

- Yewens v Noakes
- PRS v Mitchell & Booker
- Cassidy v Minister of Health
- Integration
 - Stevenson, Jordan & Harrison v MacDonald & Evans

Multiple factor test

- Ready Mixed Concrete v Minister of Pensions and NI
 - Wage/work bargain
 - Element of control
 - Other factors point towards employment
- Driver obliged to:
 - provide lorry - purchased under a hire purchase agreement from a finance company associated with the employer
 - paint lorry in company colours, maintain and insure it
 - wear company uniform
 - obey all reasonable orders from employer 'as if he were an employee'
 - Payment based on deliveries but guaranteed minimum wage
 - No fixed hours of work but maximum weekly hours
 - Substitute driver permitted - eg when ill - but very limited
 - Contract stated that the driver was an independent contractor
 - Employee wrote new contract. Are these people employed or self-employed? Paid on minimum wage and commission. Could provide sub drivers in certain circumstances. Said in contract they were independent contractors. Need to work fixed hours so could not work for other companies
 - Held: self-employed as driver could provide a substitute, a contract of employment is a personal contract so could not substitute. Court of appeal said need 3 aspects to decide is a contract of employment:
 - Wage/working bargain - must be wage obligation and obligation to work for it
 - Control element - sufficient to show they are in the place of an employer. Differentiate between an employer and a client.
 - Other factors point towards employment.

Particular factors

- Personal service/delegation
 - Express & Echo Publications v Tanton

Not a general rule that agency workers are not employees. In liquidation, could agency workers recover holiday pay and other outstanding money?

○ **Motorola v Davidson & Melville Craig**

- Triangular relationship
- Up until now, had always referred to worker and agency relationship. Could agency workers be employed by the agency? Never any connection to the client. At one time, the company thought there was no relationship as client relationship was with the agency. Court considered, could there be an implied contract between the worker and the end user?
- Situation where Motorola wanted engineers, rather than employees, only wanted to hire an employment agency. D went specifically to agency as he saw they were advertising Motorola jobs. Contracting out HR to the agency. He worked for Motorola for a while then was dismissed. Clearly was not an employee of the agency, but, argued he was employed by Motorola. Court said there could be an implied employment by the agency → Triangular relationship

○ **Dacas v Brook Street Bureau**

▪ Implied contract with council?

- Clear not for the council through an agency

○ **James v London Borough of Greenwich**

- Business efficacy test
- Said not impossible that could look at the triangle relationship and implied contract, but had to look at the test. You can only imply a contract where you need to do so to make business sense of what is happening. As long as employment agency is paying the individual, then can make business sense of what is happening. Leaves the question of exploitation.

• **Casual workers**

- Casual as required, but regular casuals. Contracts said given work as required. Given weekly rota, if refused would be demoted. Tax and NI deducted. Paid through PAYE system. Uniform supplied and holiday pay, and given bonus scheme. Some had been working like this for 8 years. Question of whether these people were employed. Court of Appeal, said not employees, they were workers on basis that there was no mutual obligation, contract states 'as required' – 1980's
- Zero hours contracts

- Hotel staff – ‘regular casuals’
- Weekly rota
- Tax and NI deducted
- Uniforms supplied
- Holiday pay
- Bonus scheme
- **Carmichael v National Power**
 - Mrs C was a power station tour guide. Started work in 1989. Accepted work as casual basis.
 - Work offered on ‘casual as required’ basis
 - Hourly rate – tax and NI deducted
 - Uniform, training and company vehicle
 - At the start worked 3 hours/wk (1989) – at the end worked 25 hours/wk (1995)
 - Had been working for 6 years. Was she an employee? Accepted there could be an implied contract which could’ve taken place of casual worker contract.
 - Held: could be implied contract, but on w/ no existing contract.
- The problem
 - “... a significant number of people in the labour market ... who reasonably think that they are in stable employment relationships and whom reasonable people would regard as employees, may not be employees after all and will be denied the protection of such basic employment rights as the right not to be unfairly dismissed.”
 - **Dacas v Brook Street Bureau, per Mummery LJ**
- **Workers**
 - **Bates von Winkelhof v Clyde & Co LLP [2014] UKSC 32; [2014] ICR 730**
 - “There is no magic test other than the words of the statute themselves” at 741
 - “As the case of the controlling shareholder in a company who is also employed as chief executive shows, one can effectively be one’s own boss and still be a ‘worker’. While subordination may sometimes be an aid to distinguishing workers from other self-employed people, it is not a freestanding and universal characteristic of being a worker” at 742.

