

Introduction to employment law

23 November 2023

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Introduction to employment law

Agenda

- Employment status
- The contract of employment
- Changing terms and conditions

Case study

Employment status – section 1, (a) and (b)

Employment status

Employee, worker and self-employed

Overview

- **Employee:** Individual who personally works for another under their supervision, direction and control
- **Worker:** Individual who personally provides their services as part of a business carried on by someone else
- **Self-employed:** Individual who runs their own business providing services for clients

Employment status

Why does it matter?

Right	Employee	Worker	Self-employed
Right to request written particulars	Y	Y	N
Minimum wage	Y	Y	N
Holiday pay	Y	Y	N
Sick pay	Y	N***	N
Unlawful deductions from wages	Y	Y	N
Protection from discrimination	Y	Y	N*
Protection from unfair dismissal** and redundancy pay **	Y	N	N
Whistleblowing protection	Y	Y	N
Family leave/pay	Y	N***	N
Minimum notice period	Y	N	N

*unless requirement to provide work personally and in a position of subordination ** requires qualifying period of service ***Save for "employed earners"

Employment status

Employees – ERA/EA

Contract of employment

- ERA s.230(1): “an individual who has entered into or works under...a contract of employment”

Contract of service

- ERA s.230(2): a contract of employment means a “contract of service or apprenticeship, whether express or implied, and (if express) whether oral or in writing”

Personal contract

- EqA s.83(2): “employment” means employment under a contract of employment, a contract of apprenticeship or a contract personally to do work

Employment status

Workers - ERA



Statutory definition? There isn't one...

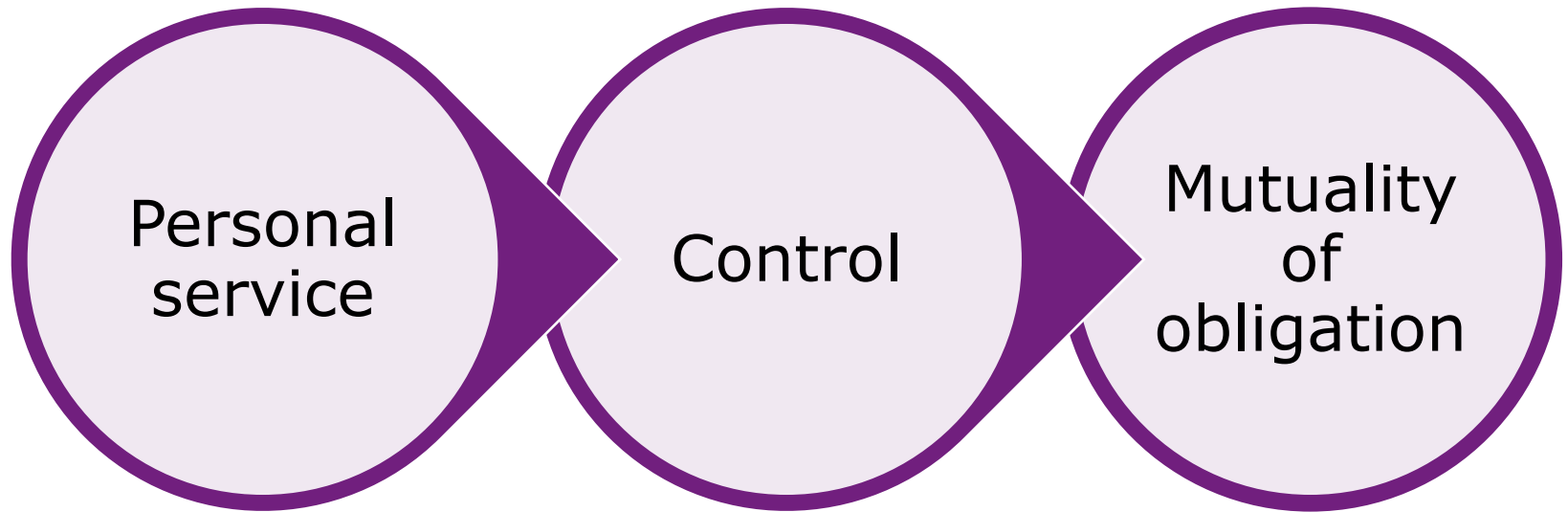
Self-employed

Business on
own account

- Regularly providing services to other businesses
- Providing own equipment
- Bearing own financial risk (e.g. cost of correcting errors, generating profits but also bearing losses)
- A high degree of autonomy over work
- No requirement for personal service

