

Anatomy of an employee

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Anatomy of an Employee

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SUMMARY

Obfuscation, uncertainty and opacity. These are just a few of the words that may be used to describe the judiciary's attempt at producing a consistent and accurate identification of employment status of individuals. Given its significance, one may have considered that definitive instruction and guidance would be present to navigate interested parties. However, where clarity is required, only confusion remains. This is not to lay the blame at the door of the judiciary entirely. The 'mix of law and fact' involved in the identification process incorporates facts in each case which will invariably lead to contradictory decisions, but the underlying principles established in law – created by the judiciary in the absence of any specific and meaningful guidance from the legislation, must offer key criteria on which impartial decisions as to the employment status of an individual can be made. This paper attempts to identify those key criteria present in the judgments indicative of employee status and thereby provide instruction for interested parties.

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1. INTRODUCTION

The aim of this paper is to identify key features developed by the judiciary in the continuing battle of effectively determining the employment status of individuals. Whilst various statutes have provided definitions of employment status – as employees; independent contractors; and workers – these are intentionally broad. (1) Tribunals, which hear the evidence and have the opportunity to question the true relationship between the parties, are best placed to identify the employment status of an individual. However, given that tribunals do not establish precedent, conflicting decisions and interpretations of law are prevalent. Identifying the key criteria in the accurate identification of employment status is essential for the individuals and their employers, given the significance for the rights and obligations it places on both parties. (2)

2. EMPLOYMENT RIGHTS PER STATUS

To begin, it is important to recognise the rights to which individuals with the various forms of employment status have access. A list is provided here to quickly demonstrate why individuals who may have been wrongly (whether this is innocent, negligent, or through deliberate (3) means) defined as ‘independent contractor’ or ‘worker’ may be denied access to some of the most important rights held at work.

The protective employment rights applicable to employees (defined in the Employment Rights Act (ERA) 1996 s. 230(1)) are the most extensive and include the right to:

- Unfair dismissal; (4)
- Redundancy; (5)
- A written statement of particulars of employment; (6)
- Request to work flexibly; (7)
- Maternity leave (8) / adoption leave (9) / paternity leave (10) – and associated pay; (11)
- Protection through an employer’s insurance scheme; (12)
- Employer’s vicarious liability for torts committed in the course of employment; (13)
- Time off to perform public duties; (14) and

All of the rights enjoyed by workers as outlined below.

Workers (defined in the ERA 1996 s. 230(3)), by comparison, have the following rights:

- Rights not to be discriminated (15) against and to equal pay (16) through the Equality Act 2010;
- Right not to suffer a detriment on the grounds related to union membership

- or activities / non-membership of a trade union; [\(17\)](#)
- Maternity, paternity and adoption pay (but not leave);
- To the national minimum wage; [\(18\)](#)
- Paid holiday leave [\(19\)](#) and rest breaks; [\(20\)](#)
- Statutory sick pay; [\(21\)](#)
- Protection against a detriment due to a worker making a protected disclosures (whistleblowing); [\(22\)](#)
- Rights to be automatically enrolled in a pension scheme; [\(23\)](#)
- Rights not to be treated less favourably where the individual works part-time; [\(24\)](#) and
- Protection of health and safety. [\(25\)](#)

The genuinely self-employed have the following rights:

- Right not to be discriminated against through membership / non-membership of a trade union; [\(26\)](#) and
- Protection under the Health and Safety at Work etc Act 1974.
- A further group of individuals have been provided rights (or had existing rights extended), following action from the European Union in Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on Temporary Agency Work (OJ L/327/9) which led to the enactment of the Agency Worker Directive and Regulations 2010 (SI 2010/93). The Regulations provide (qualifying) agency workers rights to:
 - Paid holiday leave and rest breaks (Working Time Regulations Act 1998);
 - The National Minimum Wage Act 1998;
 - Statutory sick pay;
 - Not to be discriminated against and to equal pay through the Equality Act 2010;
 - Protection under the Health and Safety at Work etc Act 1974; and
 - Maternity, paternity and adoption pay (but not leave).

Whilst the above do not contain exhaustive lists, they are used to illustrate the reason why employment status is so important to the protection afforded individuals at work. Seemingly, available rights decrease as an individual moves from status as an employee (at the top tier of rights) to worker, and then to independent contractor (the genuinely self-employed). It also explains why many employers may attempt to label an individual (sometimes dishonestly or falsely) as self-employed when they may in reality have the characteristics of an employee.

As an academic exercise, examination of the awards provided by tribunals and extracting key intrinsic and extrinsic features is interesting, challenging and illuminating. For businesses, such an approach is not merely unhelpful but may prove financially debilitating. Effective management of a business is often predicated on operational cost analysis and business planning (Dunlap 2009). Part of this involves determining who is responsible for National Insurance contributions, the extent of potential liability for tortious acts committed in the course of employment, identifying exposure to claims of unfair dismissal [\(27\)](#) and redundancy, [\(28\)](#) and identifying an employer and buyer's responsibilities and liabilities when an undertaking is transferred. [\(29\)](#)

Delineating the often confusing and contradictory application of the common law rules is vital for employers in their effective business planning (30) and managing costs. (31) There also exist potential concerns for the individual, beyond the employment rights to which he/she may have access, when status as an employee (and the certainty this status provides) is not clear. Employment status (including the self-employed and employee dimension), and unemployment have been examined on the basis of direct linkages between such status and an employee's self-rated health (Kaleta et al 2008). This method of assessing a person's health focuses not simply on somatic health, but considers a much broader concept of general well-being, motivation and perceived health. This is an important aspect of health care, incorporating biological, psychological and social dimensions (Miilunpalo et al 1997). Further, Kaleta et al consider that such forms of '... subjective assessments of general health could be even more sensitive in health monitoring than external measures of health.' (at p. 227).

Before an examination of the tests used to determine employment status is performed, it is important to recognise the influence which the European Union and the Court of Justice of the European Union (Court of Justice) have had on extending employment rights and determining employment status.

3. THE INFLUENCE OF THE EUROPEAN UNION

The UK's membership of the European Union has not only been a major force in initiating many protective employment rights, but has also broadened (and consulted in areas for the extension of) the protection of rights to 'workers,' not just those with 'employee' status. Rights such as the Working Time Regulations 1998; the National Minimum Wage Act 1998; (32) and the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 are applicable to workers who undertake to perform the work personally. Further, the concept/identification of 'worker' has also been the jurisdiction of the Court of Justice of the European Union, in relation to the interpretation of the parent laws and rights regarding free movement, rather than for the domestic courts and tribunals of the Member States (C66/85 *Lawrie-Blum v Land Baden-Wurtemberg* [1986] ECR 2121). The EU has identified the definition of worker as someone who undertakes 'genuine and effective work' (compare Case 196/87 *Steymann v Staatssecretaris van Justitie* [1988] ECR 6159 and Case 344/87 *Bettray v Staatssecretaris van Justitie* [1989] ECR 1621); (33) it does not take into account the motives of the individual for undertaking work (Case 53/81 *Levin v Staatssecretaris van Justitie* [1982] ECR 1035); and 'workers' may include those individuals who work part-time (Case 139/85 *Kempf v Staatssecretaris van Justitie* [1987] 1 CMLR 764). (34) More recently, in Case C-14/09 *Hava Genc v Land Berlin* [2010] ECR I-00931 the Court of Justice determined that Member States may not give a restrictive interpretation of the concept. Also, and perhaps most significantly for the purposes of this paper, is where the Court defined a worker thus: 'The essential feature of an employment relationship is (where)... a person performs services for and under the direction of another person in return for which he receives remuneration' (at para 19). This brings with it the concepts of personal service, pay and control which are mirrored in the domestic judicial mechanism of identification of an employee.