Sham contracts

- **Autoclenz Ltd v Belcher**

- “employment under”
- “[it] is not to say that the question of purpose is irrelevant but the focus is on the contract and relationship between the parties rather than exclusively on purpose” Lord Clarke

Lecture 6 – contract of employment

- the contract is the starting point.
- No requirement to take any form, based on consent of both parties, can be written, oral or implied. Downside is they tend to be informal and not detailed.
- It is a personal contract meaning you can not substitute either party. It is of personal significance. It is a relational contract? Details of the relationship, it is not an ongoing relationship, circumstances might change, state might get involved e.g. NMW. Rather than implying commercial law, it is the idea someone is entering a contract, it’s intended to be ongoing. Need to take account of changing circumstances.

The context:

- Consensual contract
 - Written, oral or implied
- A personal contract
 - No substitution
 - Relational?
- Mutual obligation
 - Wage/ work bargain – one works, other pays.
 - Psychological contract, shows it’s not just a contract of exchange. What the parties want out of the agreement is very different. To understand how they work and what people want out of it, also need to think of the psychological element.
- Indefinite and incomplete – it is openended. Needs to be sufficiently flexible to account for positions changing. A written contract very often will be incomplete because there is a range of sources of terms.
 - Flexibility
 - Range of sources
- Imbalance of power
 - Unequal bargaining – contract based on equality of bargaining, but, not given. Contract of employment significantly different from commercial contracts. Specific issue is, employees want flexibility, control, power:
 - Managerial prerogative/subordination – arguably just a myth. The employee submits to the manager. They want the ability to change

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- Names of employer and employee
- Date when employment began
- Date when period of continuous employment began
- Rate of pay or method of calculation
- Pay intervals
- Notice
- Job title/description
- Period/term if not permanent
- Place(s) of work and address
- Any applicable collective agreements
- Details of work outside UK if applicable
- Disciplinary rules and procedures
- Contracting out certificate
- Don't need to include terms, only need to tell employee they are in reasonable accessible documents/collective agreements or further note. – s2(2)

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Terms relating to:

- Hours of work
- Holidays and holiday pay
- Incapacity for work and sick pay
- Pensions and pension schemes

A single document

- **s2(4):** "The particulars required by section 1(3) and (4)(a) to (c), (d)(i), (f) and (h) shall be included in a single document."
 - Names and date when employment began
 - Pay, pay intervals, working hours
 - Holiday entitlement and pay
 - Job title/description
 - Place(s) of work

Reasonably accessible documents

- **s2(2):** "A statement under section 1 may refer the employee for particulars of any of the matters specified in subsection (4)(d)(ii) and (iii) ... to the provisions of some other document which is reasonably accessible."
 - Sick leave and pay
 - Pensions and pension schemes

Reasonably accessible collective agreements

- **s2(3):** “A statement under section 1 may refer the employee for particulars of either of the matters specified in subsection (4)(e) ... to the law or to the provisions of any collective agreement directly affecting the terms and conditions of the employment which is reasonably accessible”
 - Notice of termination which the employee is obliged to give or entitled to receive

Note about disciplinary procedures and pensions – **s3**

- Disciplinary rules (or reference to r.a. document)
- Disciplinary procedure (or reference to r.a. document)
- Person to whom the employee can appeal in respect of disciplinary decision or decision to dismiss
- Person to whom the employee can apply to seek redress of any grievance and details of the application process
- Any further appropriate steps

Enforcement

- **ERA s11(1):**
 - “Where an employer does not give an employee a statement as required by section 1 ... the employee may require a reference to be made to an employment tribunal to determine what particulars ought to have been included or referred to in a statement”

Determination of references

- **ERA, s12**
- **(1)** Where an ET “determines particulars as being those which ought to have been included ... the employer shall be deemed to have given to the employee a statement in which those particulars were included”
- **(2)** An ET may confirm, amend or substitute

Limits of tribunal power – can not make things up, the role is to find out what is agreed.