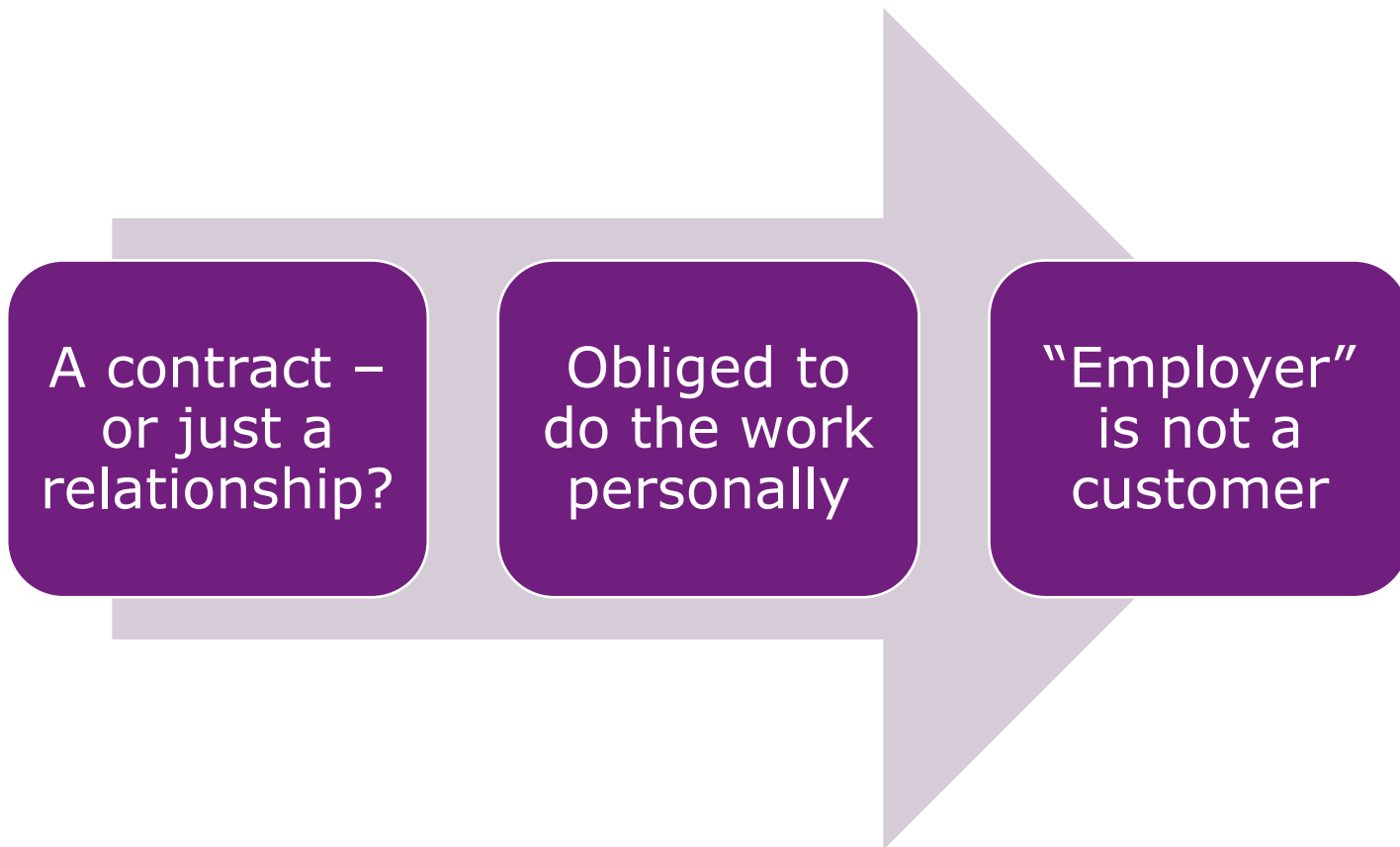
Employment status

Employees – *Ready Mixed Concrete*



