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# Employment Status: An Ethical Way Forward for Determining Liability in Tort and Employment

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## Introduction

Identifying a contract of employment remains crucial in determining whether and where legal liability falls. A contract of employment (service) is essential for there to be vicarious liability in tort. As a general rule, only employees (“servants”) acting in the course of employment will make the employer jointly and severally liable for their torts. There is much dispute as to the justification for vicarious liability, but it is recognised as a loss distribution service.<sup>1</sup> The employer is more likely to have the means to compensate the injured party. In most cases the burden will fall on an insurance company<sup>2</sup> and then it can be argued it falls on all employers through higher insurance premiums. Vicarious liability (famously described by one judge as being based on “social convenience and rough justice”<sup>3</sup>) in practice does deliver remedies to injured parties and turns on whether the tortfeasor is an employee.

Employment status has long been an essential tool for labour lawyers<sup>4</sup> and throughout the development of employment rights during the second half of the twentieth century its importance has remained. It was the device used to introduce the basic employment rights to the wider workforce. Thus, the minimum periods of notice and the right to a statement of terms, introduced by the Contracts of Employment Act 1963, only applied to employees. Within eight

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<sup>1</sup> P S Atiyah, *Vicarious Liability in the Law of Tort* (Butterworths: London, 1967), pp 12-28.

<sup>2</sup> The employer is obliged to have insurance against injury to employees under the Employer's Liability (Compulsory Insurance) Act 1969.

<sup>3</sup> *ICI Ltd v Shatwell* [1965] AC 656.

<sup>4</sup> O Kahn-Freund, in A Flanders and H Clegg (eds), *The System of Industrial Relations in Great Britain*. (Basil Blackwell: Oxford, 1954), p 45.

years rights to redundancy payments and not to be unfairly dismissed had been added to employee rights.<sup>5</sup> Wedderburn, thus, remarked in 1971 that for the English lawyer it is the “fundamental institution, to which he is forced to return again and again”.<sup>6</sup> Since then not only have there been significant developments in implied terms through the courts,<sup>7</sup> but there has been a mass of new statutory rights, most of which are applicable to employees alone.

This article will focus on the concept of the contract of employment. It is particularly concerned with vicarious liability in tort and employment law, but, as necessary, will draw from income tax and social security law. The article will argue that the current definition does not serve us well because employment status has become easy to avoid and, thus, rights are illusory. It will be observed that there is pressure for the definition to differ, depending on the form of action; it will be argued that this pressure ought to be resisted for ethical reasons and to avoid the law becoming too complex. Dworkin suggests that a state does not act ethically if it fails to show “equal concern for the fate of all citizens”.<sup>8</sup> The article argues that the United Kingdom (UK) is, so, failing in accepting that a significant part of the workforce is excluded from rights others take for granted. Self-employment is put forward as a concept that might be easier to define and could be the way forward in the interests of justice and clarity.

## Statutory Guidance

No statute comprehensively defines an employer-employee relationship. The Law Reform (Personal Injuries) Act 1948, the statute that ended the common employment doctrine, made no attempt at all. More recently statutes on employment rights tell us that an employee is an individual who has entered into or works under a contract of employment. The contract of employment in turn

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<sup>5</sup> Section 1, Redundancy Payments Act 1965 and section 22, Industrial Relations Act 1971.

<sup>6</sup> K W Wedderburn, *Worker and the Law*, 2<sup>nd</sup> edn (Penguin: Middlesex, 1971), p 51.

<sup>7</sup> The duty not to destroy trust and confidence is an important example of such implied terms; see the House of Lords' ruling in *Malik v BCCI* [1997] IRLR 462.

<sup>8</sup> R Dworkin, *Sovereign Virtue* (Harvard University Press: Cambridge, Mass., 2000).

is defined and, thus, section 230(2) Employment Rights Act 1996 states it is “a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing”.<sup>9</sup> Thus, the statutory guidance is very limited and circular in nature and, so, the definition has been left to the courts. That development, which has been long and complex, will not be tracked here, but an attempt at summarising the current test follows.

## Test for Employment

If there was any doubt as to which test is important today, it was dispelled by *Montgomery v Johnson Underwood*,<sup>10</sup> where Buckley J, on behalf of a unanimous Court of Appeal, said that in determining whether a contract of employment exists “the safest starting point” and “the best guide” were the oft-quoted passage in *Ready-Mixed Concrete (South East) Ltd v Minister of Pensions and National Service*,<sup>11</sup> where MacKenna J had said:

A contract of service exists if these three conditions are fulfilled. (1) The servant agrees that, in consideration of remuneration, he will provide his own work and skill in the performance of some service for his master. (2) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other’s control in sufficient degree to make that other master. (3) The other provisions are consistent with it being a contract of service.

Fashions for tests have varied over the years, but this approach, often known as the Multiple Test, is clearly dominant now and has pushed out the main opposition, the Economic Reality Test, discussed below.

