Employment Law
Concentrate

4th edition

David Lewis

Professor of Employment Law
Middlesex University School of Law

Michael Jefferson

Senior Lecturer in Law
Sheffield University

OXFORD
UNIVERSITY PRESS

OXFORD
UNIVERSITY PRESS

Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide. Oxford is a registered trade mark of
Oxford University Press in the UK and in certain other countries

First edition 2009
Second edition 2011
Third edition 2013

Impression: 1

Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data

Data available

Library of Congress Control Number: 2014933490

ISBN 978–0–19–870379–2

Printed in Great Britain by
Ashford Colour Press Ltd, Gosport, Hampshire

#1

Employment status

Key facts

- The main legal distinction is between workers who have contracts of service (ie employees) and those who have contracts for services (ie independent contractors).
- The intention of the parties is not the sole determinant of employment status. The parties' views as to their relationship can be important but the courts will be wary of 'sham' arrangements.
- The fact that people have accepted self-employed status for some years does not prevent them arguing that they are, in reality, employees.
- The most important factors that the courts have used to decide whether or not a contract of employment exists or not are mutuality of obligation and personal performance.
- When an issue is raised about employment status, a tribunal must consider whether there is an implied contract between parties who have no express contract with one another.
- Employee shareholders can relinquish certain statutory rights in exchange for fully paid up shares with a minimum value of £2000.

Reasons for distinguishing employees from other types of worker

Workers may be hired under a contract of service (ie employees) or a contract for services (ie independent contractors).

> *Revision tip*
> Be careful with the terminology here. It is important that you do not confuse a contract of service with one for services.

Although some legislation applies to both of these categories, such as the **Health and Safety at Work etc Act 1974** and the **Working Time Regulations 1998**, other statutes do not. Employees get the benefit of a number of statutory employment rights, such as the right not be unfairly dismissed, the right to a redundancy payment, the right to maternity and parental leave. They are also covered by the unwritten general obligations implied into all contracts of employment (see chapter 2). In addition, when employees rather than self-employed persons are engaged, employers are required by statute to deduct tax under the **Income Tax (Earnings and Pensions) Act 2003** as well as social security contributions. Self-employed people are taxed differently and can set off business expenses against income for these purposes.

At common law perhaps the most significant difference is that the doctrine of **vicarious liability** applies to employees but not to the self-employed. According to this doctrine, employers are liable to third parties for the civil wrongs committed by employees in the course of their employment. Employees act 'in the course of employment' where they carry out acts that are authorized by the employer. Similarly, where their actions are so closely connected with the employment as to be incidental to it, although prohibited and unauthorized by the employer, employees act 'in the course of employment'. However, if an employee's action is so outside the scope of employment that it was not something the employee was hired to do, then the employer is not liable. In ***Lister v Hedley Hall Ltd*** **[2001]**, the employers were held vicariously liable for a warden who sexually abused the claimants whilst they were in his care. According to the Supreme Court, the correct approach is to ask whether the employee's wrongdoing was so closely connected with his or her employment that it would be fair and just to hold the employer liable.

The statutory definitions of employee and worker

Section 230(1) Employment Rights Act 1996 (ERA) defines an employee as 'an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment'.

Section 230(2) ERA states that a **contract of employment** is 'a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing'.

A **worker** is defined more broadly by **s 230(3) ERA** as an individual who has entered into, or works under, a contract of employment or 'any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual'.

The courts' approach to identifying employees

The intention of the parties

Because there is no statutory definition of a contract of service we have to consider the criteria used by the courts to identify who is an employee. It is clear that the intention of the parties cannot be the sole determinant of employment status as this would make it too easy to contract out of protective legislation.

Massey v Crown Life Assurance [1978] 1 WLR 676

A branch manager with an insurance company chose to change his status from employee to self-employed, although he continued in the same job. Two years later the company terminated the contract and he brought an unsuccessful claim for unfair dismissal. Lord Denning MR summed up the Court of Appeal's approach:

'If the true relationship of the parties is that of master and servant under a contract of service, the parties cannot alter the truth of that relationship by putting a different label on it … On the other hand, if the parties' relationship is ambiguous and is capable of being one or the other, then the parties can remove that ambiguity, by the very agreement itself which they make with one another.'

