INTRODUCTION TO EMPLOYMENT LAW

EMPLOYMENT STATUS

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1 Types of Individuals: Employee, Worker or Self-Employed

1.1 Why the distinction?

An individual's employment and/or contractual status is fundamental to the determination of rights, duties and obligations. Indeed, it not only determines the obligations owed by the "employer" to the individual and vice versa, but it does so also in relation to third parties:

1.1.1 An employer may be found vicariously liable, for instance, for the actions of an employee in circumstances when it wouldn't be liable for the actions of a self-employed contractor. (Although note that the boundaries are shifting slightly such that courts have been prepared to find that an employer could be vicariously liable for a non-employee where the relationship was one that was sufficiently analogous to employment)

1.1.2 An individual's employment status also dictates an employer's obligations in relation to tax and national insurance.

1.1.3 As between employer / business and individual, both common law and statutory rights are affected by employment status. This is because certain terms are implied by law into contracts between employer and employee that would not be present in contracts between a self-employed worker and the party engaging him to do the work. Furthermore, some statutory employment rights are available only to those who can bring themselves within the statutory definition of "employee". These include Statutory Sick Pay, Statutory Redundancy Pay, Statutory Maternity Pay, and transfers under TUPE 2006. Further rights are also conferred on those who fall within the statutory term "worker", which has a wider definition, whilst protection against unlawful discrimination covers even some self-employed workers. The significance of the distinctions between the different tests is increasingly important as more and more employers adopt employment models that rely on the engagement of a network of independent contractors hired to deliver the core services of the business, often in the so-called 'gig' economy.

1.2 Who is an "employee"?

Confusingly, the tests to determine employee / worker / self-employed status apply differently depending on the employment right asserted.

1.2.1 Statutory definitions

The term "employee", when used in employment legislation, has no precise legal meaning (though some specified groups are deemed to have employment status for the purpose of some statutory rights whilst other groups are sometimes expressly excluded).

For the purposes of the Employment Rights Act 1996 (ERA) "**employee**" is defined as "an individual who has entered into or works under... a contract of employment": s.230(1). "**Contract of Employment**" is defined as "a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing": s.230(2). So, the statute relies on the common law concepts of the contract of service and the contract of apprenticeship.

Note that the definition of "employment" in discrimination legislation is much wider. For example, s.83(2) of the Equality Act 2010 (EA) defines "employment" as "employment under a contract of employment, a contract of apprenticeship or a contract personally to do work". This therefore encompasses an "employee" (defined in s.230(1) and a "worker" (defined in paragraph 1.3 below) and goes as far as including those who are genuinely self-employed, provided the individual is required to perform the work personally. At common law, however, the notion of the contract of service is far from well-defined. There is no clear and consistently applied test for distinguishing employees from independent contractors. Over the years, courts and tribunals have adopted various approaches in determining on which side of the dividing line a worker falls. The case law is too extensive to be covered in this course in any detail and what follows is merely a summary.

1.2.2 Common law tests

The oldest test the courts have used is the "control test". This asks who has the right to control what work is to be done and when and how it is carried out. Subsequently the courts developed the "integration", or "organisational", test. This asks whether the worker is an integral part of the business, rather than simply an accessory to it.

The current tendency, however, is to look at the "economic reality" of the relationship, with the Tribunal determining what was the true agreement between the parties, to ascertain whether the worker is in business on his own account. In so doing, it is important for the Tribunal to have regard to the reality of the mutual obligations and the reality of the situation: *Autoclenz v Belcher* [2011] ICR 1157. As Lord Clarke said in that case "*The question in every case is … what was the true agreement between the parties".*

There is one factor, out of those which the courts assess and consider, which must be present for a contract of employment to arise: "mutuality of obligation". This is usually understood as the existence of reciprocal obligations to provide work or to pay a retainer (on the part of the business) and to accept any work which is offered (on the part of the individual). In the view of the House of Lords in *Carmichael and anor v National Power plc*

([1999] UKHL 47) this constituted the "irreducible minimum obligation necessary to create a contract of service".

In some cases, when the courts have talked about "mutuality of obligation" all they have really been looking for is "consideration", which must usually be present for a contract to exist. In other cases, however, it is clear that the courts have been looking for a particular kind of consideration: for example, the requirement for mutuality of obligation has been interpreted as meaning that the worker must be obliged personally to perform his or her contractual obligations for the contract to be treated as one of service (rather than a contract for services).

The fact that mutuality of obligation exists is not, of itself, sufficient for a contract of employment to arise. Other key issues will be the degree of control between the parties, and whether there is an obligation for services to be provided personally.

The current approach is to apply a mixed test where all factors have to be weighed in the particular case. The key questions the Tribunals will ask are:

(a) Did the worker undertake to provide his own work and skill in return for remuneration;

(b) Was there a sufficient degree of control to enable the worker fairly to be called an employee;

(c) Were there any other facts inconsistent with the existence of a contract of employment.

Relevant considerations will therefore include:

- Degree of control versus scope of individual judgement;
- Amount of remuneration and how paid;
- Wages/salary or invoices/profit sharing;
- Investment in own future – who will provide capital and who risks loss;
- Who provided tools and equipment;
- Exclusivity or freedom to work for others (especially rivals);
- Traditional structure of employment in the trade;
- How parties see themselves;
- Arrangement for income tax and national insurance;
- How the arrangement can be terminated;

See *Ready Mixed Concrete v Minister of Pensions and National Insurance* ([1968] 2 QB 497).

Applying these various tests is seldom a straightforward exercise. In *Bates van Winkelhof v Clyde & Co LLP* [2014] ICR 740 SC, (see below) Lady Hale referred to the judgment of Maurice Kay LJ in Hospital Medical Group Ltd v Westwood [2013] ICR 415 CA, as to which, she said: *"I agree with Maurice Kay LJ that there is "not a single key to unlock the words of the statute in every case". There can be no substitute for applying the words of the statute to the facts of the individual case. There will be cases where that is not easy to do … The experienced employment judges who have considered this problem have all recognised that there is no magic test other than the words of the statute themselves".*

Further, in *Hall (Inspector of Taxes) v Lorimer* [1984] ICR 218, the Court of Appeal warned against using a "checklist" approach in which the court runs through a list of factors (e.g. the other provisions of the contract) and ticks off those pointing one way and those pointing the other and then totals up the ticks on each side to reach a decision.

1.3 Who is a "worker"?

The term "worker" is given a wider definition than "employee". It can include employees but it can also include those that are for tax purposes self-employed. The key issue is to refer to the particular statute.

Section 296 of TULRCA 1992 states than a worker is an individual who works 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.

Section 230 of the ERA 1996 which is adopted in the National Minimum Wage Act 1998, the Working Time Regulations 1998 and the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 states that a worker is an individual who has entered into or works under or worked under 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 that of a client or customer of any professional business undertaking carried on by the individual.

In comparison with the question of who is an "employee", historically there was less case law on the meaning of "worker" – although this body of law is now growing significantly as a consequence of claims brought by so-called gig-workers. What is clear is that an individual who is self-employed can still be a worker provided they are obliged to provide their services personally and they are not in business on their own account. This latter point was emphasised both by the Employment

Tribunal in Uber which found that the proposition that Uber's drivers were running 30,000 micro-businesses 'absurd' and the Court of Appeal in Pimlico which found that Mr Smith was 'an integral part of Pimlico Plumber's operations and subordinate to Pimlico Plumbers'.

The existence of mutual obligations is also a factor relevant to establishing worker rather than self-employed status.

1.4 Recent case law

The leading cases in this area are *Pimlico Plumbers v Smith* [2018] ICR 1511 and *Uber BV and others v Aslam and others* [2021] UKSC 5 .

In *Pimlico*, Smith worked as a plumber for the company, on a contract which referred to him as an independent contractor. Key terms were that: he was expected to work five days per week for 40 hours; the company was not obliged to offer him work and he was not obliged to accept it; he was required to wear a company uniform, carry a company ID card, use a company mobile phone and hire a company van when carrying out the work. Although there was no express right of substitution in his contract, in practice he had the right to decline jobs or send another company operative in his place if he could not attend. Smith brought claims against the company for unfair dismissal, unlawful deductions from wages, unpaid annual leave and disability discrimination.

The Employment Tribunal (and subsequently, the EAT, Court of Appeal and Supreme Court) concluded that Smith was not working under a contract of service for the purposes of the unfair dismissal claim (i.e. was not an employee) but he was a "worker" within the meaning of the Employment Rights Act 1996 s.230(3)(b) and the Working Time Regulations 1998 reg.2(1). He was also found to be in "employment" within the meaning of the EA s.83(2). His claims (other than unfair dismissal) were therefore allowed to proceed. Principal findings were:

- personal service (although Smith had a theoretical opportunity for substitution to another operative worker, the conditions attached were prohibitively onerous but, in any event, the contract terms were clearly directed to performance by him personally, with reference to "your skills" and a personal warranty over performance); and
- contractual obligation (the contract terms militated against an interpretation that the company was Smith's customer/ client since the company retained tight control over the role and how Smith was paid, all of which were

inconsistent with him truly being an independent contractor).