- Declare, confirm, amend, substitute – **s12**
- **Leighton v Construction Industry Training Board [1978] ICR 577**
 - “We are unanimously of the opinion that the words of the statute do not mean and were not intended to mean that an industrial tribunal could rewrite or amend a binding contract which had one small area of misunderstanding between the parties.”
- **Mears v Safecar Security Ltd [1982] ICR 626**
 - The Act “gives the industrial tribunal no power to interpret particulars which have been given” (obiter)

- Pre-strike notice requirements
- Prohibition of secondary action
- ECtHR:
 - The right to strike is 'clearly protected' under Article 11
 - Complaint regarding pre-strike notice provisions inadmissible
 - Secondary action 'accessory' freedom but complete ban justified under Art 11(2)

Lecture 11 – The right to strike I

- Also, remedies, when plan of industrial action is unlawful, can grant interim interdict (Scotland), not injunction (English).
- At common law, industrial action is unlawful i.e. it involves breaches of contract and tortious delictual acts. Those organising industrial action could be sued in delict for any loss incurred.
- Secondary action is action taken against an employer or organisation who is not your employer.
- Strike action is when workers stop working. Industrial action is an umbrella term. Picketing is where workers stand at entrance of work and communicate their views to other workers or the public.

A right to strike?

- Fundamental human right? - Conceptually, it is an element of wider right of human right of freedom of association.
- Or tool of collective bargaining? - Alternatively, a tool of collective bargaining. Right to strike gives trade unions some force behind the demands it makes. Can ask an employer to raise its employees wages and if the employer says no, they can threaten strike giving it force. Without it, no force so collective bargaining not given force.
- ILO Convention 87 on freedom of association and the right to organize
- Significance comes down to how widely we understand the right to strike. Can it be exercised only when the dispute arises in the context of collective bargaining? E.g. employees employed in a factory making tin cans then the employer decided to make land mines instead. If workers take strike, it might be lawful if a human right, but if tied to collective bargaining, it might be unlawful. Taking industrial action in this context is political, rather than collective bargaining.
- Understood historically as collective bargaining rather than a human right, but, changed recently, that the right to strike is protected by art 7 ECHR. UK courts now drawn to recognise the right to strike – developing line. More solid position is more narrowly understood.
- *Metrobus v UNITE* [2009] Maurice Kay LJ: 'not much more than a slogan'
 - Maurice Kay LJ – right to strike has never been more than a slogan
 - Been lawful since 1906, but complicated law – it is unlawful at common law to take industrial action, but, under statute since 1906, it is lawful. Wording doesn't mention right to strike but conveys statute immunities.

- Right to return
- Early 'curtailment' – shared parental leave
- SMP
 - Social Security Contributions and Benefits Act 1992
 - 26 weeks' continuity at 'qualifying week'
 - Above NI lower limit
 - 39 weeks entitlement
 - 6 weeks at 90%
 - Remaining period at fixed rate
- Dismissal and detriment & Suspension on maternity grounds
 - Automatically unfair – ERA, s99
 - Dismissal relating to pregnancy, childbirth, maternity and maternity leave
 - Suspension on maternity grounds – ERA, ss66 - 70
- Move towards shared care
 - Other family leave
 - Parental leave – ERA, ss 76 - 80 - Maternity and Parental Leave etc Regulations 1999
 - Default or employer's scheme or collective or workforce agreement
 - One year' continuous employment
 - Has or expects to have 'parental responsibility'
 - Child up to 5 (18 if disabled)
 - 18 weeks' leave – weekly blocks – unpaid
 - *Rodway v South Central Trains Ltd* [2005] IRLR 253
 - Protection against dismissal/detriment
 - Paternity leave - ERA, s80A - Paternity and Adoption Leave Regulations 2002
 - Qualifications:
 - 26 weeks' continuous employment
 - Father / spouse or civil partner
 - Have or expect to have parental responsibility
 - Entitlement:
 - 2 weeks within first 56 days of birth
 - Paid at basic SMP rate
 - Adoption leave - ERA, ss75A and B - Paternity and Adoption Leave Regulations 2002
 - Time off for dependants/ family emergencies – ERA, 1996, s57A
 - ERA 1996, s57A
 - Reasonable and necessary

