

Status Update
The failure of the law of Master
and Servant

Make Employment Law Great Again



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TODAY'S SESSION

- employee / worker - same tests different language
- the consequences of establishing worker status;
- modern employment questions;
- where the law might go next.

THE WORLD OF BUSINESS IS CHANGING

"Uber, the world's largest taxi company, owns no vehicles. Facebook, the world's most popular media owner, creates no content. Alibaba, the most valuable retailer, has no inventory and Airbnb, the world's largest accommodation provider, owns no real estate. Something interesting is happening."

TOM GOODWIN
Executive, Havas Media

Privy Council

Lee Ting Sang 1990

a most elusive question ... despite a plethora of authorities the courts have not been able to devise a single test that will conclusively point to the distinction in all cases

Office of Tax Simplification

March 2015

Employment status is a complex and wide-ranging subject that many have said has no real solution – and that if we did manage to 'solve it', we should immediately move on to world peace as we'd clearly be on a roll.

Employment

s.230 ERA 1996

Entered into or works under a contract of employment

"contract of employment" means a contract of service or apprenticeship

Worker

s.230 ERA 1996, NLA,

...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 ...

83(2) EA 2010 a contract personally to do work

Employment / Worker / NOTA

1. Personal Service
2. Control - employment / Subordination - worker
3. Mutuality
4. Other provisions consistent with the status

1. Personal Service

Pimlico Plumbers

- unfettered right to substitute is inconsistent personal service
- a conditional right to substitute depends upon conditionality
- depend on precise contractual arrangements - nature and degree or using different language, the extent to which the right of substitution is limited or occasional

Pimlico Plumbers

- A right of substitution
 - only when the contractor is unable to carry out services likely to be consistent
- dependent on showing that the person is as well qualified likely to be inconsistent
- subject to consent and complete discretion likely to be consistent

2. Control

Highly fact sensitive

Depends on where the court places the test?

Pro Claimant - Test 2?

If conflate with Test 4 then R?

2. Worker - subordination

s.230 ERA 1996, NLA,

....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 ...

83(2) EA 2010 - a contract personally to do work

No client / customer exception

2. Worker - subordination

EU Principle

there must be considered as a worker a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration

independent providers of services who are not in a relationship of subordination with the person who receives the services

2. Worker - subordination

Jivraj v Hashwani

Bates van Winkelhof

Para 39 Hale

Subordination is not a magic test
Not an infallible touchstone as to whether a worker

2. Worker - subordination

Byrne

whose degree of dependence is essentially the same as that of employees

who have a sufficiently arm's-length and independent position to be treated as being able to look after themselves in the relevant respects

Pimlico

"a business model under which operatives are intended to appear to clients of the business as working for the business, but at the same time the business itself seeks to maintain that, as between itself and its operatives, there is a legal relationship of client or customer and independent contractor rather than employer and employee or worker"

3. Mutuality

Two very different principles

- A. Contractual mutuality
- B. Mutuality representative of an employment relationship

3A. Contractual Mutuality

Stephenson

Mutuality determined whether contract in existence at all and control whether that contract was one of employment

3A. Employment Mutuality

Stringfellow

On reflection, it is clear that the last sentence of paragraph 14 is too sweeping. Control is not the only issue. There may be other factors...

3B. Employment Mutuality

Irreducible minimum of obligation on each side to create a contract of service

Normally to offer work and to pay for it

Employee to accept the work offered

3C. Workers and Mutuality

Windle

s.83(2)(a) EA 2010

Not use the terminology of Limb (b) worker

Uses employment in its extended sense in approaching EA 2010 question

3C. Workers and Mutuality

Interpreters claiming race discrimination against those BSL interpreters

ET took into account a lack of mutuality in holding decision that Claimants not workers

CA absence of mutuality may shed light on the character of the relationship when work being done

3C. Workers and Mutuality

...the fact that a person supplying services is only doing so on an assignment-by-assignment basis may tend to indicate a degree of independence, or lack of subordination, in the relationship while at work which is incompatible with employee status even in the extended sense

Can not exclude that factor

4. Provisions consistent with....

- Exclusivity
- Integration
- Dominant purpose of contract
- Duration
- Beneficiary the customer or client
- Method of payment
- Provision equipment
- Level of risk
- Label
- Tax

The 11+ Exam

There can be no substitute for applying the words of the statute to the facts of the individual case. There will be cases where that is not easy to do. But in my view they are not solved by adding some mystery ingredient of "subordination" to the concept of employee and worker.

And now mutuality as an additional component?

Worker Protection

Deductions
Working Time
Living Wage
Discrimination
Whistleblowing
Part Time working
Pensions

Zero Hours contracts

Retailers

Understood to be workers

Windle attack on their rights if can turn down?

Courts astute to avoidance eg Pulse Healthcare

Aslam v Uber

Personal service not in issue

No contract

Faintly ridiculous

Grimly loyal

Aslam v Uber

Uber-

Driver's agent and then reserves sole discretion to accept

Interviews and recruits

Control of key information

Logging off drivers who do not accept

Fixes fare and rebates

Control over drivers, cars, rating

Uber accepts risk of loss

Complaint handling

Power to amend terms unilaterally

Dewhurst

Cycle couriers

Declarations of self employment, no mutuality in Tender for services but also no invoices, regular working and de facto mutuality when working

Limited substitution

Boxer

Post Pimlico application of same principles

The current solutions?

Freedom to create work?
An opportunity to earn?
Business free from shackles?

Licence to exploit?
A rush to the bottom?
Low pay / low work?

Human Rights Act?

Whistleblowing as an Article 10 right?

- Matúz v Hungary
- Bates van Winkelhof
- Day v Health Education England
- McTigue

The Problem is the Solution

Lister v Hesley Hall

So closely connected fair and just to hold employers vicariously liable

Cox v MOJ

Imposition of vicarious liability?

The activity being undertaken by the person on behalf of D?

Activity was integral to D's business?

D using them had created the risk? Or D using them to make profit / carry out business?

Imposition of Worker Status

The activity being undertaken by the person on behalf of D?

Activity was integral to D's business?

D using them to make profit / for his business?

Employment status to be distinguished by mutuality.

Fenoll

So any person who pursues real and genuine activities, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must be regarded as a worker

Dhillon - 13.8% NICs

Drivers no mutuality between shifts

Contract of employment during the shift

Legislative

s.23 Employment Relations Act 1999

BIES Parliamentary Committee Review

Taylor Report

s.43K Inspiration?

A worker is a person who personally pursues economic activities for another under a contract, the terms of which are or were in practice substantially determined by

- the person for whom economic activities are performed; and / or
- the person for whom there is a contract to perform the economic activities.