The facts of the *Uber* case were that passengers enter into a "rider agreement" with Uber, under which it purported to be the drivers' agent. The passenger pays the fare to Uber which pays drivers weekly, on the basis of the fares charged, less a service fee. Facts cited by the tribunal suggesting Uber's control over the drivers included that Uber: interviewed and recruited drivers; controlled key passenger information and excluded drivers from it; required drivers to accept trips and/or not to cancel trips and enforced that by logging off drivers who breached those requirements; set the default route; fixed the fare and the driver could not agree a higher sum; subjected drivers through the rating system to what amounts to a disciplinary/performance procedure; determined passenger rebates; handled passenger complaints and imposed conditions on drivers, such as choice of acceptable vehicles, and instructed drivers on how to do their work. Note also that the private vehicle hire regulatory regime played a part in this case, in that it placed responsibilities on Uber which were seen to conflict with its argument that it merely provided software to small businesses (the drivers).

The Supreme Court unanimously rejected Uber's appeal, determining that the drivers were workers. In so doing, it dismissed the significance of the contractual terms between Uber and the drivers when deciding worker status.

In particular, the Supreme Court decided that the contractual terms between the party should not be the starting point in determining whether an individual falls within the definition of a worker. It highlighted the risk that such terms might defeat the purpose of providing statutory workers' rights (holiday pay, minimum wage etc), because the employer may dictate contractual terms for a vulnerable worker in such a way as to deprive them of these rights. Furthermore, any terms which purport to classify the parties' legal relationship or to prevent the contract from being interpreted as a worker's contract are "of no effect and must be disregarded".

Instead, the correct approach where workers are claiming statutory rights is to ask whether they qualify under the statutory provisions, irrespective of the contract. This approach involves applying the statutory language, assessing the facts of the particular case and keeping in mind the purpose of the legislation. That purpose, according to the Court, is to protect "vulnerable workers from being paid too little for the work they do, required to work excessive hours or subjected to other forms of unfair treatment (such as being victimised for whistleblowing)".

The degree of worker subordination and dependence upon the employer and the degree of control exercised over their work will be key tests and, per the Court: "the greater the extent of such control, the stronger the case for classifying the individual as a "worker" who is employed under a "worker's contract"."

In applying this approach to the drivers' circumstances, the Court highlighted the following factors which show that the drivers worked for Uber:

- Uber fixes remuneration and drivers have no say
- contractual terms are dictated by Uber
- once logged into the app, a driver's choice about whether to accept requests for rides is constrained by Uber
- Uber exercises significant control over the way in which drivers deliver their services
- communication between driver and passenger are restricted to the minimum necessary

Finally, the Court also agreed with the lower courts in deciding that the drivers are "working" when the app is switched on and they are within their territory. This aspect of the decision is particularly fact-sensitive.

Selected cases of interest

B v Yodel Delivery Network Ltd (Case C-692/19) EU:C:2020:288

Facts

B was a parcel delivery courier with Yodel. Yodel's terms of service state couriers are "self-employed independent contractors". Couriers are not required to perform the delivery personally, but may appoint a subcontractor or a substitute, who Yodel may veto if the person chosen does not have a level of skills and qualification which is at least equivalent to that required of a courier engaged by Yodel. The agreement also provides a courier is free to deliver parcels for others and is not required to accept any parcel from Yodel.

Watford employment tribunal, which was considering B's claim to be a worker under the Working Time Regs (WTR), referred several questions for a preliminary ruling by the ECJ on whether the WTR were compatible with the Working Time Directive (WTD).

Decision

The ECJ provided a reasoned order, rather than a judgment. It noted that although the term "worker" is not defined in the WTD, previous case law has established that the essential feature of an

employment relationship is a person performing services for and under the direction of another in return for remuneration. The ECJ also noted that a person's classification as an "independent contractor" under national law does not prevent that person being classed as a worker under EU law, if the individual's independence is merely notional.

The ECJ identified the significant factors the ET would have to take into account in making its determination, including: the existence of a contractual power of substitution; the courier's ability to decide whether or not to accept work; his ability to work for others (including competitors); and his ability to fix his own working hours. The ECJ noted that B appeared to have a "great deal of latitude", that B's independence did not appear to be fictitious, and there did not appear to be a relationship of subordination between B and Yodel. This suggested that B would not be a worker under the WTD. However, it would be for the ET to make the final determination on B's status.

Sejpal v Rodericks Dental Ltd [2022] EAT 91

Facts

Mrs Sejpal was a dentist at RDL in their Kensington practice. In her employment contract there was a substitution clause which required Mrs Sejpal to use her best endeavours to arrange a locum in the event of her failure to "utilise the facilities for a continuous period of more than 14 days". If she failed to make such arrangements, RDL had authority to engage a locum on her behalf. The clause was subject to the locum being acceptable to the Primary Care Trust and RDL and meeting the necessary regulatory requirements. In December 2018, Mrs Sejpal went on maternity leave and around this time RDL announced the closure of the Kensington practice. Mrs Sejpal alleged that her contract was terminated while others were redeployed and brought a maternity or pregnancy discrimination claim.

Decision

The EAT found that the ET had erred in holding that the requirement for personal service was not made out because there was an unfettered right of substitution. The EAT rejected RDL's assertion that a requirement to provide a locum after 14 days implied an absolute right to provide one before the 14-day period had elapsed. The contract did not allow for a locum to be appointed before Mrs Sejpal had been absent for 14 days. Additionally, RDL were entitled to reject a substitution who it did not deem suitable, which indicated the substitution was not unfettered. It was also evident that from a practical application Mrs Sejpal had never exercised her right of substitution. The EAT

therefore concluded that the predominant purpose of the contract was for personal service by Mrs Sejpal.

Stuart Delivery Ltd v Augustine [2021] EWCA Civ 1514

Facts

Mr Augustine worked as a courier for Stuart Delivery between November 2016 and March 2017. He claimed that he was an employee or, alternatively, was a worker within the meaning of section 230(3)(b) of the ERA 1996. Stuart Delivery Ltd had developed a technology platform connecting couriers with clients via a mobile app. Couriers could opt to undertake individual jobs, or could sign up for one or more time slots via the "Staffomatic" facility on the mobile app. This required couriers to commit to being available in a certain area at a certain time, in return for a minimum rate of £9 per hour. A courier who signed up for a "slot" could request to release it via the app, making it available to other couriers, but if no one accepted, then the original courier was liable for completing it, or incurred a penalty for failing to do so.

Decision

The Court of Appeal upheld the employment tribunal's decision that Mr A satisfied the definition of "worker". The employment tribunal had been entitled to find that the ability to release a slot did not amount to an unfettered right of substitution, since the courier would only be released from his obligation if another courier signed up, and he had no control over whether this happened or who, if anyone, signed up. In reality, having signed up for a slot, the courier was obliged to perform personally because there was a real risk of negative sanctions for not doing so.

The tribunal had considered all relevant matters when considering whether any right or ability on the part of the courier to substitute another person was inconsistent with an obligation of personal performance. The system was intended to ensure that the courier turned up for the slots that he had signed up for, and performed the delivery work during those slots. That was necessary for the business model to work. The limited right or ability for the courier to notify other couriers that he wished to release that slot was not, in reality, a sufficient right of substitution to remove from him that obligation to perform his work personally.

Addison Lee Ltd v Gascoigne UKEAT/0289/17

Facts

Addison Lee (AL) challenged the ET's ruling that, during the period when the claimant, a cycle courier, was logged on to AL's app, there was a contract with mutual obligations for 'jobs' to be offered and accepted. AL's main ground of appeal was that, on the facts found by the ET, there was no basis for concluding that the claimant was actually under any legal obligation to accept jobs offered to him when logged on: he was completely free to decide not to accept any jobs and entitled to log on or off the app at will. Therefore, AL said, the claim should have failed because an individual cannot be classed as a 'worker' unless they are under some contractual duty to do at least some work.

Decision

The EAT dismissed the appeal because: the ET had concluded that, from the time the claimant logged in, both sides expected that he was available for work, would be provided with it and that he would carry it out as directed by the controller. Although 'expectations' are not the same as contractual obligations, past cases have made it clear that the established practice and expectations of parties to workplace relationships can, over time, crystallise into legal obligations and that is what the ET found had happened in this case. It followed that there was a contractual duty on the claimant to accept jobs (and on AL to offer them). The claimant in this case had worked for AL for several years and it is clear that the longer an individual works for an organisation, the more willing an ET is to accept that the parties' expectations have hardened into legal obligations.