The UK's membership of the EU has been the instigation of (arguably) the most important employment rights. A short sample, as way as an example of its impact, demonstrates the EU Directives which have been transposed into domestic law, giving rights to people at work:

- Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women;
- Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions;
- Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes;
- Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC);
- Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees [Official Journal L 122 of 16.5.2009];
- Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses;
- Council Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community - Joint declaration of the European Parliament, the Council and the Commission on employee representation;
- Council Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time.

The Court of Justice has also been active in determining the interpretation and extent of employment rights. It recently considered the rights of workers' access to their annual leave, as provided through Directive 2003/88/EC (the Working Time Directive). The Court of Justice held, in Case C-78/11 *ANGED v FASGA* [2012] IRLR 779, that where a worker could not access his/her annual leave accrued during the year of employment (due to the worker's illness), an employer may not replace this period of leave by payment in lieu unless the contract of employment had been terminated. The Court of Justice considered that when interpreting Directive 2003/88/EC it had to be remembered that annual leave and sick leave are intended to serve different purposes. A period of illness requiring leave is necessary for the recovery to health of the individual. It does not allow the individual to benefit from the rest and recuperation that the Working Time Directive's annual leave provisions are intended to provide.

The Court of Justice has (consistently) interpreted EU laws often in their broadest sense to offer protection to individuals' employment rights. (35) Also the EU, being the source of many employment rights, has required these rights be given to 'workers' so as to avoid the requirement for 'employee' status. (36) These rights have focused on principles of anti-discrimination and health and safety, which are evidently of great importance in social policy, but it remains that two of the most commonly cited reasons for tribunal claims and offering protection against abuses of managerial prerogative (unfair dismissal and redundancy) are the two which still require status as an 'employee.'

Despite the intervention of the EU, the domestic interpretation of employment status continues to be of supreme importance and the paper now addresses the statutory and common law approaches to establishing a working definition.

4. STATUTORY DEFINITION

The Employment Rights Act (ERA) 1996 s. 230 provides the statutory definition of employment status for most employment rights. It reads:

1. "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.
2. "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.
3. "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under) –
 - a. a contract of employment, or
 - b. any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;

and any reference to a worker's contract shall be construed accordingly.

5. "employer", in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.

It is evident that there exist three types of employment under which an individual may be engaged - 'employee'; 'independent contractor'; and 'worker'. This statutory definition is broad and has provided the necessary discretion for the judiciary to advance the law in light of the developing societal, policy and employment changes in such relationships.

Similar definitions of employment to that in the ERA 1996 exist in the Trade Union and Labour Relations (Consolidation) Act 1992 s. 295(1) and the Equality Act 2010 s. 83(2). What is particularly interesting is that statutory intervention has been sparse at best, unhelpful in practice, and it rests with the common law, with its own advantages but limitations, to fill in the substantial gaps of a workable

definition and test of employment status. It seems only the issue of tax has led to meaningful consultation on the subject (Her Majesty's Revenue & Customs: False Self-employment in Construction: Taxation of Workers, July 2009). Employment rights are seemingly of lesser importance.

Davies (2009) accurately identifies the significance of the definition in ERA 1996 s. 230 in that it establishes the contract of employment as a 'common law concept' (at p. 86) which has resulted in greater litigation '... as individuals strive to get into a more protected category and employers seek to avoid the legal obligations that would follow from this.' (at p. 91).

5. EMPLOYMENT STATUS: A JUDICIAL ODYSSEY

Servants, workers, employees, independent contractors, workers on the lump, agency staff, the list continues, and it continues to grow. (37) It is exactly the nature of labour and how working patterns and relationships have developed that has caused difficulties in establishing a clear definition of employment status. This diversity of relations, with atypical forms of working becoming ever more typical, (38) and new forms of business structures with agency work and bi-lateral, trilateral and even quadrilateral relationships coming to the attention of the courts (*Evans v Parasol and another* [2009] UKEAT 0536/08/2307), has made establishing clear rules even more problematic.

The courts have traversed many forms of employment, facts, arguments, policies, and government instructions, and in so doing they have attempted to revise and refine tests that assist courts and the parties (39) in more effectively determining employment status. As a very brief outline, the main tests developed by the courts can be summarized as follows.

The control test began the common law's search for effective determination of employment status. This sought to identify the existence of an employer's right to control the individual to such a degree to make the individual the servant of the master (*Yewens v Noakes* (1880) 6 QBD 530). It was effective when the relationship existed between the servant and his master, the master told the servant what to do and the servant did it. The consequences for refusal were harsh and therefore establishing the imposition of the vicarious liability of the employer in this respect was relatively easy. Problems soon emerged with using this test in isolation - not just in this jurisdiction but also in the United States where inconsistent decisions were also commonplace. (40) The advent of a new breed of 'skilled workers' who by their nature exhibited a greater degree of independence than their 'servant' predecessors required a more critical and surgical test. This point was made by Kahn-Freund (1951) where he observed 'To say of a captain of a ship, the pilot of an aeroplane, the driver of a railway engine, of a motor vehicle, or of a crane that the employer "controls" (41) the performance of his work is unrealistic and almost grotesque.' (at p. 506).

The control test evolved to the employer's right to control the activities of the individual. Where the employment relationship was based on the employer determining key elements such as when a surgeon worked (*Cassidy v Ministry of Health* [1951] 2 KB 343 CA), and when a professional football player trained (*Walker v Crystal Palace FC* [1910] 1 KB 87), this enabled a determination of the

employer instructing the individual as to when and where the job was to be completed, whilst recognizing their increasing level of skill, and hence removal from the direct control of the employer. The employer maintained control over the individual's actions, but this became control over the individual's hours and place of work, in which order he would undertake those responsibilities, rather than the direct control such as how to complete the job, that had previously existed.

The organization test had been mooted in *Cassidy v Ministry of Health* by the three judges – Somervell, Singleton and Denning LJ where consideration of the part played by the individual in the employer's organization was more suitable and accurate rather than questioning whether the individual was subject to the employer's orders in doing the work. Denning further developed the test in *Stevenson Jordan & Harrison Ltd v Macdonald and Evans* [1952] 1 TLR 101. The case involved whether Evans was an employee or independent contractor for the purposes of ownership of intellectual property rights. Denning considered that an employee was integrated into an organization. His judgment was conceptually correct and accurate but the problem arose in how to apply it practically. Employees were considered by Denning to be 'part and parcel' of an organization, whilst a contractor found him/herself on the periphery. It is undeniable that employees have a strong relationship with the employer, underlined by implied terms such as to maintain trust and confidence and the relationship goes beyond the commercial / transactional. Independent contractors, on the other hand, are seen as entering a commercial arrangement. They enjoy tax benefits and can maximize earnings, but run the risk of financial losses on the insolvency of an employer (as an unsecured creditor) or if they work without having the required compulsory and personal insurance in place.

The organization test was seen by some as more favourable than the control test. Kahn-Freund (1951) had criticized the control test as being vague, and though 'control' adopted a common sense approach, it would necessitate and make everything dependent on whether an 'ordinary person' (42) would consider the contract one of service. However, as Kahn-Freund continues:

"Such common sense tests are sometimes the response of the Courts to situations in which "harder" criteria have been overtaken by events. They have a way of collapsing in marginal cases and of leading to a maze of casuistry without much principle." (at p. 507).