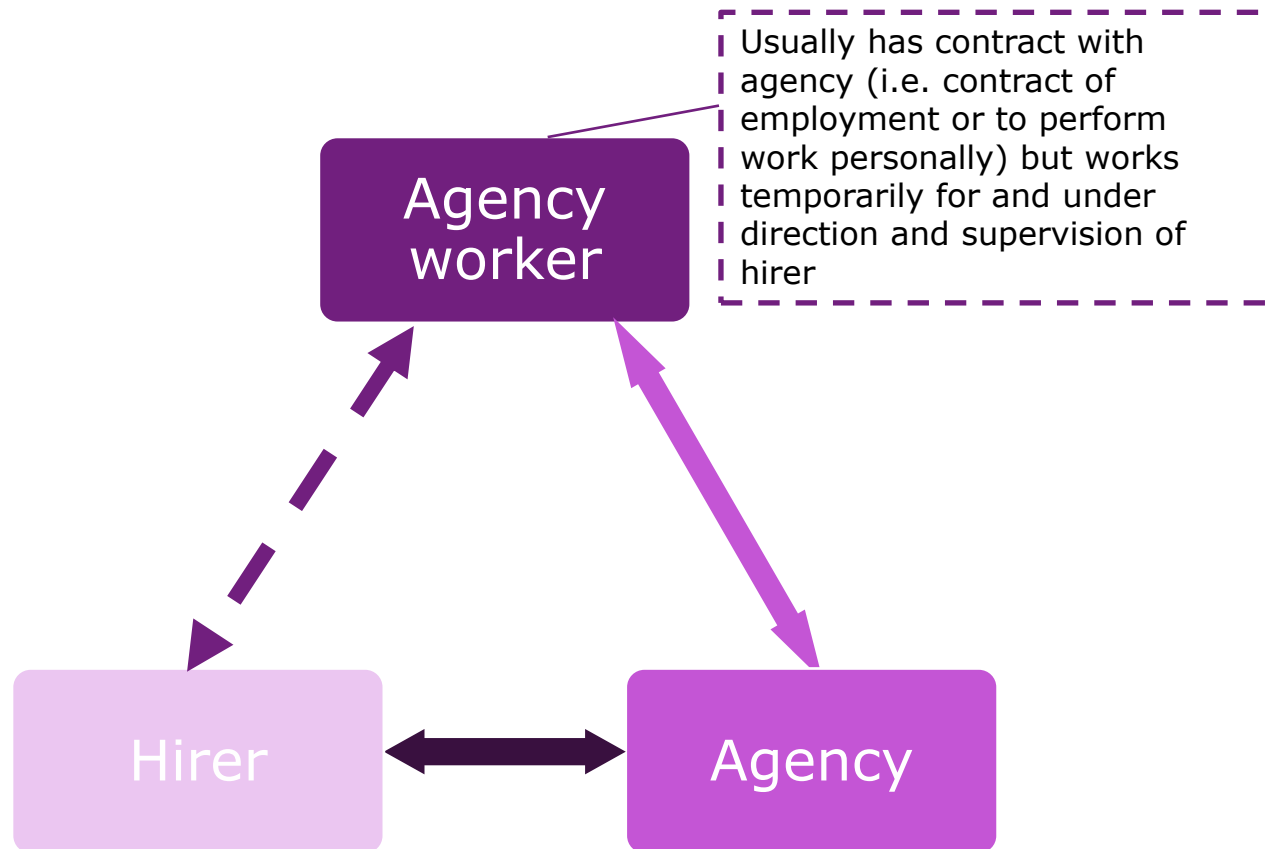
Common law tests

Worker



Employment status – section 2, (a) – (c)

