9 Employment Status

Introduction

9.01 The employment status of an individual will determine his or her rights under employment law. In particular, it will determine the statutory rights which the individual enjoys, over and above those in the contract. It is therefore important, whenever someone lays claim to a particular employment right, to ascertain whether they have acquired the necessary status. The main rights are set out in Table 9.1, which shows how status determines the rights of the person concerned.

Employees

9.02 Most of the rights which are contained in the Employment Rights Act 1996 (ERA 1996) are confined to employees. For example, the right not to be unfairly dismissed, the right to maternity leave, the right to a redundancy payment and the right to written reasons for dismissal all depend upon the individual in question being an employee. Section 230 of the ERA 1996 lays down the definition of an employee as follows:

230(2) In this Act ‘contract of employment’ means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

9.03 As can be seen, this definition is not helpful. In particular, it leans heavily upon the concept of a ‘contract of service’, which is not defined in the statute. That means that one is reliant upon the decisions of the higher courts in ascertaining whether someone is an employee or not.

9.04 In summary, the case law sets out the following conditions which must be met in order to establish a contract of employment:

(a) ‘A contract between the ‘employer’ and the ‘employee’.
(b) Mutuality of obligation between the parties.
(c) An obligation on the part of the ‘employee’ to perform the work personally.
(d) Control of the ‘employee’ by the employer.

9.05 These four conditions (a) to (d) are all ‘musts’. Once they are satisfied, that does not conclude the matter, as one must also look at whether there are factors which are inconsistent with the existence of a contract of employment (see 9.10).
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9.06 As to (a) the contract, as the statute makes clear, it may be express or implied and, if express it may be written or oral.

9.07 As far as (b) mutuality of obligation is concerned, the ‘employee’ and the ‘employer’ must be under legal obligations to one another. Usually, these obligations are upon the employee to work, and on the employer to pay for that work: *Carmichael v National Power plc* [2000] IRLR 43 (HL).

9.08 As point (c) of the list at 9.04 indicates, the individual must be obliged to provide the services himself or herself. Freedom to sub-contract (ie to get someone else to do the work) is inconsistent with an employment contract: *Express and Echo Publications v Tanton* [1999] IRLR 367 (CA).

### Table 9.1 Main employment rights

<table>
<thead>
<tr>
<th>Statutory right</th>
<th>Employees</th>
<th>Workers</th>
<th>‘in employment’ according to Equality Act</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unfair dismissal</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Maternity leave</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Redundancy payment</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Written reasons for dismissal</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Statutory holiday pay</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Right to claim unlawful deductions</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>National minimum wage</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Right for part-time workers not to be treated less favourably than full-time workers</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Right not to be dismissed or suffer a detriment for whistleblowing</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Right to be accompanied at a disciplinary or grievance meeting</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Right not to be discriminated against because of a characteristic protected under the Equality Act</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Right to equal pay</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
</tbody>
</table>
9.09 As stated in condition (d) at 9.04, it is necessary that the employer should have control over the employee. This will cover matters such as control over the work which is done, the hours which are worked, the location, and the manner in which the work is done. It has become increasingly clear from decisions of the appellate courts that the employer need not actually tell the employee how to do the job. What is important is that the employer has the right to tell the employee how to do the job: *White v Troutbeck SA* [2013] IRLR 286 (EAT).

9.10 In addition to the four ‘musts’ contained in (a) to (d) set out at 9.04, one must also consider the overall context of the relationship. Taken as a whole, is the contract consistent with a contract of employment? The following factors are among those which will be taken into account:

1. Who provides the equipment to do the job? If the ‘employer’ does so, it makes it more likely that it is a contract of employment.
2. Does the ‘employee’ take any financial risk? If so, that will be a factor tending against an employment relationship.
3. Does the ‘employee’ hire their own helpers? Again, that is a factor tending against employment.
4. Are there any restrictions upon working for anyone else? Any such restrictions will weigh in favour of an employment relationship.
5. What are the arrangements in relation to sickness and holidays? Do these reflect what one would normally expect in an employment relationship?
6. Is the individual subject to a disciplinary code administered by the ‘employer’? If so, this will make it more likely that what is being inspected is a contract of employment.

9.11 It should be emphasized that points (1) to (6) are factors to be weighed in the balance, and none of them is by itself conclusive. What is important is the answer to the question: taken overall, does this appear to be a contract of employment?

9.12 A court or tribunal will look at the reality of the situation, rather than the way in which the parties describe their status. It follows that a written contract which states that it is not a contract of employment will not be conclusive. Nevertheless, it will be powerful evidence as to the intention of the parties, and will probably be conclusive if the factual position is uncertain. Similarly, the tax status of the ‘employee’ will not be definitive, but in cases of doubt it may well weigh in the balance to conclude the matter one way or the other: *Quashie v Stringfellows Restaurants* [2013] IRLR 99 (CA).