It was, however, also subject to criticism by academic commentators (Burchell et al. 1999) (43) and by the judiciary. (44)

This led us to the 1960s. The judiciary began to identify more sophisticated tests in recognition of the increasing complexity and diversity of an educated, professional workforce. Further, skilled individuals would often work far from the employer's direct control, worked under their own autonomy and the previous tests were lacking in depth to enable the true relationship to be determined. (45) This led to the most significant case, the modern test applied consistently - *Ready-Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497. Following a question as to whom was responsible for the payment of tax and National Insurance contributions of so-called 'owner drivers', the court established the following three questions (at p.

499) to be answered:

- The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master;
- He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master; and
- The other provisions of the contract are consistent with its being a contract of service.

The first of the three tests identified in *Ready-Mixed Concrete* is the requirement for mutuality of obligations between the parties. As later confirmed in *Montgomery v Johnson Underwood* [2001] EWCA Civ 318, [2001] ICR 819, this test, along with the existence of an element of control exercisable by the employer, are essential to status as an employee and must be answered in the affirmative before the final *Ready-Mixed Concrete* test is considered: '... mutuality of obligation and the requirement of control on the part of the potential employer are the irreducible minimum for the existence of a contract of employment' (per Longmore LJ, para 46). But as identified by Deakin and Morris (2009) '... mutuality of obligation is a feature not just of contracts of employment, but also of contracts for the supply of personal services; it cannot therefore function as an indicator of employee status.' Indeed, when comparing *O'Kelly v Trusthouse Forte plc* [1983] ICR 728 (where regular casuals were held as independent contractors due to a lack of mutuality) and *Nethermere (St Neots) Ltd v Gardiner* [1984] ICR 612 (where home workers were held as employees due to the existence of mutuality), the problems inherent with the application of the test are evident. (46) Indeed, Freedland (2003) and Davies (2009) have both observed that mutuality in isolation is insufficient and what is required is a second tier of obligation established through a global/umbrella contract. It is this second tier which proves so problematic for an individual engaged on an atypical or casual basis to demonstrate. The courts have, at times, considered that a protracted course of dealings between the parties establishes a contract of employment (*Nethermere (St Neots) Ltd v Gardiner*), but more often, they have reverted to the restrictive *O'Kelly v Trusthouse Forte plc* interpretation (see *Carmichael and Another v National Power plc* [1999] 1 WLR 2042). (47) The courts '... have nevertheless conceived of that irreducible minimum as having to amount to a fixed and definite obligation, identifiable at any given moment, upon the employing entity to offer work in future, and, symmetrically, upon the worker to accept work as offered.' (Freedland (2003) p.104).

Such a definition is easily demonstrated when the parties are engaged during a period of work, but problems soon appear when the test is applied during a period of no work and how periods of work (over a series of hours/days/weeks/months) may harden into periods of continuous employment (for the purposes of ERA 1996 s. 212 - see *Stephenson v Delphi Diesel Systems Ltd* [2003] ICR 471).

Following the *Ready-Mixed Concrete* test, the courts continued along the 'economic reality' line of inquiry by attempting to establish independent contractors as being independent of the employer and in business on their own account. The development of the test was another venture in attempting to place some

rationality to determine those individuals who were truly dependent on the employer and shared reciprocal obligations compared with those individuals who were engaged in a business relationship with the employer. In *Market Investigations v Minister of Social Security* [1969] 2 QB 173 criteria that could assist in such a distinction included ‘... whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task.’ (at p. 185).

Another issue to contend with, as raised above, is the economic reality of mutuality of obligations. How does one differentiate between an obligation to provide and accept work from an incentive to do so? It is surely in the interests of the self-employed contractor to maximize his/her earnings through the acceptance of offers of employment. It is likewise common that an employee undertakes work because of financial need. Using such a test to establish a reciprocal vs commercial intention on the part of the parties would be quite difficult. Both parties - employer and individual - benefit from the work performed by the individual and this may be a relationship that continues over a period of time. Therefore it could satisfy the *Nethermere (St Neots) Ltd v Gardiner* requirement of mutuality, but likewise fail that test and utilize the *Cornwall CC v Prater* [2006] EWCA Civ 102, [2006] ICR 731 (48) line of reasoning. For employers, certainty is once again out of reach.

Further, when looking at the spectrum of employment relationships - from employee at one end and fully self-employed contractor at the other, it can be difficult to apply tests such as whether the person is in business on their own account. In an excellent review of this contentious area Leighton and Wynn (2011) explain how an employee will bear no financial risk, and an independent contractor will - hence the latter’s ability to benefit financially to a greater extent - but the test becomes problematic when some genuine employees’ contractual relationship is critiqued, such as those who are paid on commission, engaged in the financial services industry, those employees who are paid city bonuses, those with the label ‘consultant’ or ‘agent’ and so on. Are these individuals really entrepreneurs in any real sense? Indeed:

“... it is, of course, between those two ends of the spectrum that have generated most debate and case law. Many of these are employed on intermittent work patterns, such as zero hours, stand-by, seasonal agency work. As is known, the law has developed a number of legal tests for employment status, each not easy to reconcile with the other. This, in turn, has led to a high level of discretion by courts as to which ‘test’ to apply, adding to the impression of a legal lottery.” (Leighton and Wynn (2011) at p. 18).

Davies (2007) offers a very valuable critique of the problems in using the mutuality of obligation test with intermittent forms of employment.

6. GLOBAL/UMBRELLA CONTRACTS

‘Mutuality of obligations’ was a relatively easy test to apply when the individual

was engaged and performing work. Between 'jobs', it became much more difficult to demonstrate the mutuality. The courts (49) bypassed this limitation of the test by looking at the relationship as a whole and identifying if a series of engagements created an overarching or 'umbrella' contract covering the entire series. This was necessary, in part, because of the actions by employers to avoid mutuality. For example, it had become a well-used tactic by employers to adopt the form of 'zero hours' contracts to avoid the essential aspect of employment status of mutuality of obligations.

There has been no shortage of judicial pronouncements of the significance of mutuality and the dividing line between a 'global / umbrella' contract covering an entirety of work completed by the individual for his/her employer (*Nethermere (St Neots) Ltd v Gardiner*); and comparatively, a succession of contracts covering each individual engagement be it a shift or period of rostered work (see *O'Kelly v Trusthouse Forte plc*). These authorities have been discussed at length in the cases noted above and by the Supreme Court in *Autoclenz v Belcher* [2011] UKSC 41, [2011] ICR 1157, by the House of Lords in *Carmichael and Another v National Power plc*; and by the Court of Appeal in the following: *McMeechan v Secretary of State for Employment* [1997] ICR 549, *Clark v Oxfordshire Health Authority* [1998] IRLR 125, and *Cornwall County Council v Prater* [2006] EWCA Civ 102, [2006] ICR 731.

From those cases, the judiciary had been aware of some employers' attempts to circumvent protective employment rights through the use of contractual terms which sought to engage individuals on the basis of 'zero hours' contracts. These were created on the understanding that there was no mutuality of obligations between the parties. Essentially, the employer undertook no responsibility to provide work or pay and the individual had no obligation to attend work and could, as a consequence, take up employment with any other employer without notice. However, examples exist where, like the veil of incorporation metaphor in company law, the veil of the contract will be raised/pierced and the true relationship will be investigated. One such recent example occurred in *Pulse Healthcare v Carewatch Care* [2012] UKEAT/0123/12 involving care workers, engaged under a zero hours contract, whose employment status required clarification on the basis of a claim under the Transfer of Undertakings (Protection of Employment) Regulations 2006 and other employment rights. Despite the terms of the contract which provided for no mutuality of obligations, the contract failed to reflect the true nature of the job, and how the individuals were required to perform the work personally. The claimants worked regular hours over a number of years, one of the claimants was suspended on full pay during the engagement and this led the Employment Judge to comment that the 'written contract did not reflect the true position' of the employment.