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- And employers can argue that it would be impracticable to reinstate or re-engage
 - Additional award – s117
 - If employer refuses, then the remedy is limited to additional compensation (s117 ERA)
- Compensation
 - Basic award – s119
 - Calculated in same way as redundancy payment depending on age and length of service
 - Maximum £475 pw and 20 years (£14,250)
 - Compensatory award – s123 – statutory limit
 - To compensate for financial losses
 - But not punish the employer
 - Subject to a maximum
 - Lower of £78,335) or 12 months gross salary
 - Subject to mitigation of losses
 - And may be reduced for contributory fault

ERA, s203

- Enterprise and Regulatory Reform Act 2013
- Acas Code of Practice – Settlement Agreements – July 2013
- s203(1) – an agreement to exclude or limit the operation of any provision of the Act or to preclude a person from bringing Employment proceedings is void
- s203(3)
 - ACAS supervised settlement – s203(2)(e)
 - Settlement agreement – s203(3)
 - (a) agreement in writing
 - (b) must relate to particular proceedings
 - (c) employee must have received advice from a relevant independent adviser (see s303(3A) as to terms and effect of the proposed agreement and, in particular, its effect on his ability to pursue his rights before an employment tribunal
 - (d) adviser must have appropriate indemnity insurance
 - (e) agreement must identify the adviser
 - (f) agreement must state that the settlement agreement conditions are met

Lecture 18 – Redundancy

The focus here is on the statutory right to an individual redundancy payment. There is separate regulation of the procedure to be adopted in the context of collective redundancies – that was covered in lecture 13 on information and consultation. Note that the definition of redundancy in terms of the collective redundancies legislation is different and slightly broader.

What you should concentrate on here is –

- The legal definition of redundancy

- “Many men and women are employed under contracts of employment which provide for transfers over a wide area. If work is short in one place but available elsewhere within the area, there will be no redundancy situation and the employer can dismiss without being liable to make any redundancy payment.”
- Factual approach
 - *Bass Leisure v Thomas* [1994] IRLR 104
 - The place where the employee was employed: “is to be established by a factual enquiry, taking into account the employee’s fixed or changing place or places of work and contractual terms which go to evidence or define the place of employment ... but not those (if any) which make provision for the employee to be transferred to another”
 - *High Table Ltd v Horst* [1998] ICR 409
 - “The question ... where was an employee employed ... is one to be answered primarily by a consideration of the factual circumstances ... If an employee has worked in only one location under his contract of employment ... it defies common sense to widen the extent of the place where he was so employed merely because of the existence of a mobility clause ... If the work of the employee ... has involved a change of location, as would be the case where the nature of the work required the employee to go from place to place, then the contract of employment may be helpful to determine the extent of the ‘place where the employee was employed.’ But it cannot be the sole determinant, regardless of where the employee actually worked for his employer.”
- If the employer closes down the whole business, then there is a clear situation of redundancy – but what if only part of the business is closed? What if the part in Glasgow is closed but there is a business location still operating in Edinburgh? Can all those employees based in Glasgow claim that they have been made redundant? It will depend on where they were employed and that is a question to which courts have taken different approaches. Broadly a distinction can be drawn between a contractual approach – ie what does the contract say – and a factual approach – ie regardless of what the contract specifies, what happens in practice? The three cases cited demonstrate these different approaches.
- You should bear in mind that sometimes the employee will be trying to argue that he or she has been made redundant – they want to receive their redundancy payment. In other situations they may be challenging the employer’s assertion that the reason for the dismissal is redundancy – eg because they are pursuing a claim for unfair dismissal and in that context they are questioning the potentially fair reason that the employer has put forward (ie redundancy).