

Chapter 2: Who is an Employee?

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Aims of this Chapter

This chapter will enable you to achieve the following learning outcome from the ILEX syllabus:

- 1 Understand key concepts and themes in the development of employment law in England and Wales
- 3 Understand aspects of employment protection given to different types of workers

2.1 Introduction

If you currently work, take a moment to think about your own status. Would you consider yourself to be an employee? Do you perhaps work freelance as an independent contractor? Do you work part-time or through an agency? These are questions that an ET will need to answer before it can decide on the rights you are entitled to. Depending on the type of employment, this can be a difficult question to answer and, as a result, ETs have developed a number of different tests to determine an individual's employment status. These tests and the implications of an individual's employment status will be explored in this chapter.



2.2 The significance of contract

Contract seems the most appropriate category into which to put the employer/employee relationship because there is an agreement (the employer promises to pay, the employee promises to work) and there is consideration. Contract cases provide useful authorities in employment law.

The contract model does not, however, take into account collective bargaining (where union reps negotiate terms on the employees' behalf), which has a considerable influence on many workers' terms. Another criticism of the model is that an "agreement" can hardly be said to exist where statute imposes so many duties that cannot be avoided, such as the equality clause in equal pay cases. In addition, some special categories of worker are not covered by the contract model – for example, the armed forces or those whose work is of a religious nature.

Note that some rights given to employees, such as the right not to be discriminated against on the grounds of sex or race, cannot be taken away by contract.

2.3 Employment status

Employment law covers three main groups of individuals, with varying degrees of statutory protection being afforded to each of them.

(1) Employees

The most statutory protection is awarded to employees. Unfortunately there is no definitive guidance as to who an employee is. **s230(1) Employment Rights Act 1996 (ERA 1996)** defines an employee as:

. . . an individual who has entered into or works under (or where employment has ceased, worked under) a contract of employment.

A contract of employment is defined as *a contract of service or apprenticeship (s230(2))*. This rather unhelpful definition means that it is usually left to the courts to decide whether or not an individual works under a **contract of service**, using one of the tests that are to be discussed later in this chapter.

(2) Workers

Workers are defined in **s230(3) ERA 1996** as either employees or individuals who perform work or services for another party whose status is not that of a client or customer of any profession or business undertaking carried on by that individual. The term worker covers a wider range of people than employees, but does not offer the same amount of rights. Examples of workers include agency workers and casual workers.

(3) Independent contractors

Independent contractors (also known as the self-employed, sole traders or consultants) work under a **contract for services**, as opposed to a contract of services. They are described as being in business on their own account and have limited statutory employment protection.

The differences in statutory protection afforded to employees and workers can be seen in the table below. Independent contractors are not included in the table as they have very little statutory employment protection.

Status: employee	Status: worker
Protection from unfair dismissal.	No protection from unfair dismissal.
Statutory redundancy pay.	No statutory redundancy pay.
Protection during a transfer of undertaking.	No protection during a transfer of undertaking.
National minimum wage.	National minimum wage.
Protection against unauthorised deductions from pay.	Protection against unauthorised deductions from pay.
Rights under the Working Time Regulations 1998 , including rest breaks, paid holiday and limits on night work.	Rights under the Working Time Regulations 1998 , including rest breaks, paid holiday and limits on night work.
Maternity, paternity and adoption leave and pay.	Maternity, paternity and adoption pay only .
Statutory sick pay.	Statutory sick pay.

Status: employee	Status: worker
Protection against less favourable treatment because of being part-time.	Protection against less favourable treatment because of being part-time.
Protection against less favourable treatment for making a disclosure in the public interest (“whistleblowing”).	Protection against less favourable treatment for making a disclosure in the public interest (“whistleblowing”).
Protection from discrimination.	Protection from discrimination.
Right to equal pay.	Right to equal pay.