Stringfellows Restaurants Ltd v Quashie [2012] EWCA

Facts

Miss Quashie worked pursuant to a rota – she was required to perform work personally. She was also required to attend weekly meetings, comply with the image and dress code and could face disciplinary sanctions for non-compliance.

Decision

The first instance ET decision that there was not sufficient mutuality of obligation was overturned by the EAT, despite the fact that Stringfellows were not required to pay Miss Quashie (and that she had to pay to be able to dance at the venue). The Court of Appeal, in turn, overturned the EAT's decision and reinstated the Employment Tribunal's judgment. Although there were mutual obligations of some kind while Miss Quashie was working, they were not sufficient to create an employment relationship. A critical point was the lack of obligation on

Stringfellows' part to pay Miss Quashie. The dancer negotiated her own fees with customers and carried the full economic risk. This, combined with the terms of the contract, which described her as self-employed, led to the conclusion that Miss Quashie was not an employee.

Jivraj v Hashwani ([2011] UKSC 40)

Facts

This case dealt with the test for protection which proceeded the EA (under the Employment Equality (Religion and Belief) Regulations 2003), although the relevant provisions are the same. Mr Hashwani sought to have the provisions of an arbitration agreement avoided as they provided for an arbitrator who was a "respected member of the Ismaili community", Mr Hashwani's appointed individual was not a member of such community.

Decision

The Supreme Court held that there could be no breach of the Regulations (now effectively the EA) as arbitrators are not 'employed' under the relevant provisions so cannot be protected. Lord Clark emphasised an arbitrator is an independent provider of services who is not in a relationship of subordination with the person receiving the services. Further, an arbitrator's purpose is to find an impartial resolution to a dispute and so they could not be subject to the direction of either party to the dispute and the relationship was not one of 'employment'.

1.5 Zero-Hours Contracts

This is a blanket term which has no technical meaning but is used to describe casual workers who have no entitlement to be offered any minimum hours of work over a given period and encompasses bank staff (a pool of workers available as and when needed) and individuals on an umbrella contract (who perform a series of individual contracts but are subject to over-arching terms which apply even between jobs).

Many issues surrounding an increase in the use of zero-hours contracts have been in the media spotlight, including the lack of protection afforded to some individuals who may not have employment status whilst working under a zero-hours contract. As noted above, such individuals will not have the benefit of statutory sick and maternity pay or the same protection from dismissal as employees. Particular concerns related to the use of zero-hours contracts include, 'exclusivity clauses' which require individuals to abstain from working for other employers, even if they are not offered any work under the contract, and an implied obligation to accept work that is offered at very short notice and/or when it is inconvenient, or not be offered any further work. It is also

recognised that zero- hours contracts provide valuable flexibility to some individuals.

In May 2015, the government introduced a ban on exclusivity clauses in zero hours contracts through the Small Business, Enterprise and Employment Act 2015. As of 6 April 2019, workers have the right to receive an itemised payslip and, since 6 April 2020, all workers have the right to receive a written statement of terms. Also, since 6 April 2020, where the worker has variable remuneration, the reference period for calculating an average week's pay for the purposes of calculating holiday pay has been extended from the previous 12 weeks worked to the previous 52 weeks worked.

In its Good Work Plan (see below), the Government committed to other reforms that may be relevant for zero hours workers, for example, a right for all workers to request a more predictable and stable contract after 26 weeks' service. Although a consultation on so-called "one-sided flexibility" closed on 11 October 2019, the timescale for legislation to implement this development is not known.

When determining the status of an individual working under a zero-hours contract, the existence and extent of mutuality of obligation will again be key. In *Clark v Oxfordshire Health Authority* ([1998] IRLR 125) the Court of Appeal ruled that a nurse who was retained by the health authority to fill temporary vacancies in hospitals did not have a global employment contract because there was no mutuality of obligation during the periods when she was not working.

In *Carmichael and anor v National Power plc* ([2000] IRLR 43) the House of Lords held that casually employed tour guides, when not actually working, had no contractual relationship of any kind with the tour guide operator, because there were no mutual obligations to offer and perform work, and the documents that existed simply provided a framework for a series of successive and ad hoc contracts of service or services which the parties might subsequently enter into. These were contracts of the type known as "zero hours", where no minimum hours are required to be worked.

However, in *Cornwall County Council v Prater* ([2006] EWCA Civ 102) the Court of Appeal held that where there was sufficient mutuality of obligation during assignments carried out by a home tutor, even though there was no obligation to provide assignments or accept them, the individual assignments could constitute contracts of employment.

Courts and tribunals will look beyond the written terms where necessary when examining the relevant factors. In the recent case of *Pulse Healthcare v Carewatch Care Services Ltd* (unreported) the EAT held that carers working under contracts which stated that the business was not required to provide any working hours to the carers each week, were in fact employees. The reality of the situation was that there were

global 'umbrella' contracts of employment for each carer which did include mutual obligations – practically, the employer had to provide and pay for work.

(i) **Bank Staff Workers**

Bank staff will be treated similarly to other types of casual workers. In *Thomson v Fife Council Unreported* ([2005] WL 2407137) the Claimant was working as a Relief Social Care Worker, with no guarantee of hours to be worked, and no obligation to accept assignments. The EAT held that although she had been provided with statutory sick pay, this could not amount to mutuality of obligation in the absence of any obligations on the part of the employee. There had been no obligation on the part of the Council to provide work, and no obligation on the part of the worker to accept it.

In *Little v BMI Chiltern Hospitals* ([2009] UKEAT/0021/09/DA), the Claimant worked as a "bank" theatre porter for Chiltern Hospital under a series of written agreements in which he worked on an "as and when" basis and was described as an "independent contractor". The documentation expressly stated that there was to be no mutuality of obligation between the parties but that if the Claimant was unable to offer himself for work for four consecutive weeks his name would be removed from the bank list. In the Tribunal, the Claimant did not try to argue that he was engaged under an umbrella contract of employment (acknowledging that there was no mutuality of obligation between assignments in his case). Rather, he argued that each period he worked constituted a separate contract and that there were mutual obligations during each period which amounted to a contract of employment. The Tribunal had found that, on occasions, bank workers had been sent home by the hospital halfway through a shift without being paid for the remainder of the shift. The EAT found that this negated any mutuality of obligation and therefore as a matter of fact and law, the contract between the hospital and Mr Little had been one for freelance services.

(ii) **Umbrella contracts?**

Where casual workers carry out a series of assignments for a business, there is often a two stage test – i.e. is he/she employed during assignments? If so, is there sufficient mutuality of obligations between assignments to establish an umbrella employment contract? This was the case in *Drake v Ipsos Mori UK Ltd* ([2012] UKEAT/0604/11).

Mr Drake worked as a market researcher for Ipsos Mori on a number of assignments from 2005 to 2010 during which time he

was told he was a worker and that he was not obliged to accept work. His handbook suggested that, once an assignment was accepted it was governed by a "verbal contract" and that he was obliged to complete the assignment. The EAT overturned part of the first instance decision and held that there may be sufficient mutuality of obligation for a contract of employment to exist during assignments. In doing so the EAT expressly stated that a right for either party to terminate at will was not inconsistent with the existence of an employment contract. The individual facts were remitted to the ET to decide whether or not Mr Drake was an employee to look again at the two limbed test identified above.

(iii) **Alternatives to zero-hours contracts**

Employers who don't wish to engage individuals on zero-hours contracts could consider alternative flexible arrangements including,

- Part-time working
- Homeworking
- Job Shares
- Term-time working
- Annualised/compressed hours contracts

1.6 Who is "self-employed"?

1.6.1 For employment rights

Individuals who are *genuinely* self-employed under employment law will be engaged on a contract for services and will not be entitled to the employment rights enjoyed by employees and workers under contracts **of** services.

Demonstrating self-employment under employment law is a high hurdle. Generally, courts and tribunals are reluctant to deny individuals recourse, for example, when they have been discriminated against especially in light of the unequal bargaining position between employer business and individual.

In the case of *The Hospital Medical Group Ltd v Westwood* ([2012] EWCA Civ. 1005) it was held that a GP, retained as a "self-employed individual contractor" by HMG to provide surgical hair restoration services under a document labelled a "contract **for** services" was, in fact a worker and therefore entitled to bring claims for unlawful deductions from wages and accrued holiday pay.