The approach to be adopted by Employment Tribunals was accurately summed up by Elias J in *Consistent Group Ltd v Kalwak* [2007] UKEAT/0535/06, [2007] IRLR 560 at para 58:

"If the reality of the situation is that no-one seriously expects that a worker will seek to provide a substitute, or refuse the work offered, the fact that the contract expressly provides for these unrealistic possibilities will not alter the true nature of the relationship. But if these clauses genuinely reflect what might realistically be expected

to occur, the fact that the rights conferred have not in fact been exercised will not render the right meaningless.”

In *Pulse Healthcare* the finding of mutuality of obligation, the inability to provide substitutes, and the challenging job made the employer’s assertion that these were a series of ‘*ad hoc*’ discrete arrangements rather than a global contract, incredulous. It compelled the tribunal, and later the Employment Appeal Tribunal, to confirm that the individuals did have ‘employee’ status.

7. CONFUSION, UNCERTAINTY AND OBFUSCATION

The above tests, developed by the judiciary, painted a picture of a virtual checklist to be applied which would, at the very least, provide a strong prima facie case of employment status. Indeed, Her Majesty’s Revenue & Customs (HMRC), drawing on these very tests, provides the following questions to be answered (accompanied by an on-line tool) that claims (with the requisite disclaimers) to demonstrate employment status:

‘As a general guide as to whether a worker is an employee or self-employed; if the answer is ‘Yes’ to all of the following questions, then the worker is probably an employee:

- Do they have to do the work themselves?
- Can someone tell them at any time what to do, where to carry out the work or when and how to do it?
- Can they work a set amount of hours?
- Can someone move them from task to task?
- Are they paid by the hour, week, or month?
- Can they get overtime pay or bonus payment?

If the answer is ‘Yes’ to all of the following questions, it will usually mean that the worker is self-employed:

- Can they hire someone to do the work or engage helpers at their own expense?
- Do they risk their own money?
- Do they provide the main items of equipment they need to do their job, not just the small tools that many employees provide for themselves?
- Do they agree to do a job for a fixed price regardless of how long the job may take?
- Can they decide what work to do, how and when to do the work and where to provide the services?
- Do they regularly work for a number of different people?
- Do they have to correct unsatisfactory work in their own time and at their own expense?

Businesses may then use the above questions when assessing their own employment practices and when establishing contracts of employment to identify, with a good deal of certainty, the applicable employment status of the workforce. (50) That would be a seemingly logical conclusion until one considers the judgment of Nolan LJ in *Hall v Lorimer* [1994] 1 WLR 209:

“In order to decide whether a person carries on business on his own account it is necessary to consider many different aspects of that person’s work activity. This is not a mechanical exercise of running through items on a check list to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of evaluation of the overall effect, which is not necessarily the same as the sum total of the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another. The process involves painting a picture in each individual case.’ (at p. 217).”

It is the detail of the relationship, the dynamic nature of such, and the accurate delineation of the actual working relationship which can cause problems in determination. Not only are those pertinent issues, but there is a further, significant dimension to employment status - policy. Employment status is not an issue determined in isolation. Any student who has journeyed through the encompassing subject of employment status has enjoyed/endured (depending on his/her point of view, interest and general humour) judicial commentary on the tests and critique of legal argument, but everyone will have understood that the topic is merely the first steps towards some wider right / obligation as the main issue - be that the responsibility for taxation, protection against unfair dismissal, a right to a redundancy payment and so on. Hence, employment status is NOT the basis of these cases, it is merely a right of passage to the consideration of another employment issue. This is not to suggest the topic is not of crucial significance - of course it is fundamental, but the fact that it exists as a stepping stone for another right provides an interesting dimension - what right is the individual attempting to access? This, as several cases have demonstrated, can influence the weighting the tribunal places on the facts of the case in relation to the reasoning in *Hall v Lorimer*.

Two cases, due to the proximity of judgment and the stark difference in outcome, have been analyzed at length to explain the rationale for the decision reached on employment status (see Leighton 1984). *Nethermere (St Neots) Ltd v Gardiner* and *O’Kelly v Trusthouse Forte plc* were cases which centred on the existence, or not in the case of *O’Kelly*, of mutuality of obligations. The claimants in *Nethermere* were females, who were working from home due to child care responsibilities, who often had substantial periods of time where they refused work offered by the employer, and were chosen first to be dismissed before those employees performing their work in the employer’s factory. *O’Kelly* was a ‘regular casual’ waiter, who had been employed for several years and was subject to the same pay (including tax and National Insurance contributions being taken at source), disciplinary matters, and other terms and conditions as were full-time employees. However, whilst *Nethermere* involved claimants seeking protection against an unfair dismissal, *O’Kelly* wanted employee status in order to seek protection against dismissal for his request to join a trade union. The courts differed in each case as to the application of the ‘obligation’ dimension in mutuality - utilizing a

narrow interpretation in *O'Kelly* when denying the claimants employee status, but a broader, more inclusive approach in *Nethermere*. However, as *O'Kelly* was decided in 1983, at the time of unrest with the militant trade union movement and battle between the Conservative government which had won the general election following the previous Labour government's problems in controlling the activities of trades unions, some commentators postulated that the decision had more of a public policy dimension, rather than a true legal analysis and application. (51)

Whilst it is clear that employment, by its nature, does not exist in a legal vacuum and will be affected by society and policy factors, it has led some arguments to be presented that decisions of tribunals may be founded (or at least heavily influenced) on this very basis.

One such example is evident in *Lane v The Shire Roofing Company* [1995] IRLR 493 concerning Mr Lane, a builder/roofer/carpenter who had, since 1982, traded as a one-man firm and was registered as self-employed with the Inland Revenue. As his work as a sole trader had diminished, and he had allowed his public liability insurance to lapse, Lane began working for Shire Roofing. Shire Roofing was a newly established company. It actively wanted to limit its costs and reduce overheads (as part of its business planning initiatives) and part of this strategy was to engage individuals as independent contractors. The agreement between Shire Roofing and Mr Lane expressly used the label 'independent contractor' in the contract. A Mr and Mrs Bird contacted Shire Roofing to quote for a re-roofing job. Having priced the job and considered the various options of using scaffolding or ladders, it was decided that it was most cost-effective for Lane to complete the job using his own materials (including his ladders) rather than for Shire Roofing to hire scaffolding. Lane began the roofing work and when Mrs Bird returned home, she discovered Lane sat in his car, bleeding from his ears. It transpires that in the course of carrying out this job Lane 'fell' from the ladders and sustained brain damage. He wished to claim from Shire Roofing's insurers to compensate him for the injuries sustained, but to do so required him to possess 'employee' status, even though Shire Roofing had accepted that they were responsible for the individuals' safety at work. The Court of Appeal considered previous authorities and the tests for employment status. What is particularly telling about the judgment was where Henry LJ remarked 'When it comes to the question of safety at work, there is a real public interest in recognizing the employer/employee relationship when it exists, because of the responsibilities that the common law and statutes ... place on the employer. (52)

Shire Roofing was arguably in breach of its health and safety obligations, and had engaged people such as Mr Lane, as independent contractors, to circumvent such obligations. Had the Court allowed Shire Roofing to succeed by relying on the label in the contract, it would have enabled the employer to avoid its obligations, and therefore it held Mr Lane to be an employee despite the label and that much of the evidence of 'employee' status (such as mutuality of obligations) was missing.