Looking at the table, it might be asked why anyone would choose to be an independent contractor, given the number of rights they are excluded from. There are, however, advantages. Independent contractors pay their own tax and national insurance directly to H M Revenue & Customs and are given a number of tax benefits (unlike employees, whose employers deduct their tax and national insurance payments through the PAYE (Pay as You Earn) system). They also have considerable flexibility in their working patterns.



(3) List the statutory rights that are not available to workers.

2.4 Identifying a contract of employment

Before looking at the various tests used by the courts to decide whether a contract of employment exists or not, it may be helpful to look at the policy considerations.

If a court is faced with a claimant who wishes to be classified as self-employed for tax purposes, it will be concerned with preventing tax avoidance. If, however, the issue is one of health and safety, the court’s main interest may be the protection of injured parties. Many examination papers have problem questions which involve a discussion of whether an individual is an employee or not. A good way to tackle such a question is to begin by asking why the status of this person is important. What right is he trying to exercise? The answers to these questions may well affect the emphasis the court or tribunal places on different tests. In *Lane v Shire Roofing Co (Oxford) Ltd [1995]* the Court of Appeal stated that the courts are more likely to hold that a worker is an employee in a health and safety case than in other cases.

Ascertaining whether or not a worker is an “employee” is not always straightforward. The main tests that have been developed are:

- the **control test**;
- the **organisation/integration test**;
- the **multiple** (economic reality) **test**;
- the **personal services test**; and
- the **mutuality of obligation test**.

You may find in your reading that the names of these tests and the cases ascribed to them vary from textbook to textbook.

2.4.1 The control test

This is the traditional test.

Bramwell LJ in ***Yewens v Noakes [1880]*** (note the date) said:

“A servant is a person subject to the command of his master as to the manner in which he shall do his work.”

In 1957 in ***Gibb v United Steel [1957]*** Streatfeild J said:

“The proper test [is] who has the right at the moment to control the manner of the execution of the acts of the servant.”

In the past, if an employer was able to tell an employee not only what to do, but how to do it and when, then a contract of employment existed.

This original test weighed the control by the employer against the independence of the employee. The test is still useful in that it helps to distinguish between an employee and an agent – the latter being able to carry out his principal's instructions using his own discretion as to how and when he does the work. It also works at simple levels to distinguish between independent contractors and employees (e.g. cab drivers and chauffeurs) but usually only in situations where the answer is obvious anyway.

In ***Narich Ltd v Commissioner of Payroll Tax [1984]***, a lecturer who worked for “Weight Watchers” had her work so closely controlled by the employer's handbook that she was deemed to be an employee despite a clause in the contract stating that she was not.

The problem with this test is that, as technology increased and jobs became more skilled, the employer would need to be a technical expert as well as a manager to satisfy it. Kahn-Freund said in 1951:

“To say of the captain of the ship, the pilot of an aeroplane, the driver of a railway engine, of a motor vehicle or of a crane that the employer ‘controls’ the performance of his work is unrealistic and almost grotesque.”

The test changed from actual control to right of control. This reflects the court's recognition that employees today enjoy greater autonomy in their employment than did workers in the 19th century.

2.4.2 The organisation/integration test

Another problem with the control test was that it did not apply satisfactorily to professionals or to those who worked as entertainers. For example, aircraft pilots are normally employees but, when landing planes, they are not under the control of their company, which may be based thousands of miles away. One way of dealing with this was the development of the “organisational” test.

In ***Cassidy v Minister of Health [1951]*** a hospital authority was held to be vicariously liable for an injury suffered by a patient as a result of negligent treatment by full-time medical staff. Two Lord Justices of Appeal based their decision on the fact that the doctors and nurse were part of the permanent establishment and therefore subject to the standing orders of the hospital authority, which was in a position to make rules concerning the organisation of the medical staff's work as opposed to the manner in which it was done.

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Published in 2011 by:
ILEX Tutorial College Ltd
College House
Manor Drive
Kempston
Bedford
United Kingdom
MK42 7AB

British Library Cataloguing in Publication Data

A catalogue record for this manual is available from the British Library.
ISBN 978-1-84256-555-1