The Court of Appeal looked beyond the labelling of the arrangement and HMG's assertion that he could not be an employee or worker as he

provided services to a client or customer, one of the express exemptions from protection under the Employment Rights Act 1996. In fact, Dr Westwood did not market his hair restoration services elsewhere and HMG were not merely a 'client' – he had been recruited to work as an integral part of HMG and this integration precluded a finding that he was self-employed.

In *Johnson-Caswell v MJB (Partnership) Ltd* (3101854/2011) an employment judge, in a pre-hearing review, held that the Claimant could pursue his unfair dismissal claim as he was an employee. Mr Johnson-Caswell worked under a flexible contract to provide financial advisory services, which declared him to be 'self-employed'. The judge disregarded this and stated that 'control' over the claimant was demonstrated by his need to receive training and supervision to comply with FSA requirements as well as the existence of a one-year non-solicitation clause which would prevent the claimant carrying out FSA-regulated activity after termination of the agreement.

1.6.2 For tax purposes

HMRC and the Tax Tribunal will apply their own factors to decide whether or not an individual (usually purporting to provide consultancy services) is genuinely self-employed or an employee / worker, in which case national insurance contributions and income tax will be owed by the business engaging them.

HMRC have set out guidance in relation to its determination of status and the factors to be considered are similar to those considered by the employment tribunals, including: whether or not there is a right to substitute a different individual to carry out the tasks, whether there are mutual obligations – on the individual to provide personal service and on the business to pay the individual and/or provide work, whether and to what extent the business controls the way the individual carries out their services, the extent to which the individual is integrated into the business organisation and the extent to which the individual bears financial risks.

The factors to be considered were discussed in the first instance tax tribunal case of *Slush Puppie Limited v HMRC* ([2012] UKFTT 356). Mr Sandford was a shareholder and director in the Scottish distributor company bought by SPL. Subsequently he was engaged through his unincorporated consultancy company to carry on work for SPL as a 'self-employed' service engineer. Mr Sandford wore a SPL uniform and carried SPL business cards but despite this, he was deemed genuinely self-employed for tax purposes.

The factors considered in this case were: the financial arrangements – there was a fixed consultancy fee and fixed daily rate; the fact that he was not entitled to sick pay or holiday pay and the fact that there was no mutuality of obligation – Mr Sandford was at liberty to work for

anyone else and could refuse work from SPL (the fact that he had not done this was not found to be relevant here). However, the decisive factor was that there was no written agreement – the tax tribunal held that this was demonstrative of the 'ad hoc' (rather than structured employment) nature of the arrangement which was not challenged previously by Mr Sandford.

Although the above factors are very similar to those considered by the tribunals in employment law matters, different determinations are common. For example, in the *Autoclenz* case cited below, the Supreme Court considered that the individuals' contracts were a 'sham' and that they were employees as far as their employment rights were concerned. However, HMRC reviewed the arrangements and determined that they were genuinely self-employed for tax purposes.

As the determination of employment status for tax purposes by HMRC can have significant implications on status for employment law purposes, much attention is paid to how HMRC, in practice, interprets and applies the legal tests. HMRC has published an employment status checker tool, CEST, for the purposes of determining whether the IR35 (intermediaries) legislation applies to a particular set of facts. The latest edition was released on 4 May 2021to reflect the off-payroll working changes that came into effect for the private sector on 6 April 2021.

1.7 The status of partners

The status of members of Limited Liability Partnerships has been a hot topic in the courts and tribunals in recent years, with two cases in particular providing helpful insight. These decisions provide welcome clarity to the many professional services firms (including legal firms and accountancy firms) and private equity houses who choose to adopt the LLP structure.

Commonly, factors considered by courts and tribunals in these cases include: involvement in decision-making, the making of a capital contribution, entitlement to an LLP's surplus assets, the degree of control exercised over the organisation of the LLP by the individual in question, the remuneration arrangements and the individual's liability for the LLP's debts or part thereof.

1.7.1 *Tiffin v Lester Aldridge LLP* ([2012] EWCA Civ 35)

Tiffin sought to demonstrate that he was an employee under ERA, in order to bring unfair dismissal proceedings, despite being a fixed share (rather than equity) partner in the Respondent LLP.

Rimer LJ's leading judgment clarified that the individual could not be both a partner in the LLP and an employee. He advocated a practical interpretation of the test under s4(4) LLP Act:

Firstly, had the LLP been a traditional partnership, looking at section 1(1) Partnership Act 1890, would Tiffin have been a partner? This is a

factual enquiry, it is not sufficient to look at the label attached to the relationship by the parties.

The Court of Appeal held that it was the intention of the parties that Tiffin was a partner: when he became a fixed share partner he was entitled to drawings from a fixed share of profits (rather than salary), additional profit share points and additional benefits including life assurance and health insurance. Tiffin was also given his P45 (to indicate the end of employment), made a capital contribution and became a signatory to the firm's bank accounts. Further, Tiffin signed a members' agreement in 2007 (when the firm became an LLP) as a 'fixed share partner'.

The Court of Appeal dismissed the importance of Tiffin's arguments including that the true partners were the equity partners, who contributed a lot more and expected more of a share of profits. It was also irrelevant that Tiffin had less of a management voice. There is no need for some minimum share of profits nor minimum level of involvement in management.

It was therefore held that, had Lester Aldridge been a traditional partnership, Tiffin would have been a partner. That being the case, he could not be an employee.

In this case there was no need for stage two of the test. However, the Court directed that, had Tiffin been found not to have been a partner, they would have had to examine the case law (including *Ready Mixed* Concrete) cited above to decide whether or not he was an employee.

1.7.2 *Bates van Winkelhof v Clyde & Co LLP* ([2014] UKSC 32)

The claimant was engaged as a partner by law firm Shadbolts and seconded to Ako Law in Tanzania under a JV agreement. When Shadbolt's were taken over by Clyde & Co LLP the JV also transferred. Within the Clyde & Co structure, the claimant was an equity member (and had partly fixed and partly profit-related remuneration). There was another 'layer' of partnership – senior equity members who were remunerated solely based on profit.

When the claimant informed Clyde & Co that the MD of Ako Law admitted to bribing others she was dismissed from Ako Law and suspended from Clyde & Co. Soon after she was expelled from the Clyde & Co partnership and presented claims of detriment based on a whistleblowing and discrimination (pregnancy and sex).

The ET, EAT and Court of Appeal agreed that the discrimination claims were admissible (although territorial jurisdiction was disputed).

However, the claimant's eligibility to claim for a detriment was the most contentious issue. To qualify she had to have the status of a worker.

The Supreme Court overturned the Court of Appeal's and ET's decisions holding that:

- It was not necessary to have an element of subordination between a worker and their employer. Whilst the concept of subordination is sometimes helpful to distinguish between the various categories, one needs to apply the facts to the wording of section 203(3)(b) ERA.
- The court disagreed with Rimer LJ's judgment in Tiffin, holding that it was wrong to seek to establish whether an individual was a "partner" rather than an "employee". In the Supreme Court's opinion, section4(4) LLP Act is simply saying that whatever the position would be were the LLP members to be partners in a traditional partnership, then that position would be the same in the LLP. The words "employed by" under that section referred to "traditional" "worker". It was therefore not the case that members of an LLP could only be "workers" if they would also have been workers in a traditional partnership.
- In the circumstances, Ms Bates could not market her services as a solicitor to anyone other than the LLP and was an integral part of its business. The LLP was in no sense her client or customer. As a result, Ms Bates was a worker.

1.7.3 Rights of Employees versus Rights of Workers

Right	**Employee**	**Worker**
Written particulars of employment	YES	YES
Dismissals: • Not to be unfairly dismissed • Statutory minimum notice period • Written statement of reasons for dismissal • Statutory redundancy payment and right to collective consultation	YES	NO
Statutory maternity pay and sick pay	YES	NO[1]
Not to be subject to unlawful deductions from wages	YES	YES
National Minimum Wage	YES	YES
Paid annual leave	YES	YES
Working time – rest breaks, maximum working week	YES	YES
Parental leave, ordinary and additional	YES	NO

Right	Employee	Worker
maternity leave, flexible working		
Protection on transfer of business (TUPE)	YES	NO[2]
Right to be accompanied at grievance or disciplinary hearings	YES	YES
Protection for protected disclosures	YES	YES
Employer's vicarious liability	YES	NO[3]
Right to refuse Sunday working	YES	NO
Protection from discrimination: • Equal pay • Gender • Marital or civil partnership status • Race • Disability • Religion or belief • Sexual orientation • Part-time worker status • Age	YES	YES
Protection from victimisation for making allegations, providing information or evidence or bringing a claim with respect to discrimination	YES	YES
Protection from discrimination: • Fixed-term status	YES	NO
Time off for: • Antenatal care • Dependants • Trade union activities • Public duties • Looking for work in redundancy situation • Pension scheme trustees • Employee representatives • Study or training	YES	NO
Not to suffer detriment in relation to exercising any of the above rights	As for individual rights	

[1] "Employee" for SMP purposes is wider than the standard ERA 1996 definition. It includes office-holders (such as company directors) whose earnings are taxed in the same way as employees (section 171(1), SSCBA) and Crown servants (section 169, SSCBA). It also includes anyone who is an "employed earner" for NICs purposes, such as agency workers other than models and homeworkers.