It is evident what the Court of Appeal sought to achieve in this judgment. The policy of not allowing an employer, who controls the terms of the contract of employment, to dictate the employment status of the individual to serve its own ends gave it latitude in assessing the nature of the claim. Had Lane been held an

independent contractor with no personal insurance on which to claim, the State would have been responsible for his medical expenses, possible payment of income support during his recovery and beyond, and it would have legitimated the employer flouting the law and avoiding the expense of carrying appropriate insurance.

Whilst this debate about the ability of an individual to claim from the employer's insurance when injured at work has public policy dimensions, a further element should also be raised. Let us change the facts of *Lane* slightly and postulate that instead of the roofer being injured, what would have been the consequence had the roofer dropped a roof tile and it had struck Mrs Bird? Had Mrs Bird been injured, would her claim of vicarious liability be likely to succeed? It was clear that Mr Lane had no insurance and, seemingly, an inability to satisfy a substantial damages award. Shire Roofing would have denied responsibility for the tort as Mr Lane was considered by it to be an independent contractor, he was a skilled and competent roofer, the activity was not extra-hazardous, and Shire Roofing would have relied on the argument that it was not conclusive that scaffolding should have been used and hence it had not acted negligently.

The cases cited above are used simply to highlight the broader considerations that have impacted on the tribunals' decision when assessing an individual's employment status. Courts and tribunals may look more favorably on a claimant who is possibly having rights removed unfairly by the sharp practice of an employer, such as by the use of contractual terms identifying an individual as an independent contractor. This 'policy-dimension' will not lead to a distortion of the law, but it is hard to believe that such matters will not be in the considerations of a tribunal when applying the law - and the breadth of the case law that may be applied in any given case will surely allow the tribunal the necessary latitude to apply whatever test enables it to reach the conclusion it chooses. Indeed this public policy dimension has been demonstrated clearly in relation to the State's fear of tax avoidance measures through activities in the construction industry [\(53\)](#) and in interference of freedom of contract through the application of IR35.

It can be seen that the internal system of determining employment status of individuals has a wider, external dimension which is why better determination of the status is so necessary.

8. LABELLING, MISLABELLING AND PREROGATIVE POWER

Recently, a professional advice organization (at unbiased.co.uk) estimated that small and medium sized enterprises could have benefited from a £2 Billion tax saving (in relation to National Insurance contributions) from moving from engaging employees to using independent contractors, but it also recognized the potential pitfalls in such an approach. Its recommendation was for employers to seek professional advice (through an accountant or independent financial adviser), but even with such an approach, it remains very difficult for an employer to accurately and with certainty, engage an individual as an independent contractor.

The intention of the professional advice organization is commendable,

particularly in times of financial hardship and the government's austerity drive which is adversely affecting businesses, but it is fraught with dangers on both sides. As demonstrated in *Young & Woods Ltd v West* [1980] IRLR 201, where the claimant, in 1979, was dismissed when engaged under a contract, agreed by him and the employer, which identified West as an independent contractor who was personally responsible for payment of tax and National Insurance contributions. West had been given the choice upon employment in 1975 to be categorized as an employee or as a self-employed contractor (and saving him between £400-500 per year). He chose the latter (self-employed) status, although he ostensibly performed the same job as an employee. The Court of Appeal held, on the facts, that he was engaged as an employee irrespective of the contract and the 'label' contained therein. West was compensated through unfair dismissal protection upon the termination of his employment in 1979. Perhaps, as a cautionary tale for both parties in the employment relationship, West's details were sent to the (as it then was) Inland Revenue and he was required to pay the taxes as an employee that he should have contributed whilst engaged as an independent contractor. Therefore the employer was subject to compensate the individual for unfairly dismissing him, and the employee had the compensation he received for being unfairly dismissed taken in the form of owed taxes for his incorrect employment status.

Unlike Mr West, most individuals have very little power in the content of the contract of employment, and the concept of choice in employment status is largely a managerial prerogative rather than a negotiation between the parties. (54) Levesque et al (2002) have presented arguments, based on their application of a utility-maximising model, on the choice of employment status by individuals, their motivations for the choice, and how their desires and attitudes toward work influence this choice. The authors explain why individuals make choices to be an employee or an independent contractor, but do not appear to question the dimension of the level of 'choice' in the categorisation of the individual, whether he/she actively determined their status, or whether they actually understood the implications of their decision other than on a purely economic basis. Without such an understanding, it is difficult to derive any meaningful conclusions as to the distinction between an employee and independent contractor on the basis of their economic desires. Further, whether he/she is in business on their own account, is, in a practical sense, very nuanced and difficult to readily differentiate.

Labels identifying employment status cause problems and (often) confusion between the parties. Harvey (2001) produced evidence of deliberate false-identification of employment status in the construction industry. This, argues Harvey, may be a result of the complexity of the legal rules accurately identifying the status, or the distinction between employment status for the purpose of employment rights compared with the identification for the purposes of taxation. However, from the outset it is important to recognize that a label cannot alter the true relationship between the parties. If the true relationship is one of employee-employer, simply obtaining the individual's signature on a contract which identifies him/her as an independent contractor will fail when the relationship is considered by the courts. The mislabelling of employment status had already been discussed by Denning LJ in *Massey v Crown Life Insurance Co* [1978] 1 WLR 676 where he stated:

“The law, as I see it, is this: if the true relationship of the parties is that of master and servant under a contract of service, the parties cannot alter the truth of that relationship by putting a different label upon it. If they should put a different label upon it and use it as a dishonest device to deceive the Revenue, I should have thought that it was illegal and could not be enforced by either party and they could not get any advantage out of it - at any rate not in any case where they had to rely upon it as the basis of a claim: see *Alexander v Rayson* (1936) 1 KB 169. An arrangement between the two parties to put forward a dishonest description of their relationship so as to deceive the Revenue would clearly be illegal and unenforceable. On the other hand, if the parties' relationship is ambiguous and is capable of being one or the other, then the parties can remove that ambiguity by the very agreement itself which they make with one another. The agreement itself then becomes the best material from which to gather the true legal relationship between them. This is clearly seen by referring back to *Inland Revenue Commissioners v Duke of Westminster* (1936) AC 1.” (at p. 680).

The problems with labels have been demonstrated over many years. Indeed in *BSM Ltd v Secretary of State for Social Services* [1978] ICR 894 the employer specifically engaged the individual driving instructor as an independent contractor, following a reorganization of the business, for the purposes of a reduction of overheads - including the avoidance of value added tax. The driving instructor, Mr Thorn, was held as an independent contractor as he and BSM had entered into an agreement for the purpose of changing the employment status, as the parties were entitled to do. The significance of *BSM* is of the weighting attached to the label and what factors influenced this decision. To this point, Warburton (1979) explains 'Where the contract is oral the relationship between the parties is a question of fact and the court will not interfere with the Tribunal's finding. If the contract is written its construction is a matter of law and only in the latter case will the court review the Tribunal's finding.' (at p. 464). This is particularly interesting given the numbers of individuals who work without a contract of employment or having been provided with the statement of written particulars as required by the Employment Rights Act 1996 s. 1. Where such individuals perform their services and then are dismissed, it is necessary for the tribunal to determine his/her employment status based on the evidence provided by the parties. The appeal courts will not question the finding as the tribunal has the opportunity to question the parties, ask the questions it feels necessary to determine the true relationship, and attach whatever weightings it sees fit according to the *Hall v Lorimer* line of reasoning. If this is the correct state of affairs, it appears this situation may be more difficult and problematic to an individual's claim than if he/she signed an, albeit misleading, contract. At least then the appeal courts would have the ability to consider the relationship in greater detail and have more opportunity to challenge the tribunal's finding.