Thus, the parties' views as to their relationship can be important if there is any ambiguity. However, it is the operation of the contract in practice that is crucial rather than its appearance and the courts will not endorse 'sham' arrangements. In ***Autoclenz Ltd v Belcher*** **[2011]** the Supreme Court held that in order to find that a contract is in part a sham it was not necessary to show that both parties intended to paint a false picture as to the true nature of their obligations. The relative bargaining power of the parties must be taken into account in deciding whether the terms that were documented truly represent what was agreed.

Looking for extra marks?

Point out that whether the courts should give any weight to the declared intentions of the parties or look solely at the contractual terms and how they operate in practice is a highly contentious issue.

Control

Historically, control was treated as the touchstone of an employment relationship. The position today is more complex in that an element of control is necessary but not sufficient to establish employee status (see 'Mutuality of obligation' and 'Personal service'). Subject to statutory and common law constraints, employers can still exercise considerable control over their workers.

Looking for extra marks?

Point out that the key question here is whether there is a contractual right to control and not whether, in practice, the worker has day-to-day control over his or her own activities.

Mutuality of obligation

Another important factor that the courts have used to decide whether or not a contract of employment exists or not is that of mutuality of obligation between the employer and the individual.

Carmichael v National Power plc [2000] IRLR 43

The Supreme Court upheld the decision of the employment tribunal. The case was about whether two tour guides had contracts of employment and were therefore entitled under **s 1 ERA 1996** to a written statement of particulars of the terms of their employment. The Supreme Court accepted that they worked on a casual 'as and when required' basis. An important issue was that there was no requirement for the employer to provide work or for the individual to perform it. Indeed, the court heard that there were a number of occasions when the applicants had declined offers of work. According to the court, there was an 'irreducible minimum of mutual obligation' that was necessary to create a contract of service. There needed to be an obligation to provide work and an obligation to perform that work in return for a wage or some form of remuneration.

Looking for extra marks?

Point out that tribunals are entitled to find that a 'right to refuse work' clause was not genuine.

However, this focus on whether there is an ongoing commitment deflects us from the crucial question of whether casual staff can be regarded as employees *during the periods they are at work*. The question of whether there is continuity of service is an entirely separate one.

Cornwall County Council v Prater [2006] IRLR 362

The Court of Appeal accepted that a home tutor was an employee under a succession of teaching engagements, notwithstanding that there was no obligation to undertake any particular assignment and the local authority had no obligation to offer more work. There was mutuality of obligation in each individual teaching engagement such as to make it a contract of employment. The argument that there has to be a continuing obligation to provide more work and an obligation on the worker to do that work was not accepted.

Revision tip

You should not confuse the issue of employment status with the question of continuity of service.

Personal service

It is also crucial to employment status that the individual is required to perform his or her service in person. In ***Express and Echo Publications v Tanton* [1999]**, a contract allowed a worker to provide a substitute if he was not available. According to the Court of Appeal, this prevented the worker from being an employee because there was no obligation to do the work personally. However, in ***MacFarlane v Glasgow City Council* [2000]**, this approach was not applied to gymnasts working for a local authority who were able to provide substitutes for any shift that they were unable to work. In this case the local authority paid the substitutes directly and the gymnasts could only be replaced by others on the council's approved list.

Agency workers

So far we have seen that individuals, including both homeworkers and casual staff, can be regarded as employees if there is sufficient mutuality of obligation and control over them when they are working. Indeed, unless the relationship is dependent solely upon the true construction of a written contract, whether a person is engaged under a contract of employment is a question of fact for a court or tribunal to determine. We now turn to the position of agency workers.

Dacas v Brook Street Bureau [2004] IRLR 359

This case provides authority for the proposition that, when an issue is raised about the employment status of an applicant, a tribunal must consider whether there is an implied contract between parties who have no express contract with one another. Formal written contracts between the

applicant and the agency and between the agency and the end-user relating to the work to be done for the end-user do not necessarily preclude the implication of a contract of employment between the applicant and the end-user. In this case Dacas was held not to be an employee of the agency or the end-user for the purposes of claiming unfair dismissal.

By way of contrast, in ***Cairns v Visteon Ltd*** **[2007]** a contract of employment existed with the agency and the EAT felt that it was not necessary to imply a contract with the end-user. To imply a contract of employment by conduct it is necessary to show that the conduct of the parties is consistent only with there being a contract of employment between them.