Agency workers



Employment status

Agency workers



Day 1 rights

- Information about access to permanent employment vacancies
- Access to facilities and amenities

- Equality in terms and conditions including pay, holiday and rest periods
- Excluding benefits in kind



Equality in terms

Taylor Review/ Good Work Plan

Taylor Review

An independent review of modern working practices

- Report produced in 2017
- “The work of this Review is based on a single overriding ambition: All work in the UK economy should be fair and decent with realistic scope for development and fulfilment.”

Good work plan

Headline Commitments

UNLIKELY TO PROCEED:

Employment status tests to be refined after further research; online employment status tool to be developed.

PENDING: To address 'one-sided flexibility', the government committed to introducing a right for those on zero-hours or other flexible contracts to request a more stable and predictable contract.

PENDING: Making it easier for casual staff to establish continuity of employment and thus accrues certain employment rights.

DONE: Improved written statement of terms for all workers, from day one.

DONE: Reference period for holiday pay changed to 52 weeks rather than 12.

PENDING: State-led enforcement of holiday pay for vulnerable workers.

DONE: Agency workers: repeal of the Swedish Derogation; "key facts" statement regarding terms and pay; EAS to investigate umbrella companies.

DONE: Ban on deductions from staff tips.

DONE: Lower thresholds for requesting information and consultation arrangements from 10% to 2% of employees.

PENDING: New single labour market enforcement body, to better ensure that vulnerable workers were aware of their rights and have access to them, and that businesses are supported to comply.

ONGOING/ DONE: Tribunal service modernisation, naming of employers who fail to pay tribunal awards and increased penalty for aggravated employment law breach.

The employment contract – section 3

Statutory particulars

The obligation

S.1 of Employment Rights Act 1996 requires that certain particulars must be given to a WORKER no later than the FIRST day of employment (no longer within 2 months of start date) save:

- in respect of pensions, collective agreements, training rights and the note about disciplinary procedures which can be given later, in instalments (but no later than 2 months after start date)

To be contained in one document, save that the following can be referred to in another reasonably accessible document

- Sickness absence and sick pay
- Other paid leave
- Pension and pension schemes
- Training entitlements (other than compulsory training)
- Disciplinary rules and procedure, including appeals and grievance process (save for specified individual)

Doesn't prescribe terms but it is simply a requirement that certain specified particulars are provided to the worker.

Penalties for non-compliance are weak, workers cannot bring stand alone claim and max penalty is capped at 4 weeks' capped pay.

Particulars which must be given (*= new or changes applicable from 6 April 2020)

Statutory particulars

The names of the worker and employer	The date on which employment and continuous employment began	Remuneration: scale, rate, method of calculation and intervals of payment	Hours, including details of normal hours of work, days of the week, whether variable and how varied*
Holiday entitlement and holiday pay	Sickness and sick pay	Terms and conditions relating to other paid leave*	Pension and pension schemes
Any other benefits not covered elsewhere*	Notice of termination for both parties	Job title or a brief description of duties	Fixed term details
Probationary period, including conditions and duration*	Any collective agreements which affect terms and conditions	Place of work	Where required to work outside the UK for a period of one month or more: the period; currency remuneration and; additional remuneration or benefits;
Any training entitlement provided by the employer, including any compulsory training and other compulsory training the employer will not pay for*	Disciplinary rules and procedure	Appeals procedure (including person to whom worker can apply)	Grievance procedure (including person to whom worker can apply)

Contractual terms

Express

- Contract
- What was said at interview
- Service agreement
- Verbal agreement
- Written particulars
- Offer letter

Implied

- Custom and practice
- Trust and confidence
- Good faith and fidelity
- Health and safety
- Confidentiality
- Not to compete
- Employee to obey reasonable instructions