9. CONTRACTUAL POWER AND TAXATION

It is clear that there are different rules for the purposes of finding employment status than exist when identifying the tax liabilities of the parties (see *Ferguson v*

John Dawson & Partners [1976] 1 WLR 1213 CA). For example, agency workers may be held as employees or independent contractors (as appropriate) but for taxation purposes, IR35 requires that such individuals are considered employees and taxed as such. This prevents tax avoidance schemes being used by the employer. This relates to those individuals who deliberately transfer from the status of an employee to that of an independent contractor, for the advantages for both the employer and individual that it brings (at least until the individual wishes to avail him/herself of some protective employment right exclusive to employees) whilst undertaking essentially the same duties. However, it has become an increasingly contentious area as many employers have been warned / become concerned with the prospect of being found to have engaged in tax avoidance because of the tax advantages of using employees who were masquerading as self-employed contractors.

The tax implications of employment status was also demonstrated in *Autoclenz v Belcher*, although the case concerned access to National Minimum Wage Act 1999 protection and the Working Time Regulations 1998 through status of a 'worker.' A group of 20 individuals had been engaged as valeters and in 2007, were asked by the employer to sign new contracts altering the terms and conditions to the effect that there existed no obligation for the employer to provide work, no obligation for the individual to provide his/her services, and a right of delegation of duties to others. The clear intention of the employer was to ensure that the individuals could not be held as employees due to the lack of mutuality of obligations, and the existence of a general right of substitution (where contracts of employment are contracts of personal service and an unfettered right of substitution removes this essential feature - *Community Dental Centers Ltd v Sultan-Darman* [2009] UKEAT/0532/09). The Court of Appeal (55) referred to Gibson LJ's judgment in *Express & Echo Publications Ltd v Tanton* [1999] IRLR 367 CA where he identified how a 'genuine' right of substitution (whether actually utilized or not) was devastating to the status of an employee. However, it has been noted that the parties may not fully understand their employment status, (56) nor readily appreciate the implications for accepting change; (57) individuals may not realize that they have a right not to accept change; (58) the individual may not appreciate their right to work 'under protest' and preserve the right to bring a claim for breach of contract at a later date; (59) and the courts and tribunals must appreciate the superior bargaining power enjoyed by the employer (60) and therefore look to '... elaborate protestations in the contractual documents (which)... when examined, b(a)re no practical relation to the reality of the relationship.' (at para 104).

One of the substantial problems, witnessed by the overused 'commercial-based contractual' assessment of employment relationships, has been due to cases, particularly those which remain at the forefront of assessing employment status - *Ready-Mixed Concrete* and *Market Investigations* - which adopt the economic reality test. (61) Both cases established the economic reality model as an appropriate mechanism to explain the true relationship between the parties. The 'economic reality test' was developed from the American Supreme Court where, in *United States of America v Silk* [1946] 331 US 704, the question asked was whether the individuals were employees 'as a matter of economic reality'. Having begun the journey along this path, is it any wonder why analysis of the contract is such a

fundamental, and possibly misconstrued, instrument to make such determinations?

Having considered the arguments presented by the parties in *Autoclenz*, the Supreme Court upheld the Court of Appeal's judgment and found the individuals to be workers for the purposes of the rights being claimed. Applying the tests in *Ready-Mixed Concrete*, *Montgomery v Johnson Underwood* and *Market Investigations*, the individual valeters were subject to a sufficient degree of control, they had no right to benefit from sound management, and there was the existence of mutuality between the parties. Similarly, in *Weight Watchers (UK) Ltd v Her Majesty's Revenue & Customs (HMRC)* [2011] UKUT 433 (TCC), [2012] STC 265, the Upper Tribunal (Tax and Chancery Chamber) held that despite a written contract identifying Leaders at Weight Watchers' meetings as independent contractors, the reality of the employment resulted in the individuals being held as employees. The 'substitution clause' inserted into their contract, when viewed in light of the *Autoclenz* judgment, was fettered and not a genuine right (see Bogg, 2012). The result of the case led to Weight Watchers facing a reported, and somewhat unpleasant, tax bill of £23 million. (62)

It would be unusual, save for some very sought-after professionals, for an individual to have a genuine equal contracting footing with the employer. The employer will present the contract of employment to an individual who may either 'take it or leave it.' There may be some room for negotiation regarding salary or holiday / expenses provisions etc., but generally individuals have very little bargaining power (see Bewley and Forth 2010). This power imbalance lends itself to abuse, largely prevented in consumer law through statutory intervention (e.g. the Unfair Contract Terms Act 1977, the Sale of Goods Act 1979 to name but two), but is missing in employment contracts (save for abuses in health and safety provisions etc.).

Therefore, employers may not simply rely on a written document to guarantee employment status. Where an employer seeks to reduce overheads and seeks to engage contractors rather than employees (as in *Lane v Shire Roofing Co (Oxford)*) a tribunal may still later hold the individual to be an employee. As such, any deficiencies in the employer's contribution of National Insurance may be sought by HMRC at a later date. This may be further complicated by an action, where deemed relevant, for prosecution for tax avoidance. It is important to note that such a situation may have been orchestrated by an employer and individual where the employment status was genuinely a sham (compare *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786 (63) and *Tiffin v Lester Aldridge LLP* [2012] EWCA Civ 35, [2012] 1 WLR 1887). Perhaps more commonplace is a change to a contract made by a stronger employer to an individual in a weaker position who may feel compelled to agree to a new contract placed in front of him/her. The courts, as in *Autoclenz*, will look to the true intentions of the parties to ensure that the real working relationship is identified, rather than a written document which bears no relation to the true contract (that which is effective in practice).

The checklist established by government departments to assist employers and individuals determine employment status (as demonstrated above) may be a helpful, if broad-brush attempt at categorizing the status for employment rights and taxation. (64) However, the reality of the relationship and the inconsistent

case law and its application, make effective tax arrangements very difficult to establish.

10. EMPLOYERS - A WAY FORWARD

From the information presented above it is evident that there is no easy solution for employers. A genuine attempt to accurately reflect the status of the individual in a contract of employment – through identification of the role performed in the employer's business may be insufficient to avoid misidentification. This goes beyond negligent, careless or even deliberately misleading drafting (see Macaulay 1985).

The lack of an effective statutory definition is in practice valuable for it enables the tribunal discretion to assimilate information and use its experience to identify the intention of the parties and offer protection to vulnerable individuals when necessary. Had employers been provided with a more certain statutory definition of employment status, this would have resulted in an easier way to circumvent employment rights than currently exists.

The consequence is that employers and individuals must look to the (albeit often contradictory and unnecessarily complex) authorities established in the courts as a guide. It would be largely unhelpful to offer a list of each of the questions raised by the courts in determining employment status as many overlap or would not be applicable in every circumstance. However, some clear instructions have been found and this at least enables a broad consideration of the issues. As ever, the devil is in the detail of their application and interpretation by the courts.

