaped a specific regime for this subcategory of ES. Conversely, the micro-system of rules under section 205A do not refer to them at all. Indeed, it is undeniable that the first part of section 205A(6) of the ERA 1996 seems to be defective; the verb 'to become' should have been accompanied by the verb 'to be'. However, the same legal provision seems to offer an unexpected safe harbour to the interpreter; more precisely, it refers to 'individual' (letter a), rather than 'employee'.<sup>71</sup> In other words, if the intention of the legislature had been to restrict the protection exclusively to the ES by conversion, the term 'employee', rather than 'individual', would have been used in this case. The individual, the term eventually utilized, is a neutral nomenclature, consistent with and theoretically encompassing not only the individual who becomes an employee shareholder already working for the employer as an employee, but also the employee shareholder recruited as such from outside the organisation of the employer. Ultimately, the formal or syntactical ambiguity of this specific section of the ERA 1996 is resolved by the use of the commonsense rule of interpretation.<sup>72</sup>

## 7. Conclusion

The purpose of this work has been to analyse the provisions of the ERA introduced by the Growth and Infrastructure Act 2013, which carve out the contours of the new concept of employee shareholder.

It has also sought to identify the rights renounced by the employee shareholder, against the backdrop of the various employment rights furnished to individual employees engaged under a contract of employment.

Furthermore, the examination of the legal provisions governing the employee shareholder category has brought to light potential

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*Judicial Process* (New Haven and London 1921); N MacCormick, *Legal Reasoning and Legal Theory* (n 69) 19-52.

<sup>70</sup> O Jones, *Bennion on Statutory Interpretation* (n 67) 511-514. See also: N MacCormick, *Rhetoric and the Rule of Law* (n 53) 125; J Bell and G Engle (n 67) 21-47.

<sup>71</sup> R Poscher, 'Ambiguity and Vagueness in Legal Interpretation' in PM Tiersma and LM Solan (eds), *Language and Law* (OUP 2012) 128-144.

<sup>72</sup> O Jones, *Bennion on Statutory Interpretation* (n 67) 514.

inconsistencies originating from the this novel body of law, the most significant of which is the chronological succession of steps (agreement, written statement of particulars, independent advice) that the employer must follow prior to the employee becoming an employee shareholder. Besides, an interpretation of the concept of legal advice has been provided. In this respect, having in mind principles of legal reasoning and rules of statutory interpretation, this paper has put forward solutions about what the advice should comprise, and the legal consequences in cases where the advice is not provided. The conclusion is that in these circumstances, the ES would be entitled to claim back his/her original status, as employee.

Moreover, this piece of work has also considered the implications of the nature of the shares to be issued to the employee shareholder and the possibility that they may be issued by the parent company of the ‘employing entity’. This possibility, coupled with the nature of the employer that may have access to the new scheme (exclusively a company), in addition to the definition of parent company, may generate potential issues which were probed in this contribution.

The paper has sought to identify, by way of a speculative interpretation given the dearth of scholarly contributions in this area, two categories of employee shareholder: the employee shareholder whose status is created by conversion, and the less readily identifiable category of employee shareholder *ab initio*.<sup>73</sup> In the latter case, the individual on whom the status of ES is conferred, is recruited from outside the organisation. Nevertheless, it has been demonstrated in this contribution, by way of a considered analysis and interpretation of the applicable sources, that despite the fact that this additional category of ES is not so obvious in the legislative framework under discussion, the protection afforded to the ES by conversion (particularly, the entitlement to independent advice and a cooling-off period) shall be deemed as extended to the *ab initio* contractual relationship too.

Ultimately, in looking at the new British legislation from an international perspective, it is possible to affirm that the UK employee shareholder is far from implementing any form of cooperation between employers and employees in the management of the company. In this respect, the underpinning philosophy of the EU legislation in the area of employment law has not been fully achieved<sup>74</sup>. Indeed, this new subcategory of

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<sup>73</sup> It seems that so far, among Scholars, this category has not been identified yet.

<sup>74</sup> Reference is made to Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community, [2002] OJ L80, or,

employee will take part in the financial risk and, if fortunate, in the profit of the employer, thanks to the grant of shares. Indeed, this should be consistent with some legal frameworks brandished in the past by the EU legislation and never converted in an enforceable statute.<sup>75</sup> However, the low value of the financial benefit he can receive (the meagre £2000) measured against the significant waiver of rights that the employee is required to abandon suggests that this new category of UK employee is not exactly what the EU legislature had envisaged and, as far as the employee is concerned, may not be worth it.

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more colloquially, 'Directive on National Information and Consultation'. This piece of legislation, which, as far as the UK is concerned, has been implemented by the Information and Consultation of Employees Regulations 2004, encourages workers and employers to strike deals on the kind of participation that the employees must be allowed in the work place. See, as regards the possible friction between employee shareholder and EU legislation, P de Gioia-Carabellese, 'The Employee Shareholder: the Unbearable Lightness of Being ... an Employee in Britain' (2015)22 Maastricht Journal of European and Comparative Law 81,95.

<sup>75</sup> Particularly, the Council Recommendation 92/443/EEC (OJ [1992] L243/53), the so called PEPPER Recommendation.



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