For SSP, "qualifying employees" are more widely defined in this context than under the normal employment status tests and include all those whose earnings are liable for class 1 National Insurance contributions. Therefore, a worker could qualify.

[2] An employee is defined in slightly wider terms than is normally used for employment protection purposes (for example, under the ERA 1996) as any individual who works for another person, whether under a **contract of employment** or apprenticeship "or otherwise" (*regulation 2(1), TUPE*). Although some commentators have suggested that "or otherwise" for these purposes could encapsulate workers, thus far there is only ET level authority (*Dewhurst v Revisecatch Ltd t/a Ecourier* ET2201909/18) to support this proposition.

[3] Vicarious liability may extend beyond employees to encompass workers, but this is not a universal rule and will depend upon the facts of the particular case. The appropriate question to ask is: whether the relationship was one that was sufficiently analogous to employment? *Barclays Bank plc v Various Claimants* [2020] UKSC 13.

1.8 "Atypical" workers – agency workers

Many workers are engaged to work indirectly, either through employment businesses (or "**agencies**") or service companies. The typical situation is one where:

1.8.1 there is a written contract between the person for whom the individual works on a day-to-day basis (the "**end user**") and the intermediary between the individual and the end user (the "**agency**") whereby the agency provides the end user with individuals, or a specific individual;

1.8.2 there is a written contract between the agency and the individual under which the agency offers to provide individuals with opportunities for work, which the individuals can take up or not, as they wish; and/or

1.8.3 there is no written contract between the individual and the end user, so that if there is a contract between them, it must be an implied contract.

The important question is whether the individual is an employee and if so, of whom.

1.8.4 Employee of the agency?

In some circumstances, the individual may be viewed as an employee of the agency.

In *McMeechan v Secretary of State for Employment,* ([1997] IRLR 353), the Court of Appeal held that the agency is the individual's employer, so far as any particular assignment is concerned, so that every time the individual accepts a particular assignment with an end-user, he will be the agency's employee for the duration of the assignment. Please note that this case is likely to be confined to its own facts. In *Bunce v Postworth Limited,* ([2005] EWCA Civ 490) the Court of Appeal appeared to confirm that *McMeechan* was not to be followed and that the individual will hardly ever be an employee of the agency, since the agency did not have enough control over the employee.

In *Ncube and others v (1) 24/7 Support Services Ltd (in liquidation) (2) Secretary of State for Trade and Industry and (3) Trust Healthcare Management Ltd, Unreported* (ET/2062005/05) a Tribunal found that an agency which exercised close management and disciplinary control over its workers was an employer. In particular, mutuality of obligations was found in the obligation to provide and undertake regular training and appraisals with the agency. However, the Tribunal was keen to stress the unique features of this case, and it is unlikely to be followed often.

1.8.5 Employee of the end user?

Whether an individual is an employee of the agency or of the end user, has been one of the hottest topics for employment lawyers in recent years and the position has been far from clear.

There was significant concern about the impact of the Court of Appeal's decision in the case of *Dacas v Brook Street Bureau (UK) Limited* ([2004] IRLR 358). The Court of Appeal in that case raised the possibility of an implied contract of employment arising between an agency worker and the end user, particularly where the individual had been engaged through an agency for more than one year.

In *Cable* & *Wireless v Muscat* ([2006] I.C.R. 975) the Court of Appeal appeared to follow *Dacas* in upholding the EAT's decision that the agency worker was an employee of the end-user. However, on the facts Muscat was engaged as an employee originally, only for a 'sham' agency relationship to be subsequently formed, which did not reflect the reality of the situation.

In *Astbury v Gist Limited unreported* (EAT 14/4/05), the EAT held that an individual was the employee of the end user. In doing so, they noted that "it is ... highly desirable that all three parties should be involved" whenever an Employment Tribunal is called upon to determine the legal consequences of an individual/end-user/agency relationship. The EAT did not mention the *Muscat* decision and therefore this decision should be treated with caution.

1.8.6 A change in approach? The 'business reality'

Recent cases have prompted a move away from the *Dacas* approach, and the widely criticised tendency of Tribunals to imply contracts of employment too readily.

In *Craigie v London Borough of Haringey* (EAT/0556/06), the EAT cast doubt on *Dacas*. Returning to fundamental principles of law, it stated that an inference of a contract can only be found where such inference is necessary, not merely possible or desirable. This test was also applied in *Heatherwood & Wrexham Park Hospitals NHS Trust v Kulubowila and Others* (EAT/0633/06) where it was emphasised that the necessity of implying a contract had to be considered on the facts of each individual case and that this test held a high threshold.

The leading case on agency workers' status at present is the EAT's decision in *James v Greenwich London Borough Council* ([2007] IRLR 168), approved by the Court of Appeal in *James v Greenwich London Borough Council* ([2008] EWCA Civ 85). Mrs James was an agency worker who worked for Greenwich London Borough Council for five years and argued that an implied contract of employment had arisen. The EAT held that a contract should only be implied in exceptional cases and that the test to be applied is whether it is necessary to imply a contract in order to reflect the business reality of the situation. The EAT disagreed with comments made in *Dacas* to the effect that once arrangements had been in place for a year or more, there would be an inference that an implied contract of service existed with the end user. The EAT restated settled law that the most important factors to consider were necessity, control and mutuality of obligation as discussed above.

The EAT gave the following non-binding guidance in respect of when it is appropriate to imply a contract between worker and end-user, which has been expressly endorsed by the Court of Appeal [2008] EWCA Civ 85:

(i) it is not appropriate to imply a contract where the end-user cannot insist on the agency supplying a particular worker.

(ii) "Where the arrangements are genuine and when implemented, accurately represent the actual relationship between the parties - as is likely to be the case where there was no pre-existing contract between worker and end user - then it will be a rare case where there will be evidence entitling the Tribunal to imply a contract between the worker and the end user. If such a contract is to be inferred, there must subsequent to the relationship commencing be some words or conduct which entitle the Tribunal to conclude that the agency arrangements no longer dictate or adequately reflect how the work is actually being performed, and that the reality of the relationship is only consistent with the implication of the contract. It will be necessary to show that the worker is working not pursuant to the agency arrangements but

because of mutual obligations binding worker and end user which are incompatible with those arrangements."

It follows from this that *genuine* tripartite arrangements, where the end-user pays an agency to account not only for workers' wages but for overheads and profit, do not usually give rise to implied contracts of employment between the worker(s) and end-users.

(iii) The passage of time does not justify the implication of a contract. The EAT's suggestion, that being the comment of Sedley LJ in *Dacas,* was wrong.

(iv) A court or tribunal will be more likely to imply a contract of employment between agency workers and end-users where the agency relationship or express terms are a sham (as in *Muscat*) or where it is otherwise clear on the facts that an employment relationship exists.

This latter point has been the subject of many subsequent cases:

(v) *East Living v Sridhar* (UKEAT/0476/07/RN) the Claimant, an agency worker, brought a claim of victimisation against the agency and the end user. The end user appealed against a finding that it was the Claimant's employer for the purposes of the victimisation claim.

The EAT held that the ET had erred in concluding that there was a contract of employment with the end user, having determined the issue on the basis that the arrangements were simply consistent with the relationship being one of employment. The ET failed to consider the express contractual arrangements at the outset to examine whether the relationship was adequately explained by the contractual arrangements that were put in place. The agency retained quite substantial and significant control over the Claimant's standards of conduct in a handbook, required the Claimant to intimate any grievance he had to the client in the first instance, and were obliged to pay him for hours worked

(vi) In *Muschett v HM Prison Service* ([2010] EWCA Civ 25) the CA considered the case where Muschett was supplied as a temporary worker by an agency to work at a remand centre operated by the prison service. There was no written contract with the prison service and the basis of Muschett's work for the four month period was the contract for services between him and the agency. Muschett went through an induction procedure and received a copy of the prison service staff handbook and was subject to its conditions. Payment was made to him by the agency.

The ET found that he had had no contractual obligation to provide work for the Claimant and although he had been under the

control of the prison service, there had been no mutuality of obligation. The matters relied on by the Claimant, such as provision of a prison service handbook, training and discussions regarding payment position, were matters that were no more than would normally arise from working at the particular premises – the "something more" that was required by *James* was not present.

