Understanding the Real Nature of Contract of Service in Employment Law: The UK Example

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Abstract
This work examines the real nature of contract of employment and contract for employment under Employment Law in UK adopting a Case Review Approach in her analysis. The terms employment, worker, employee, employer, contract of service, contract for service were well defined before its application and analysis. The work submits among other things that it is right to say that there is uncertainty in explaining employment Statues in UK, this means that the effectiveness of the law, in practice, may be called into question. However, it is important for both parties to know what their legal relationship stand.

INTRODUCTION

The question at the heart of what is involved in determining a contract of service employment status is the issue as to whether this is one of law or one of fact. It features that important because, in general, appeals may be made from an employment tribunal to the Employment Appeal Tribunal only on a question of law (s.21 Employment Tribunals Act [1996]. This issue has proved to be an analytical question of great complexity, clearly crucial to any consideration, as well to understand what is meant by the term "employment". The story of the courts' deliberations of this issue is a winding and confused one.

In ***Ferguson v John Dawson & Partners (Contractors) Ltd, ([1976] IRLR 346; [1976] 1 WLR 1213; [1976] 3 All ER 817*)** Browne LJ took the view that this question was an issue of fact and thus not open to challenge on appeal. The later decision of the Court of Appeal in ***O'Kelly v Trusthouse Forte plc, ([1983] IRLR 369; [1983] 3 WLR 605)*** suggested that the question was one of law but that it involved matters of degree and fact which were essentially for the employment tribunal to determine.

CASE REVIEW

"Whether or not a person is employed under a contract of service is often said in the authorities to be a mixed question of fact and law." Lord Griffiths, *Chung and Shun Lee –v- Construction and Engineering Co Ltd* [1990] IRLR 236 Privy Council. In 1990, however, the Privy Council confirmed, in the case of Lee ***Chung and Shun Shing Construction & Engineering Co Ltd, [1990] IRLR 236*** Privy Council, that exceptionally where the relationship depended on the true construction of a document it will be a question of law; but where the relationship must be determined by the investigation of factual circumstances the question should be regarded as one of fact. Thus suggesting that only in very limited circumstances may employee status be viewed as an issue solely of law? Support for this view can be found in the decision of the House of Lords in ***Carmichael v National Power plc, [2000] IRLR 43***. Where Lord Hoffman at 1233 said that "…the terms of the contract are a question of fact. And of course the question of whether the parties intended a document or documents to be the exclusive record of the terms of their agreement is also a question of fact."

The Employment tribunal's one main function is to examine the employers conduct to judge whether or not its conduct is acceptable and sensible so that the employee can tolerate the conduct. A related case (***Woods v W M Car Services (Peterborough) Ltd*** **[1982] IRLR 413**, approved in ***Malik & Anor v Bank of Credit and Commerce International SA*** **[1997] IRLR 462.** The Employment Tribunals are independent judicial bodies who determine disputes between employers and employees over employment rights. Although it may seem obvious whether someone is an employee or not, the answer is not always that straightforward. Even the courts sometimes have difficulty in figuring it out. It is, however, crucial, to know because it determines what, if any, employment rights people have.

There are two types of contract, the main distinction being between those who work under a contract of service, and those who work under a contract for services. Contract of service relates to a person in employment as in the case of a domestic servant who is described as being in service, and contract for services relates to a person who is self-employed and who provides services to clients. The situation is complicated by the use in recent, and generally European generated, legislation which uses the broader term of "worker" rather than "employee" with the effect that whilst some legislation applies to all workers, many of the fundamental employment rights at national level only apply to "employees".

It has become necessary to determine whether an individual is for the purpose of a piece of legislation categorized as an independent contractor, a worker, an employee or something else. The situation is clearly unsatisfactory, and many calls have been made for the legislature to clarify the position as yet this has not been done.

In contrast, a person who works under a contract for services, i.e. a self-employed person, is neither an employee nor a worker. There is no requirement for an employer to put such a person on the payroll; rather payment may be made on invoice. There is no entitlement to any of the employment rights available to employees and workers.