James v London Borough of Greenwich [2008] IRLR 302

It was emphasized that the real issue in agency worker cases is whether a contract should be implied between the worker and the end-user rather than whether an irreducible minimum of mutual obligations exists. The Court of Appeal also pointed out that the implication of a contract of employment is not inevitable in a long-term agency situation.

The **Agency Worker Regulations 2010** introduced the principle of equal treatment for agency workers after they have been in 'the same role' with the same hirer for a qualifying period of 12 continuous calendar weeks. **Regulation 5** gives agency workers the right to the same 'basic working and employment conditions' as they would have been entitled to if they had been engaged directly by the hirer.

Looking for extra marks?

Focus on the latest decisions of the Court of Appeal as its approach has changed in recent years.

Employee shareholders

Section 205A ERA 1996 creates the status of **employee shareholder**. Such persons will receive a minimum of £2000 paid up shares in the company but relinquish their general right to claim unfair dismissal, the statutory rights to a redundancy payment and to request flexible working, and certain statutory rights in relation to time off for training. In addition, employee shareholders are required to give 16 weeks' notice of their intention to return to work after maternity, adoption, or paternity leave.

The statute obliges the company to provide individual employee shareholders with a written statement of particulars which specifies:

(i) that the employee shareholder will not have the statutory rights just described;

(ii) the notice periods which apply in relation to a return to work after maternity, adoption, or paternity leave;

(iii) whether any voting rights are attached to the shares and whether they carry any rights to dividends;

(iv) whether, if the company was wound up, the employee shares would confer any right to participate in the distribution of assets;

(v) if the company has more than one class of shares, explain how any employee shareholder rights differ from the equivalent rights that attach to the shares in the largest class;

(vi) whether the employee shares are redeemable and, if so, at whose option;

(vii) whether there are any restrictions on the transferability of the employee shares and, if so, what they are.

An employee shareholder agreement cannot be implemented unless, before it is concluded, the individual has received advice about the terms and effect of the proposed agreement and seven days have elapsed since the advice was given. In addition, the company must reimburse any reasonable costs incurred in obtaining this advice whether or not the individual becomes an employee shareholder. Finally, employees have the right not to suffer a detriment on the ground that they have refused to accept an employee shareholder contract and a dismissal for this reason will be automatically unfair (see chapter 9).

Key cases

Cases	Facts	Principle
Autoclenz Ltd v Belcher [2011] IRLR 820	Car valeters were required to sign contracts which stated that they were engaged 'from time to time on a sub-contract basis'.	In order to find that a contract is in part a sham it was not necessary to show that both parties intended to paint a false picture as to the true nature of their obligations.
Carmichael v National Power plc [2000] IRLR 43	Tour guides who worked on a casual 'as and when required' basis claimed that they were employees	For a person to be an employee there needed to be an obligation on the employer to provide work and an obligation on the individual to perform that work in return for a wage or some form of remuneration.
Express and Echo Publications v Tanton [1999] IRLR 367	The individual's contract allowed him to provide a substitute worker if he was not available.	It is inconsistent with a contract of employment that a person can provide a substitute. There must be an obligation to do the work personally.

Cases	Facts	Principle
Lister v Hedley Hall Ltd [2001] IRLR 472	A warden sexually abused the claimants while they were in his care.	The correct approach to vicarious liability is to ask whether the employee's wrongdoing was so closely connected with his or her employment that it would be fair and just to hold the employer liable.
Massey v Crown Life Assurance [1978] 1 WLR 676	A branch manager voluntarily changed his status from employee to self-employed but claimed unfair dismissal when his contract was terminated.	If the true relationship of the parties is that of employer and employee under a contract of service, the parties cannot alter the truth of that relationship by putting a different label on it.

Exam questions

Problem question

For five years Bruce worked for Manfoot Plc as a specialist shoemaker in their factory. He was allowed to choose the hours he worked and was paid according to the number of shoes he produced. At the beginning of last month, Bruce asked his manager, George, if he could stop working in the factory at the end of the month and start working from home. George said that he would be happy to arrange this.

On the first day of the month Bruce started working from home and signed a document which declared him to be self-employed. Subsequently, he took delivery of materials and handed over finished shoes to the company's collector every week. Payments were made on the basis of £8 per finished shoe, there being no deductions of any kind.

Advise Bruce as to whether or not he is an employee for the purpose of exercising his rights under **ERA**.

See the Outline Answers section in the end matter for help with this question.