The tests to establish 'employee' status require:

- An element of control exercisable by the employer sufficient to make the employer the other's master; and mutuality of obligations (and the difficulties inherent in defining the appropriate measure of 'obligation'); then
- Apply the third 'Ready-Mixed Concrete' test by listing consistencies and inconsistencies of the contract being one of employment; (65) and
- Explain if, and therefore how, the individual is in business on his / her own account. (Establishing and maintaining details with the individual would prove very beneficial in this regard). Finally,
- Do not rely on HMRC's Employment Status Indicator as anything more than indicative. Where employment status is a serious consideration for business planning, concentrate on the judgments on mutuality of obligations and substitution clauses in contracts of employment. These are increasingly the more important aspects when the courts determine employment status.

The tests are easy to identify and explain, but once the dissection of the relationship begins, the problems truly begin.

As a further remark, it should be recognized that tribunals undertake to hear the evidence presented by the parties and attach the relevant weightings in reaching its decision (per *Hall v Lorimer*). Appellate courts are to accept appeals where the tribunal has concluded a case, coming to a decision that no reasonable tribunal

would; or where the tribunal has misdirected itself as to the law. Whilst lawyers will appreciate this role played by the appeal courts it is of concern as it provides a vast discretion to a tribunal which can determine employment status and leave little room for meaningful review. (66) Whilst it would be unhelpful for an appellate court to re-examine the facts as already presented and considered in the tribunal, what results is widely contradictory decisions based on broad common law tests with little meaningful direction as to their application.

Finally, employers should continue to carefully draft contracts of employment (identifying actual terms applicable to the contract, not those which are designed primarily to attribute employment status of one kind or another to the individual), review the working relationship regularly and adjust the written agreement through whatever means most appropriate (e.g. a works handbook; intranet), and ultimately, ensure that individuals engaged as independent contractors are clearly engaged in a way that avoids mutuality and control, and be prepared for a possible inconsistent decision depending on whether the issue is to do with employment rights, taxation or health & safety. Unfortunately, we are largely no further to a definitive identification of employment status than we were 100 years ago. Indeed, it has only become more complex and confusing.

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(1) I make this statement through evidence of the inconsistent approach taken in tribunals regarding employment status, complaints by members of the judiciary that the tests developed through the common law have not solved the problems inherent in offering a comprehensive test, and the inaction of Parliament to remedy these limitations through legislative action.

(2) Employment status, outlining as it does access to rights and obligations, led Freedland and Kountouris (2011) to contend: 'We can best understand what the makers and adjudicators of labour law do, when they engage in the legal construction of personal work relations, if we view them as choosing or defining a primary legal connection or set of legal connections, which they use as the identifier of the personal worker relation in question, and as the vehicle for the process of legal regulation in which they are engaged.' (p. 328).

(3) E.g. so called 'sham' contracts – see (among others) Albin, E. 'A Worker-Employer-Customer Triangle: The Case of Tips' (2011) 40 *Industrial Law Journal* 181; Bogg, A. 'Sham Self-Employment in the Supreme Court' (2012) 41 *Industrial Law Journal* 328; Brodie, D. 'Employees, Workers and the Self-Employed' (2005) 34 *Industrial Law Journal* 253; Brown, E. 'Protecting Agency Workers: Implied

Contract or Legislation?' (2008) 37 *Industrial Law Journal* 178; Davies, A. C. L. 'Sensible Thinking About Sham Transactions: *Protectacoat Firthglow Ltd v Szilagyi* [2009] EWCA Civ 98; [2009] IRLR 365' (2009) 38 *Industrial Law Journal* 318; Leighton, P., and Wynn, M. 'Classifying Employment Relationships – More Sliding Doors or a Better Regulatory Framework?' (2011) 40 *Industrial Law Journal* 5; Leighton, P., and Wynn, M. 'Will the Real Employer Please Stand Up? Agencies, Client Companies and the Employment Status of the Temporary Agency Worker' (2006) 35 *Industrial Law Journal* 301; and Reynold, F. 'The Status of Agency Workers: A Question of Legal Principle' (2006) 35 *Industrial Law Journal* 320.

- (4) Employment Rights Act 1996 s. 94.
- (5) Employment Rights Act 1996 s. 135.
- (6) Employment Rights Act 1996 s. 1.
- (7) Employment Rights Act 1996 s. 80F.
- (8) Employment Rights Act 1996 s. 71.
- (9) Employment Rights Act 1996 s. 75A.
- (10) Employment Rights Act 1996 s. 76.
- (11) Social Security Contributions and Benefits Act 1992 s. 164.
- (12) Employers' Liability (Compulsory Insurance) Act 1969 s. 1.
- (13) Equality Act 2010 s. 109.
- (14) Employment Rights Act 1996 s. 50.
- (15) Equality Act 2010 s. 13.
- (16) Equality Act 2010 s. 66.
- (17) Trade Union and Labour Relations (Consolidation) Act 1992 s. 146.
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- (20) Working Time Regulations 1998 reg. 12.
- (21) Social Security Contributions and Benefits Act 1992 s. 151.
- (22) The Public Interest Disclosure Act 1998 s. 2.
- (23) Pensions Act 2008 s. 3.
- (24) The Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 reg. 5.
- (25) Health and Safety at Work etc. Act 1974 s. 3 and more widely though the Management of Health and Safety at Work Regulations 1999 reg. 3, the Control of Substances Hazardous to Health Regulations 2002 (as amended) reg. 3, and the

Control of Major Accident Hazards Regulations 1999 reg. 4.

(26) The Trade Union and Labour Relations (Consolidation) Act 1992 s. 296 provides: '(1) In this Act worker means an individual who works, or normally works or seeks to work – (a) under a contract of employment, or (b) under any other contract whereby he undertakes to do or perform personally any work or services for another party to the contract who is not a professional client of his, or (c) in employment under or for the purposes of a government department (otherwise than as a member of the naval, military or air forces of the Crown) in so far as such employment does not fall within paragraph (a) or (b) above. (2) In this Act employer, in relation to a worker, means a person for whom one or more workers work, or have worked or normally work or seek to work.'

(27) According to Vince Cable, in a press release associated with the Conservative Party Conference on 3rd October 2011, 'businesses tell us that unfair dismissal rules are a major barrier to taking on more people.'

(28) Employment Rights Act 1996 s. 135.

(29) The Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI/2006/246).

(30) See *Lane v Shire Roofing Co (Oxford)* [1995] EWCA Civ 37 where the employer purposely organized the workforce to engage independent contractors to reduce business overheads (such as tax payments) – per Henry LJ '[The respondent company \(which was the corporate manifestation of its proprietor, Mr. Whittaker\) was a newly established](#) roofing contractor. It was in its early days of trading, and Mr. Whittaker did not wish to take on too many long term employees - he considered it prudent and advantageous to hire for individual jobs.'

(31) Von Hippel, C., Mangum, S., Greenberger, D., Heneman, R. and Skoglund, J. (1997) 'Temporary Employment: Can Organizations and Employees Both Win?' *Academy of Management Executive*, 11, p. 93.

(32) The European Commission has considered establishing a requirement for a Europe-wide minimum wage which has led to discussion of whether harmonization of minimum wage policies should be established between the individual member states or even a common EU minimum wage. See Vaughan-Whitehead, D. (Ed) (2010) 'The Minimum Wage Revisited in the Enlarged EU' International Labor Office, Edward Elgar Publishing.