Section 230(1) of ERA *defines "worker as being someone employed under contract of employment or any other contract "whereby the individual undertakers to do or perform personally… (Gwyneth Pitt, 8th Ed 2011pg 102),* and and s. 230(2), ERA defines a 'contract of employment' as 'a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing'.

In order to determine whether an individual is an employee, there some question that need to be asked, firstly is whether there is any agreement between the parties, and if so is that agreement a contract of employment, and if so does that create a contract of employment? The problem arises in that is, there is no detailed definition or description of a contract of employment, and it has been for the courts to determine which specific aspects of a contract of employment set it apart from other types of contract, by definition, if a worker has a contract of service with an organization, they are an employee.

HM Revenue & Customs (HMRC) describes the process of assessing employment or self-employment as "picture-painting". In other words, a person's employment status cannot be properly identified unless the whole picture is considered. One particular factor, such as whether the employer or the individual provides the equipment and materials, does not, in itself, prove employment or self-employment. All of the relevant factors must be considered and, in all cases, it is the employer that must make the decision.

John Quigley said that *"There are many reasons why it is important to know whether an individual is an 'employee'. But despite countless court cases and numerous statutes and statutory instruments in the employment law field, it is difficult to give a clear answer to the question: who is an "employee..." (**John Quigley 2004)***

As it is, the key rights and responsibilities of employee status under a contract of service are, The worker is controlled by their employer (they must perform the tasks they are instructed to by a line manager according to their job description)

The worker is expected to work at a specific place during specific hours on specific days (even flexi-time has core hours). The worker must present themselves for work and cannot send someone else as a substitute .Employees have statutory rights to holiday pay, sick pay, maternity and paternity rights and redundancy payments, employees have statutory rights regarding how they can be asked to leave their employment.

To sum up, the courts have applied a variety of common law tests such as the control, integration, economic, reality and „the multiple tests, to advance this, the so-called integration (or organizational) was explored in the early 1950's whereby the extent to which the worker was assimilated into the business was considered to be the best determinant.

The control test was first used the court in ninetieth century, this test asked, what was the degree of control the alleged employer or 'the master' exercised over the alleged employee who is 'the servant'. The courts asked whether the master could control not only what was done but also the manner in which it was done. The case of ***Yewens v Noakes* (1880) 6 QBD 530,** Bramwell LJ stated that, *'a servant is a person subject to the command of his master as to the manner in which he shall do his work'. (ibid)* This test allowed the courts to easily categories working individuals for a long time; however, Kahn-Freund correctly argued that the control test would severely limit the scope of employment relationships. ***(O. Kahn-Freund, (1951) 14 MLR 505-8).***

Integration test was the second test developed by the court, It was first identified by Somervell and Denning LJJ in ***Cassidy* v *Ministry of Health* [1951] 2 KB 343**, **CA**, where it
was applied to establish that a doctor working within the NHS was an employee of the Health Authority, and Denning LJ referred again to this test in ***Stevenson, Jordan and Harrison Ltd* v *MacDonald and Evans* [1952] 1 TLR 101**. this case also gave rise to issues in copyright law) when the Court of Appeal had to consider an issue of the law of breach of confidence. Lord Denning LJ described the test in these terms,

'… under a contract of service, a man is employed as part of the business, whereas, under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it…' *(ibid, p.111*).

The test was also used in tort cases, such as the decision of the Court of Appeal in the negligence case of ***Cassidy v Minister of Health, [1951] 1 All ER 574*** as well as tax cases such as ***Bank voor Handel en Scheepvaart NV v Slatford, [1953] 1 QB 248*** when Lord Denning put it thus: '(employment status) depends on whether the person is part and parcel of the organization' *(ibid, p. 295).*

In ***Ready Mixed Concrete Ltd v Minister of Pension [1968] 1 All ER 433, 2 QB 497***, the multiple test was developed to combat the difficulties of categorizing working individuals, the court said that because every case is different, there are multiple thing to think about, one advantage of the multiple test is that, it allow the court or tribunal great flexibility.