Before the EAT, Muschett argued that the ET should have found there to be an arguable case that an implied contract of employment existed. The EAT and the CA upheld the decision of the ET as it was in accordance with *James*.

In addition, the first instance ET decision stated that Muschett was not an employee of the agency either, under discrimination legislation, leaving him without protection against discrimination. Neither the EAT nor Court of Appeal ruled on this point so no precedent was set.

1.8.7 Has *James v London Borough Greenwich Council* provided certainty for the end-user?

Although *James v Greenwich London Borough Council* has provided guidance and it would appear that it is easier for end-users to defend claims from agency workers, there are still a number of recent cases that have implied an employment relationship with an agency worker and the end-user.

In the cases of *Harlow District Council v O'Mahoney and APS Recruitment Limited* (UKEAT/0144/07) and *National Grid Electricity Transmission PLC v Wood* (UKEAT/0432/07) the EAT, following guidance in *James v Greenwich London Borough Council*, found that the ET had not erred in finding it necessary to imply a contract of employment between the agency worker and end-user. In both cases a crucial factor in reaching this decision was the fact that the workers had negotiated changes to their terms of engagement directly with the end user, not through the agency. Such changes included pay, notice and when holidays could be taken. In *Tilson v Alstom Transport* ([2010] EWCA 1308), the Court of Appeal upheld the EAT's decision that an agency worker was not employed by the end-user despite the control that they exercised over his work. The worker's integration into the end-user's organisation was not inconsistent with the existence of an agency arrangement in which there was no employment contract with the end-user.

In *Cairns v Visteon UK Ltd* ([2007] I.R.L.R 175 EAT) the EAT refused to find an implied contract of employment between Mrs Cairns and the end-user even though she would have a better chance of establishing an unfair dismissal claim against Visteon. However, the case suggests that in some circumstances a contract of employment may be implied if such

a contract is necessary to procure a suitable Respondent for an unfair dismissal claim. Further, the EAT did not rule out the possibility that an individual could have two employment contracts, with both the agency and the end user (as earlier intimated by the Court of Appeal in *Dacas*), although in the EAT's view this would be most unusual.

The *Cairns* case also highlights some practical issues which remain to be resolved arising from the possibility of such parallel contracts arising. Where there are two employers, who should have the power to dismiss? Who is responsible for following the disciplinary and grievance procedures? Where a dismissal occurs who should the Claimant claim against? These issues were not dealt with by the EAT in *Cairns.* Although the EAT did not rule out the possibility, it seems that in practice a Tribunal will not readily find that an agency worker can claim unfair dismissal against two "employers" (in respect of the same work) on the basis of both express and implied contracts of employment.

1.8.8 Express Terms?

It is common practice in agency agreement documentation to require the agency worker to sign an agreement acknowledging that they are not an employee of the agency or the end-user. This agreement states that the contract is the "entire agreement" between the parties. In *Royal National Lifeboat Institution* v *Bushaway* ([2005] IRLR 674) the EAT considered the effectiveness of such a contractual term. According to the EAT, the contractual documentation was "not conclusive". The EAT ruled that "when one looks at the written agreement between the Respondent and the applicant in the context of what was actually negotiated and what was done both before and after the applicant started work, it is clear that it does not reflect and contain the entire bargain between the parties." In the circumstances, it was open to the Employment Tribunal to look beyond the written terms and to conclude that the Claimant was an employee of the end-user, in other words to imply a contract of employment.

1.8.9 'Sham' contracts

In practice, this question of whether the contractual documentation entered by the parties is a "sham" that obscures the true nature of their relationship is often raised before Tribunals. Usually this involves an individual who, having entered a contract purporting to be a self-employed contractor, subsequently wishes to argue that they are, in reality, an employee or worker (in order to claim the benefit of statutory rights). The Tribunal has to decide the question of employment status, frequently as a preliminary issue, (as in the case against *Uber*) in order to determine whether it has jurisdiction to hear the claim(s) before it.

In *Protectacoat Firthglow Limited v Szilagyi* ([2009] EWCA Civ 98)*;* the Court of Appeal upheld an employment judge's decision that an individual who had entered a partnership agreement and a contract for

services was, in fact, an employee. The Court of Appeal held that, to amount to a sham, contractual arrangements did not need to be entered with a common intention on the part of the parties to mislead third parties. It would be sufficient if the arrangements as recorded and, where appropriate, as evidenced by the parties' conduct, did not reflect the parties' true intentions or expectations not only at the inception of the contract but also as time passed.

In reaching this decision the Court of Appeal reviewed the authorities on the nature of a sham. It held that the test for a sham must be sensitive to context. The test identified in *Snook v London & West Riding Investments Ltd* ([1967] 23 QB 786) that, for a sham to exist the parties had to have a common intention to mislead third parties, was not of "uniform assistance" in determining whether a written agreement was a sham. This was because, rather than considering whether a written agreement was a sham, it had considered whether a party lost their rights when a hire purchase agreement had been completed with fictitious information. The Court of Appeal drew the following conclusions:

(i) "The question is always what the true legal relationship is between the parties. If there is a contractual document, that is ordinarily where the answer is to be found. But, if it is asserted by either party, or in some cases by a third party, that the document does not represent or describe the true relationship, the court or Tribunal has to decide what the true relationship is".

(ii) "The court or Tribunal has to consider whether or not the words of the written contract represent the true intentions or expectations of the parties, not only at the inception of the contract but, if appropriate, as time goes by".

In a case involving a written contract, the Tribunal should ordinarily regard the documents as a starting point and ask itself what legal rights and obligations the written contract creates. It may then have to ask whether the parties ever realistically intended or envisaged that its terms, particularly the essential terms, would be carried out as written. Essential terms are those central to the relationship, namely mutuality of obligation and the obligation to personally perform work.

Unlike commercial agreements, the reality of workplace agreements was that frequently the principal/employer dictated the terms and the contractor/employee had to take it or leave it – there is an inherently unequal bargaining position.

Referring to Protectacoat, the EAT in *Launahurst Ltd v Larner* (UKEAT/0188/09) upheld an employment judge's decision that, despite having signed a "contract supply agreement" portraying him as an independent contractor, Mr Larner was an employee. Despite a clause stating that the written agreement constituted the entire contract

between the parties, the employment judge was entitled to decide that the agreement did not reflect the reality of the parties' relationship and that the "entire agreement" clause was a sham. The written agreement had been entered "as a result of [the] attitude that was taken by the Revenue in relation to tax and self-employment status", and bore no reality to the way in which the parties conducted themselves. In these circumstances, the entire agreement clause did not describe or represent the parties' true intentions and was therefore not definitive.

The issue of sham contracts was also considered in the important case of *Autoclenz Ltd v Belcher & Ors* ([2011] UKSC 41).

Autoclenz Limited had a contract to valet cars for British Car Auctions. It advertised for self-employed valeters and successful applicants were referred to as sub-contractors in their contracts. Autoclenz issued new terms in 2007, on which Autoclenz wished "to engage the services of car valeters from time to time on a subcontract basis".

The valeters could provide a substitute: "As an independent contractor, you are entitled to engage one or more individuals to carry out the valeting on your behalf, provided that such an individual is compliant with Autoclenz's requirements of sub-contractors as set out in this agreement".

There was no mutuality of obligation: "You will not be obliged to provide your services on any particular occasion, nor in entering into such an agreement, does Autoclenz undertake any obligation to engage your services on any particular occasion".

Mr Belcher and his colleagues cleaned cars at BCA's Measham site. They wore BCA overalls (having previously worn Autoclenz overalls) and Autoclenz provided all the cleaning products and equipment and arranged group insurance cover. The valeters were paid on a piecework basis and submitted weekly invoices. Autoclenz deducted a fixed sum for the provision of cleaning materials and insurance from the payment due each week. The Claimants were responsible for payment of their tax and national insurance contributions. In 2004, HMRC undertook a review and was satisfied that the valeters were self-employed.

In November 2007 the valeters presented claim forms to a Tribunal. They sought a declaration that they were employees and an order for Autoclenz to pay them the NMW and unpaid holiday pay under the Working Time Regulations 1998. An employment judge held that the degree of control exercised by Autoclenz fully integrated the valeters into its business and that the contract terms permitting the valeters to provide substitutes and suggesting a lack of mutual obligations did not reflect the reality of the situation. He held that the valeters were employees and, in the alternative, that they were workers. Autoclenz appealed.

The EAT allowed the appeal in part and held that the valeters were not employees but that they were workers.