(33) *Steymann* involved an individual working at a religious community who performed general duties and rather than being paid wages, was provided with accommodation and sustenance. When a question was raised regarding employment status for the purposes of EU law, the Court of Justice held the individual to be a 'worker' as the work undertaken was 'genuine and effective.' In *Bettray*, the work undertaken was as part of a drug rehabilitation programme and as such, was not genuine but had been manufactured for the purposes of the individual's treatment.

(34) Now superseded through the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (SI 2000/1551).

(35) For example *EC Commission v United Kingdom* [1982] ICR 578 concerned the interpretation of the UK's transposition of the Equal Pay Directive and *R v Secretary of State for Trade and Industry ex parte BECTU* [2001] (Case C-173/99) concerned the conformity of the qualifying period of 13 weeks' employment in the Working Time Regulations in relation to the parent Directive.

(36) The Court of Justice of the European Union has established itself as the body that determines status as a 'worker' not the Member State which provides the employment right or obligation, in the realm of free movement. Beyond this, the State has broad discretion on status. However, in 2007, the EU Commission remarked on the differences between determining employment status throughout the Union: 'The European Parliament called for an initiative towards convergence in the national definitions of worker status to ensure a more coherent and efficient implementation of the Community acquis. It urged the Member States to promote the implementation of the 2006 ILO Recommendation on the employment..... relationship... (Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions - Outcome of the Public Consultation on the Commission's Green Paper..... "Modernising labour law to meet the challenges of the 21st century" (SEC(2007) 1373)).

(37) See 'Discussion Document on Employment Status in Relation to Statutory Employment Rights' (2002) Department of Trade and Industry, July, URN 02/1058.

(38) Although such work has been reported to have a negative impact of those individuals' job satisfaction. See Bardasi, E., and Francesconi, M. (2003) 'The Impact of Atypical Employment on Individual Wellbeing: Evidence from a Panel of British Workers' Working Papers of the Institute for Social and Economic Research, paper 2003-2. Colchester: University of Essex.

(39) Burchill, B., Deakin, S., and Honey, S. 'The Employment Status of Individuals in Non-Standard Employment' (1999) URN 98/943 no. 6, EMAR Employment Relations Research Series, Department of Trade and Industry. The authors present evidence that 30% of those individuals in employment had an ambiguous employment status.

(40) See the commentary in the case note 'Master and Servant - Independent Contractor' (1920) 20 *Columbia Law Review* 98 (<http://jstor.org/stable/1111464>).

(41) Note however the comment of Lord Griffiths in *Lee Ting Sang v Chung Chi-Keung and Another* [1990] 2 AC 374, 382 who quoted with approval from Cooke J. in *Market Investigations Ltd. v. Minister of Social Security* [1969] 2 QB 173, 184-185: "... control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor".

(42) (Per Somervell LJ in *Cassidy* at 579).

(43) The test could be said to be appropriate to situations in which managerial authority is exercised in a de-personalised way, and subjected to bureaucratic rules and procedures. The test is arguably of less use in situations where the boundaries of the organisation are diffuse or unclear, as in the cases of sub-contract or agency labour. (p. 6)

- (44) In *Ready Mixed Concrete (South East) Ltd v Minister of Pensions & National Insurance* [1968] the limitations of the integration test were highlighted when Mackenna J remarked 'This raises more questions than I know how to answer. What is meant by being "part and parcel of an organization"?'
- (45) Examples of skilled individuals experiencing a reduced level of direct control by the employer yet still being held as employees was demonstrated in *Morren v Swinton and Pendlebury Borough Council* [1965] 1 WLR 576; and *Lee Ting Sang v Chung Chi-Keung* [1990] 2 AC 374.
- (46) As is the nature of the construct itself which enables the employer great scope to permit or restrict access – 'Since it is ultimately for the employer to determine how binding workers' obligations are towards it, this leaves the question of the rights that the working relationship can attract largely in the hands of the employer.' (Fredman and Fudge (2013) p. 118).
- (47) See Clarke, L. 'Mutuality of Obligations and the Contract of Employment: *Carmichael and Another v National Power PLC* (2000) 63 Modern Law Review 757.
- (48) In *Prater* the focus was on her employment status when she was actually working, rather than the concept of the 'umbrella contract' per *Carmichael*.
- (49) See *Airfix Footwear Ltd v Cope* [1978] ICR 1210.
- (50) However, in a review of a leading work in the area by Freedland and Kountouris (2011), Deakin states 'the concept of the contract of employment has become bound up with an "epistemic and subject-existential crisis" for labor law. This crisis has arisen because of "evolutions in labour law systems themselves and in the functionings of labour markets" which have made the employment contract inapt for describing and regulating a growing segment of work relations.' (Deakin, S. (2013) 'What Exactly is Happening to the Contract of Employment? Reflections on Mark Freedland and Nicola Kountouris's Legal Construction of Personal Work Relations' *Jerusalem Review of Legal Studies* Vol. 7, No. 1 (2013), p. 135 (at pp. 137-8).
- (51) For a broad discussion see Busby 2002.
- (52) [1995] PIQR 421.
- (53) The Finance Act 2004.
- (54) Given this power imbalance, and the negative consequences for individuals who are not assigned an accurate employment status, should the courts adopt a more protective stance for individuals' rights (as is arguably the case in situations of health and safety abuses) and follow the line of reasoning often quoted of the Supreme Court of Canada? 'The relationship between an employer and an isolated employee is typically a relationship between a bearer of power and one who is not a bearer of power... The main object of labour law has always been, and we venture to say always will be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship.' (*Slaight Communications v. Davidson* [1989] 1 SCR 1038, per Dickson CJC at pp. 1051-2).

(55) [2009] EWCA Civ 1046, [2010] IRLR 70.

(56) See Burchill, B., Deakin, S., and Honey, S. (1999).

(57) Unless in relation to the implied term of mutual trust and confidence, see *French v Barclays Bank plc* [1998] IRLR 646.

(58) *Bainbridge v Circuit Foil (UK) Ltd* [1997] ICR 541 CA.

(59) *Henry v London Greater Transport Services Ltd* [2002] EWCA Civ 488, [2002] ICR 910.

(60) See Collins, H. 'Market Power, Bureaucratic Power, and the Contract of Employment' (1986) 15 *Industrial Law Journal* 1.

(61) A further problem of the tests as currently understood has been discussed by Fredman and Fudge (2013) where they comment, in relation to women workers especially, "Labor law's continuing assumption that the contract of employment signifies the group of workers who should rightly attract employment protection rights has for decades failed the many women who are unable to conform to the stringent pre-conditions for membership of that magic circle. Particularly problematic is the assumption that those workers who are not employed in a bilateral relationship with an employer under a contract of employment are self-employed, independent and therefore undeserving of employment rights." (p. 116).

(62) <http://tinyurl.com/q8ghes3>.

(63) Establishing a sham in contracts led to the following definition: "acts done or documents executed by the parties to the 'sham' which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual rights and obligations (if any) which the parties intend to create... for acts or documents to be a sham, with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating. No unexpressed intentions of a 'shammer' affect the rights of a party whom he deceived." per Diplock LJ at 802.

(64) Employment Status Indicator - <http://www.hmrc.gov.uk/calcs/esi.htm>.

(65) Although it would have been considerably more helpful for the court not to have taken seemingly greater interest in the inconsistencies of there being a contract of service. It read that Mackenna J took a particularly negative approach at p. 516).

(66) See Leighton's (1984) criticisms of the judgment and role of the Court of Appeal in *O'Kelly v Trusthouse Forte plc*.