9.13 As to the taxation position, if the individual concerned is an employee, the employer is obliged to deduct income tax and national
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insurance contributions from their wages at source, and make payments under PAYE regulations. An employee will be taxable under Schedule E.

Workers

9.14 The test for determining who is a worker is derived from statute. Generally, the definition is similar, no matter which statute or statutory instrument is relied upon to establish the right in question. For example, in the Working Time Regulations 1998, reg 2(1), the definition reads as follows:

‘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; . . .

9.15 It follows that, in order for an individual to be a worker:
(1) there must be a contract;
(2) it must be to carry out work or services personally for another party to the contract; and
(3) that other party must not be a client or customer of the worker’s business or undertaking.

9.16 There has been some case law on the exception contained in (c): Byrne Bros (Formwork) Ltd v Baird [2002] IRLR 96 (EAT). In summary, the position is this:
(a) If the individual is genuinely self-employed then he or she will not be a worker.
(b) If the individual has an arm’s-length and independent arrangement with a third party to be treated as working for themselves, then they will not be a worker.
(e) If the individual actively markets their services as an independent person to the world in general, they are unlikely to be a worker.

9.17 Factors to consider include the duration of the engagement, how exclusive it is, and whether the ‘worker’ is free to work for others, as well as the method of payment.

9.18 As to the statutory rights enjoyed by a worker, the most important are set out in Table 9.1.

9.19 As far as taxation is concerned, most (but not all) workers will be taxed under Schedule D (Schedule E treatment is possible, but not
Agency workers

The worker will usually submit an invoice and charge VAT if they pass the earnings threshold. It will be their responsibility to account to HMRC for tax and national insurance contributions. The employer has no obligation to deduct PAYE or pay national insurance.

Discrimination

9.20 In order to be protected from discrimination, an individual must satisfy the test which is set out in s 83(2) of the Equality Act 2010:

83 (2) ‘Employment’ means—
(a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work;
(b) Crown employment;
(c) employment as a relevant member of the House of Commons staff;
(d) employment as a relevant member of the House of Lords staff.

9.21 This definition is wider than that which applies to determine whether someone is an employee or a worker. Anyone who is an employee or a worker, as set out in the preceding sections, will also qualify for protection under the Equality Act. However, the definition is broader than that for a worker, because it does not exclude those who provide work for a customer or client in the course of a business or profession.

9.22 Although the conditions are easier to fulfil than those for employment or worker status, they must still be met. The individual doing the work must do so under a contract with the person for whom the work is done. In addition, the contract must have as its dominant purpose the execution of work or labour: Mirror Group Newspapers Ltd v Gunning [1986] IRLR 27 (CA).

Agency workers

9.23 Generally speaking, agency workers have difficulty in establishing a relationship of employment. There are two possibilities—employment by the employment agency, and employment by the hirer or end user. Usually the employment agency will not have sufficient control to establish an employment relationship. As far as the hirer is concerned, the barrier to establishing the employment relationship lies in showing the existence of a contract. The agency worker will need to show an implied contract of employment with the hirer. This means that he or she must show that it is necessary to imply such a contract in order to explain the relationship between the parties. This is inevitably difficult, as the obvious explanation for the relationship is that the agency worker carries out their work for the hirer because the employment agency has arranged for them to do so: James v London Borough of Greenwich [2008] IRLR 302 (CA).
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9.24 Although the agency worker will not usually be able to establish employment status, he or she will be entitled to certain rights, eg those under:

(a) the Agency Workers’ Regulations;
(b) the legislation on national minimum wages;
(c) legislation conferring the right to be accompanied at grievance and disciplinary meetings;
(d) the right not to suffer detriment or be dismissed because of whistleblowing;
(e) rights under the Working Time Regulations 1998 in respect of hours and the breaks to which an employee is entitled;
(f) rights under the Equality Act.

Casual workers

9.25 There is no legally defined category of ‘casual workers’. However, certain issues arise in relation to those who work irregularly, eg on a seasonal basis. There are usually two separate questions where an individual has a relationship which is irregular or seasonal. First, during the time when he or she is working, is there a contract of employment? This would be determined upon the principles set out at 9.04. Even if it is determined in the individual’s favour, that may not assist them if, for example, they are seeking to establish a period of continuous employment of two years in order to claim unfair dismissal. The second question therefore is whether there is a global or umbrella contract which covers the period between active working, so that the individual can acquire the requisite period of continuous employment.

9.26 The argument about an umbrella contract is frequently about the intention of the parties as to what will happen in the future. Will work be provided? Will the employee perform it? Can any inference be drawn from the conduct of the parties, eg from the pattern of work which the employee has carried out?

9.27 There are various provisions which allow periods where an individual is not employed to be counted as part of a period of continuous employment. These are to be found in ss 210 to 218 of the ERA 1996. Because they are mainly of relevance in computing a period of continuous employment for unfair dismissal purposes, they are dealt with in Chapter 10 on Unfair Dismissal (see 10.12 to 10.16).