Autoclenz appealed against the decision that the valeters were workers and the valeters cross-appealed against the decision that they were not employees. Autoclenz argued that, having found that the employment judge had misdirected himself on the approach to sham terms, the EAT should have held that, as the terms were genuine, the valeters could not be workers either.

The valeters argued that the employment judge had correctly considered the genuineness of the substitution and mutual obligation clauses.

The Court of Appeal dismissed Autoclenz's appeal and allowed the Claimants' cross-appeal. In doing so, they provided further guidance on how Employment Tribunals should address disputes over the genuineness of a written term of a contract:

The focus of the Tribunal's enquiry must be to discover "the actual legal obligations of the parties". This involves examining all the relevant evidence, including the written terms, evidence of how the parties conducted themselves in practice and what their expectations of each other were. Evidence of how the parties conducted themselves in practice may be so persuasive that the Tribunal can draw an inference that such practice reflects the true obligations of the parties. However, the mere fact that a particular contractual provision, for example a right of substitution, is never actually exercised, does not automatically mean that it is not genuine.

The Tribunal in this case did not decide that the "right to refuse work" and substitution clauses were not genuine rights simply because they were not operated in practice. It relied on evidence that the valeters were expected to turn up for work unless they had given appropriate notice as an indicator of mutuality of obligation. Its reasoning in relation to the substitution clause was less clear as it appeared to rely on the same evidence to find that the substitution clause was not genuine. However, "with some hesitation" Smith LJJ concluded that it was entitled to infer from the evidence that the valeters did not even know of the right of substitution that the parties did not realistically expect the right to be exercised.

In the light of the findings made by the Tribunal, the Court of Appeal held that the conclusion that the valeters were employees was well-founded.

Autoclenz further appealed to the Supreme Court. The Supreme Court upheld the Court of Appeal's decision. The Court focused on whether the express contractual provisions reflected the "actual legal obligations of the parties" and concluded they did not. The Tribunal at first instance had been entitled to rely on evidence that the Claimants were expected

to turn up for work unless they had given appropriate notice as an indicator of mutuality of obligation. Further the Tribunal had not erred in inferring from evidence that the Claimants did not even known about the right of substitution that the parties did not realistically expect that right to be exercised.

1.9 Agency Workers Regulations 2010

The Regulations, which came into force on 1 October 2011, implement the EU Agency Workers Directive which aimed to ensure that agency workers receive equal treatment in comparison with permanent staff.

1.9.1 Who is covered by the Regulations?

Regulation 4 clarifies the meaning of "temporary-work agency" as used in the Directive. The term equates to an employment business, which supplies workers to hirers for temporary work (as opposed to an employment agency, which finds permanent employment for individuals).

Regulation 3 defines an "agency worker" as someone who is supplied by a temporary work agency, works temporarily for and under the supervision and direction of a hirer and has a contract with the temporary work agency which is a contract of employment with the agency or any other contract to perform work and services personally for the agency.

1.9.2 Equal treatment and Establishing Equal Treatment

The aim of the Directive is that "the basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user undertaking, at least those that would apply if they had been recruited directly to occupy the same job".

Regulation 5 implements this aim by providing that agency workers are entitled to the same basic working and employment conditions as those who had been directly recruited by the hirer and carry out the same job.

"Basic working and employment conditions" are defined in Regulation 5(2) as the relevant terms and conditions that are ordinarily included in the contracts of employees of the hirer. Those terms and conditions are defined in Regulation 6 and include the duration of working time, overtime, breaks, rest periods, night work, holidays and public holidays and pay. 'Pay' includes holiday pay, payment of overtime, shift allowances, unsocial hours premiums and bonuses which relate directly to personal and individual performance (but excluding other forms of bonus e.g. profit share, share participation or car allowance).

After completing the 12-week qualifying period , in order to show unequal treatment an agency worker must compare themselves to a directly recruited comparator and identify the relevant terms and

conditions that are ordinarily included in their contract. Both the agency worker and the comparator must work under the supervision and direction of the hirer and they must be engaged in the same or broadly similar work.

1.9.3 12 week qualifying period

The Government, TUC and CBI agreed that there will be a 12 week qualifying period before an agency worker is entitled to equal treatment under the regulations. This is reflected in Regulation 7.

Regulation 7 also aims to prevent abuse of the 12 week qualifying period, for example, by laying off agency workers just before the qualification period has elapsed and then rehiring them after a short break. Continuity will only be broken where the agency worker carries out 'substantially different' work or duties or they have a 6 week break. The meaning of 'substantially different' is set out in the BIS guidance on the Regulations as "a genuine and real difference to the role". It will not be enough to simply change line manager but not job requirements. Nor will it be enough to transfer between similar administrative functions or give a different rate of pay.

Some absences including sickness absence of up to 28 weeks, statutory or contractual leave, jury service of up to 28 weeks, temporary cessation in requirement for work or strike/other industrial action will only suspend continuity and it will continue upon their return.

Continuity continues to run in cases of statutory or contractual maternity, paternity or adoption leave and for absences connected to pregnancy, maternity or childbirth.

1.9.4 Liability for equal treatment

Regulation 14(1) explains that it will be the employment business (i.e. the agency), rather than the hirers which will be primarily responsible for ensuring equal treatment. However, under Regulation 14(3), the agency has a defence if it can show that it took reasonable steps to obtain relevant information from the hirer about its basic working and employment conditions and when it received such information, it acted reasonably in determining what the agency worker's basic working and employment conditions should be after the qualifying period and for the remainder of the assignment. The hirer will however be liable if they failed to give the required information to ensure equal treatment – Regulation 14(6).

An agency worker is able to bring their claim against the hirer or the employment business. In *Stevens v Northolt High School and Teach 24 Ltd* (ET/3300621/2014), a recruitment agency successfully defended a claim for equal treatment under the Agency Workers Regulations. The claimant, an agency worker, argued that she had been paid less than comparable directly-hired staff. The Tribunal agreed but made its award

of £10,000 against the hirer only. This was because the agency could prove that it had taken reasonable, albeit unsuccessful, steps to seek to obtain information from the hirer about the working conditions of comparable, directly-hired workers.

1.9.5 Information on equal treatment for workers

Regulation 16(1) allows agency workers who believe they are not receiving equal treatment to request a written statement on matters relating to their equal treatment. This statement must be provided within 28 days of the request.

1.9.6 Access to employment vacancies

Regulation 13 requires that temporary agency workers shall be informed of any vacant posts in the user undertaking to give them the same opportunity as comparable workers in that undertaking to find permanent employment. This right applies from the start of the assignment and is not subject to the 12-week qualifying period. A hirer may inform the agency worker by a general announcement in a suitable place in the hirer's establishment or via the internet/intranet, provided the agency worker knows where and how to access the information. An EAT decision (Coles v Ministry of Defence UKEAT/0403/14) confirms that the right is limited to the provision of information and does not require the end user to treat agency workers as having equal status to comparable permanent employees considered for the same post.

In *Kocur v Angard Staffing Solutions Ltd [2022] EWCA Civ 189*, the Court of Appeal held that the right of an agency worker to be informed of vacancies with a hirer as provided by regulation 13 does not extend to a right to apply and/or be considered for the notified post (although note that this case is currently being appealed at the Supreme Court).

1.9.7 Access to facilities

Regulation 12 provides that from day one of the agency workers assignment, an agency worker is entitled to the same on site facilities and amenities as a comparable employee. These include a canteen or other similar facilities, child care facilities and transport services. Liability falls to the hirer as the agency has no role in providing these rights.

The Regulations do allow for less favourable treatment in the provision of such facilities and amenities if it can be justified on objective grounds. It is unlikely that the hirer will be able to rely on cost alone to justify different treatment.

1.9.8 The Swedish Derogation (repealed 6 April 2020)

Article 5(2) of the Directive provides "Member States may, after consulting the social partners, provide that an exemption be made to

the principle of equal treatment where temporary agency workers who have a permanent contract of employment with a temporary work agency continue to be paid in the time between assignments". This was negotiated by the Swedish Government, hence it is referred to as the "Swedish derogation model".

This was reflected in Regulations 10 and 11 which provided an exemption from the right to equal treatment with regard to pay (including holiday pay) where the temporary work agency provided the agency worker with a permanent contract of employment with minimum requirements and paid them a minimum amount between assignments when they were not working for a hirer. The Government's Good Work Plan (see 1.12 below) confirmed the government's intention to repeal the Swedish derogation. The Agency Workers (Amendment) Regulations 2019 (SI 2019/724) came into force on 6 April 2020 and repealed regulations 10 and 11. This means that all agency workers now have a right to pay parity after 12 weeks.