Later still come the economic reality test which involved the courts looking primarily at the extent to which the employee's work and personal circumstances reflected someone who was in business on his own account. If that was the case then the contract was a contract for services, but if it was not then the contract was a contract of service. This was first enunciated in the High Court decision in ***Market Investigations Ltd v Minister of Social Security, [1969]*** where J Cooke stated that the fundamental question was '*is the person who has engaged himself to perform these services performing them as a person in business on his own account'.*
Council [2000] IRLR 676).

There is also a relationship between an employee and employer called 'mutuality of obligation'. Mutuality of obligation means that the employer is obliged to provide work for an employee, and the employee is obliged to complete the work (within the scope of their job description, employees have to complete the work that 'comes down the pipe', which is one of

their fundamental distinctions from a contractor. In the case of ***O'Kelly v THF PLC*** despite control being present, mutuality of obligations was missing. The workers had no duty to give notice, and they employers had no duty to provide work. However, despite similar circumstances, in ***Nethermere v Taverna & Gardiner*** it was held that there was sufficient mutuality of obligation. Explaining, Stephenson LJ stated *"There must, in my judgment, be an irreducible minimum of obligation on each side to create a contract of service."* This illustrates that there is a very fine line that needs to be drawn, proving the difficulty courts have in identifying employment status.

If the employee fails to fulfill their obligations, the employer can take action that may ultimately result in the employee's dismissal. Similarly, if the employer does not fulfill their obligation to the employee, the employee can take action that might result in an industrial tribunal. The implication of the mutuality of obligation test for workers with irregular working patterns are highly disadvantageous at least if it is applied in a strict sense, the sort of narrow reasoning seen in O'kelly is also to be found in the judgment of the EAT in ***Wickens v Champion Employment [1984] I.C.R 365***, where temps engaged by private employment agency were not accorded… *[Painter & Holmes pg55]*

A more problematic area of law for the courts to decide upon has been in the form of a typical workers, such as casual workers, agency workers and home workers. The groups often find it difficult to establish a contract of service and the rights, which accrue under this label.

Home worker and casual workers are particular group where establishing the nature of the relationship may prove difficult, the case of ***Airfix Footwear Ltd v Cope [1978] ICR 1210*** *and* ***Nethermere (St Neots Ltd v Taverna and Another [1984] ICR 612*** here it was held that workers were employees in Cope, because work was provided on regular basis and there was a strong element of control.

Distinguishing between the employed and self-employed is evidently a very difficult task, Deakin states: *"The creation of a strict legal dichotomy between the employed and self-employed may have been a good legislative policy; but it is highly questionable whether this was ever really coherent as a distinction between two types of contract***."(*S Deakin 2007 36(1)69***

Agencies are popular in employment. There are three possibilities an agency worker can be: an employee of the end-user; an employee of the agency; or not an employee at all (worker or self-employed). Agency workers have proved to be very problematic when trying to work out employment status, Gardiner comments: *"There is confusion in the workplace and considerable uncertainty in the law about the status of individuals who obtain work through employment agencies."*

In the case of ***McMeechan v Secretary of State [1997] IRLR 353*** it was held that the employment agency was the employer. This was attempt to make it clear by Elias J in ***James v Greenwich London borough Council [2008] EWCA Civ 35*** utilizing a restrictive approach and suggesting that it is rare for an agency worker to be employed by anyone. However in ***Dacas* v *Brook Street Bureau* [2004] IRLR 358**, the Court of Appeal held that a worker was not the employee of the employment agency, on the grounds of an absence of mutuality of obligation, and the lack of a sufficient degree of control. Sedley LJ argued that to be employed by nobody was *"simply not credible"*. However, where the agency has a high degree of control over the worker and where sufficient mutuality is established, the worker may be held to be an employee of the agency.

CONCLUSION

To conclude this work, it is possible to say that there is uncertainty in explaining employment statues in UK, this means that the effectiveness of the law, in practice, may be called into question. However, it is important for both parties to know what the legal relationship is. On

the part employer, he will then know the extent of his liability and on the part of the worker; he will know the rights he has, both in respect of his employer and in the wider context of welfare benefits and employment protection rights. At the end of the day, however, it is the employer who must decide whether a particular person is working under a "contract of service" or a "contract for services" and, in the event of a compliance audit by HMRC, bear the heavy financial consequences of getting it wrong.

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