Incorporated

- Policies
- Handbook
- Collective agreement
- Health and safety rules
- Disciplinary procedure
- Redundancy policy

Statutory

- Paid holiday entitlement
- Notice period
- Right to be accompanied
- Equality clause
- National Minimum Wage

Contractual Terms

Common Examples

- s.1 particulars
- Bonus, and other benefits
- Expenses
- Mobility clause
- Confidentiality
- NDAs
- IP
- Termination and PILON
- Returning property
- Garden Leave
- Conflict of interest
- Restrictive Covenants
- Boiler plate

Ethical considerations

Confidentiality and non-disclosure agreements

- General confidentiality obligations in employment contracts can of course continue to exist but the information the employer is seeking to protect must have:
 - necessary quality of confidence, i.e. must not be useless or trivial or in public knowledge; and
 - been imparted in circumstances emphasising its confidential nature
- In a notice published in March 2018, the SRA stated that it is professional misconduct for a solicitor to prepare an agreement for use by a client that contains an inappropriate non-disclosure clause
- Also in March 2018, the EHRC recommended that:
 - legislation should be introduced making any contractual clause which prevents disclosure of acts of discrimination, harassment or victimisation void;
 - a statutory code of practice should make clear the circumstances in which confidentiality clauses preventing disclosure of past acts of harassment will be void

In August 2019, the Law Society published a new guidance leaflet in respect of non-disclosure agreements.

In October 2019, the EHRC released its own guidance in respect of the use of confidentiality agreements in discrimination cases.

Changing terms and conditions – section 4, (a) – (c)

Variation of contract terms

General considerations

- Are you changing contractual or non-contractual terms?
- Does the contract permit or envisage the change?
- Do the implied terms permit or impact on the power to vary?
- Are there any legislative restrictions on implementing the change?
- Is there a recognised union (or a union seeking to be recognised)? What does the recognition agreement say about terms subject to collective bargaining? Does practice align with this?
- What are the options and the risks...?

Changing terms and conditions

What are the options and the risks?

Express agreement

- Individual
- Collective

Unilateral imposition

- Implied acceptance
- Work under protest
- Constructive dismissal

Dismissal and re-engagement

- Wrongful dismissal
- Unfair dismissal
- Collective redundancies

NB: s.145B TULRCA where there is a recognised union

Variation of contract terms

Special case: TUPE

- Variations to a contract of employment transferred under **TUPE** will be void if this is the sole or principal reason for the variation. The variation will not be void, if:
 - the terms of that contract permit the employer to make such a variation; or
 - the sole or principal reason for the variation is an economic, technical or organisational reason (ETO reason) entailing changes in the workforce, and the employer and employee agree that variation; or
 - as regards incorporated terms in a collective agreement, the variation of the contract takes effect on a date more than one year after the date of the transfer, and the terms are no less favourable.
- Employees can challenge the validity of some terms whilst retaining the benefit of others.

Breach of contract

Breach of contract

Employee breaches

If the employee breaches the contract of employment, the employer has the following options:

- take disciplinary action up to dismissal;
- sue for damages for the breach of contract (although unlikely to be able to show loss); and
- seek equitable remedies, such as injunctive relief (key in breaches to restrictive covenants/confidentiality).

Breach of contract

Employer breaches

If the employer breaches the contract of employment, the employee has the following options:

- waive the breach;
- accept the breach and resign in circumstances which amount to constructive dismissal;
- not accept the breach, affirm the contract as it was before the breach, but reserve the right to claim damages for the breach (“working under protest”);
- if the employee is dismissed in breach of contract, e.g. without a payment in lieu of notice he will have a claim for wrongful dismissal;
- seek equitable remedies. Note, equitable remedies are not available in the Employment Tribunals so applications must be pursued in the High Court or county court;
- sue for debt if a wages claim. Note they can also bring an unlawful deduction of wages claim in an employment tribunal; and/or
- consider statutory claim, where the contract contains terms implied by statute, e.g. the equality clause.

Questions?



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