1.9.9 Potential claims and compensation

Regulations 17 and 18 provide for a number of claims to be brought against either the hirer or the agency for breach of the Regulations. There is no qualifying period for an agency worker to bring a claim for being subjected to a detriment on a prescribed ground or for a claim that their rights of access to employment or facilities have been breached. After the 12 week qualifying period agency workers are able to bring claims for breaches of Regulation 5 on equal treatment.

The time limit for making a claim to the tribunal is three months from the date of the infringement or detriment and the tribunal can make a declaration, order payment of compensation and make recommendations for action to be taken.

Contrary to expectations, the Regulations have not created vast amounts of litigation. This may be partly due to businesses' reluctance to use agency workers, linked to prevailing economic conditions (shrinkage in the labour market) and a fear of the impact of the Regulations. Changes implemented in 2020

.In addition to the repeal of the Swedish derogation (mentioned at 1.9.8 above), as of 6 April 2020:

- Temporary work agencies must provide agency work-seekers with a Key Information document, including information on the type of contract, the minimum expected rate of pay, how they will be paid and by whom under the Conduct of Employment Agencies and Employment Businesses (Amendment) Regulations 2019 (SI 2019/725)

- All workers were given the right to a written statement of terms under the Employment Rights (Miscellaneous Amendments) Regulations 2019 (SI 2019/731)

1.10 Apprentices

Although the definition of a contract of employment in Section 230(2) of the Employment Rights Act 1996 includes apprenticeships, such contracts usually involve greater responsibility for employers than normal contracts of employment.

The Apprenticeships, Skills, Children and Learning Act 2009 (ASCL) came into force in 2011 and sets out that apprentices engaged since 1 April 2011 will work under either a traditional contract of apprenticeship under the common law or an apprenticeship agreement under ASCL

1.10.1 Contract of Apprenticeship

Under a contract of apprenticeship, apprentices will be employees and entitled to all the rights that entails. In addition, since the primary purpose of such contract is training (with work for the employer being secondary), individuals retained on a contract of apprenticeship have enhanced rights on termination.

Dunk v George Waller & Sons Ltd ([1970] 2 All ER 630) demonstrates that damages for terminating a fixed term contract of apprenticeship can be very costly as compensation will include damages for loss of earnings, training and impact on future earnings.

Furthermore, it was stated in *Learoyd v Brooks* ([1891] 1 QB 435) that it will require a greater degree of misconduct than is the case with ordinary employees to dismiss for that reason. Individuals under a contract of apprenticeship cannot be dismissed for redundancy unless there is a closure of the employer's business or a fundamental change in its character.

1.10.2 Apprenticeship Agreement

An apprenticeship agreement will be a contract of service (i.e. an employment contract) *not* a contract of apprenticeship (which is effectively 'employment plus'). This means that apprentices engaged under this model will only have the 'ordinary' rights of employees. Since May 2015, apprenticeship agreements have ceased to apply in England, where they have been replaced by an approved English apprenticeship agreement framework. However, they still apply in Wales and some legacy agreements will still be in effect in England.

To qualify as an apprenticeship agreement, the relevant contract must satisfy four conditions:

- The apprentice must undertake to work for the employer.

- The agreement must be in the prescribed form. For example, it must contain the terms required by section 1 ERA and must include a statement of skill, trade or occupation for
- which the apprentice is being trained under an apprenticeship framework.
- The agreement must state it is governed by the law of England and Wales.
- The agreement must state that it is entered into in connection with a qualifying apprenticeship framework.
- The government has published plans to reform apprenticeships in England, including the introduction of new standards which are designed to be "more rigorous and responsive to the needs of employers". Under the Deregulation Bill, there are plans to replace existing apprenticeship agreements with "Approved apprenticeship agreements".

1.10.3 Approved English apprenticeship agreements

This new concept was introduced in England with effect from May 2015, subject to transitional provisions. It is a similar but simplified version of the 'old' apprenticeship agreement. The key elements are that the agreement must;

- Be between the apprentice and the employer in a sector for which an 'approved apprenticeship standard' has been published.
- Provide for the apprentice to receive training so that the apprentice is able to achieve the approved apprenticeship standard; and

1.11 Directors - Are they employees?

A director is an office holder who owes a statutory and common law duty to their company. Generally executive directors are employees and non-executive directors are self-employed. However, this is only a general rule and it is necessary to look at all the relevant factors and circumstances under which they perform their role.

As already stated, mutuality of obligations is an important factor in deciding if a director is an employee. The case of *Eaton v Robert Eaton Ltd and the Secretary of State for Employment* ([1988] IRLR 83) explained that in order for a director to be an employee there must a mutual obligation on the company and the director to offer and accept work beyond the duties required of a director.

A factor that has proved to be extremely problematic in deciding if a director is an employee is where the director has a controlling shareholding in the company.

Older case law seemed to suggest that a controlling shareholder is not under the control of the company and cannot therefore be classed as an employee. This approach can be seen in the case of *Buchan v Secretary of State for Trade and Industry* ([1977] IRLR 682) where a controlling shareholder could effectively block his own dismissal.

More recent case law seems to suggest that being a majority shareholder does not prevent a director from being an employee, *Clark v Clark Construction Initiatives Ltd and Utility Consultancy Services Ltd* (UKEAT/0225/07) and *Nesbitt and Nesbitt v Secretary of State for Trade and Industry* (UKEAT/0091/07/DA).

This area has proved so problematic and uncertain that the President of the Employment Tribunals issued a Practice Direction staying all claims which involve the question of when a director and majority shareholder of a company qualifies as an employee of that company pending the judgment of the Court of Appeal in *Secretary of State for Business Enterprise and Regulatory Reform v Neufeld* ([2009] EWCA Civ 280).

Mr Neufeld was a 90% shareholder of A & N Communications In Print Limited. He paid Schedule E tax and NI. He had no written contract with the company, but he had lent money to the company and given personal guarantees. He had not taken all of his holiday entitlement.

The case was heard in December 2008, and the Court of Appeal held that, in principle, there is no reason why a director/shareholder (including a controlling shareholder) cannot also be an employee of a company.

Instead, whether a shareholder/director is an employee is a question of fact for the court or Tribunal before which the issue arises. To answer that question the court or Tribunal may, in theory, have to address two points: first, whether the contract was a genuine contract or a sham and, second, if the contract was genuine, having regard to what the person has done or been required to do under the contract, is the contract a contract of employment?

When determining whether the contract is a contract of employment, the following are considerations:

- what has been done under the claimed contract, possibly over time;
- there must be more than mere appointment as director;
- salary vs. directors' fees;
- were actions done in capacity of director, not employee?

Factors considered by the Court of Appeal to **not** ordinarily be of special relevance when determining existence of contract of employment:

- fact of control;
- investment of share capital;
- loans or guarantees made to company;

- personal investment in the company.

In *Secretary of State for Business, Innovation and Skills v Knight* (UKEAT/0073/13), the EAT had to consider a somewhat different issue - whether a managing director and sole shareholder of a company, who had not exercised her right to be paid over a two-year period, remained an employee. If that was the case then, once the company became insolvent, the employee was entitled to a redundancy payment from the Insolvency Service. The EAT upheld an Employment Tribunal's decision that the claimant was an employee, that there was sufficient mutuality of obligation between her and the company despite her decision to forgo payment, and that the decision to forfeit payment did not amount to a decision to vary the contract and end the employment status.

1.12 The Taylor Review and the Good Work Plan

In 2016, Theresa May commissioned Matthew Taylor to consider how employment practices needed to change in order to keep pace with modern business models, such as the so-called 'gig' model which relies on those working flexibly on a self-employed basis. Matthew Taylor and his panel published their recommendations in 2017 and were concerned that uncertainty over employment status was leading to some gig workers missing out on 'worker' status and attendant basic employment rights including the NMW. In order to strike a balance between worker fairness, flexibility and gig entrepreneurship, the review recommended renaming 'worker' status to become that of a 'dependent contractor'. It wanted the Government to go further, by redefining the legislative tests for employment status, incorporating accepted case law guidance and, for example, redefining 'worker' status (as it is now) to place greater emphasis on employer control and less emphasis on the need for personal service (so that, according to the review, it would become 'harder for some employers to hide behind substitution clauses').

The Government Response to the Taylor Review proposals was published on 7 February 2018. Whilst the Response was largely receptive to the extensive employment recommendations of Taylor, few changes were made in the short term. However, the Government also undertook four consultation exercises, including one addressing the subject of employment status, in the first half of 2018, to allow it to research and consider some of the Taylor Review proposals in more detail.

In December 2018, the Government announced its intention to proceed with many of the Review proposals in the form of its "Good Work Plan". Although some of these changes have already been enacted (e.g. the repeal of the Swedish derogation for agency workers), the Government's response to its employment status consultation is still awaited and it is currently unclear when its publication may be expected.

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