The meaning attributed to the judge’s words has evolved over the years to incorporate the notion of irreducible minimum. Within

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<sup>9</sup> Similar (but not identical) definitions appear in the Employer Liability (Defective Equipment) Act 1969 and the Employer Liability (Compulsory Insurance) Act 1969.

<sup>10</sup> [2001] IRLR 269.

<sup>11</sup> [1968] 1 All ER 433.

McKenna J's first two conditions are three absolute musts, mutual obligations, personal performance and sufficient control. Only if these essentials are there is a contract of employment possible, in which case, under the third condition, all provisions are considered to see if on balance they are consistent with such a contract.

*Nethermere (St Neots) Ltd v Taverna and Gardiner*<sup>12</sup> decided that mutual obligations are an absolute must and the approach was approved by the House of Lords in *Carmichael v National Power*.<sup>13</sup> Mutual obligations will usually be satisfied through a wage-work bargain, but the requirement may amount to no more than the need to have consideration in all contracts.<sup>14</sup>

The second must, personal performance, will not be satisfied if the worker can delegate his work to another.<sup>15</sup> Exceptionally a limited or occasional power of delegation will be overlooked.<sup>16</sup>

The final part of the irreducible minimum is sufficient control. What is sufficient is not defined and will turn on the particular facts, but it is clear from *Montgomery v Johnson Underwood* that it cannot be dispensed with altogether.

## Test Applied

The fundamental flaw in the employment definition being very prescriptive is that it is easy to evade. Thus, the employer, who almost invariably will dictate the conditions under which he will engage a worker, can, without trouble, make sure that he does not create a contract of employment. So, although an employer cannot exclude liability for unfair dismissal according to section 203, Employment Rights Act 1996 and his ability to exclude liability for negligence is severely restricted by section 2, Unfair Contract Terms Act 1977, he can effectively avoid liability by making sure the irreducible minimum is not met.

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<sup>12</sup> [1984] IRLR 240.

<sup>13</sup> [2000] IRLR 43.

<sup>14</sup> *Cotswold Developments Construction Ltd v Williams* [2006] IRLR 181.

<sup>15</sup> *Express and Echo Publications Ltd v Tanton* [1999] IRLR 367.

<sup>16</sup> *MacFarlane v Glasgow City Council* [2001] IRLR 7.

Perhaps the simplest way to avoid employment status is for the employer to make sure there is a lack of mutual obligations. The case of *Carmichael v National Power* provides a straightforward model, where the power station guides were employed “on a casual as required basis”. In recent years where no paid employment was guaranteed, the relationship was frequently described as a zero-hours contract. The growth of such contracts was noted by the White Paper, *Fairness at Work*,<sup>17</sup> which estimated that there were 20,000 such arrangements in the UK. Given further growth, the workers falling foul of the mutuality rule must be a significant part of the workforce. Of course, to the employer there is the downside to these arrangements in that, without an enforceable contract, he cannot be assured of the worker’s labour. At times an employer would be ill-advised to leave himself so exposed that he could not insist on the worker’s performance. But in practice, if he has a sufficiently large pool of workers, this downside will not cause problems. Thus, the weaker the bargaining position of the workers, the less likely is it that the law will protect them.

Two particular devices have been used to find mutual obligations, where on the face of it there is a zero-hours contract. First, an umbrella or global contract might exist which governs the whole relationship. Thus, the homeworkers in *Nethermere* were treated as employees, because the giving and taking of work over the period had hardened into an enforceable contract. How exactly this works has never been explained, but it seems likely to be defeated by an employer clearly expressing his intention to avoid any obligation to employ. The second device is more convincing. It can be argued a casual worker with each engagement works under a contract of employment, that the gaps between engagements could be ignored as being temporary cessations of work (through section 212(3)(b) Employment Rights Act 1996) and that there is a continuous period under a contract of employment.<sup>18</sup> In spite of this scope for argument casual workers have generally failed to prove employment status and would need expert legal advice to establish such a relationship.

A contract that clearly allows the worker to delegate his duties to another could successfully avoid employment status. This is a less

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<sup>17</sup> 1998 Cm. 3968.

<sup>18</sup> *Cornwall County Council v Prater* [2006] IRLR 362.

attractive route for most employers, who see selection of their workforce as vital.

Another way of avoiding employment status is to engage agency staff. The Conduct of Employment Agencies and Employment Business Regulations 2003<sup>19</sup> require employment agencies to issue its workers with a written statement of terms and conditions, which indicates whether the agency regards them as self-employed or employees. Statute treats such workers as employees for tax and national insurance purposes,<sup>20</sup> but otherwise their status turns on the usual rules. An attempt at establishing employment status will often fail as the irreducible minimum does not exist between the agency worker and either the agency or the end user/client employer. Frequently there will be mutual obligations between the agency and worker, but insufficient control; the day to day control exercised by the end user may be sufficient, but there will usually be a lack of mutual obligations with the worker. Thus agency workers, estimated by the DTI<sup>21</sup> to be 700,000 in number in 2001 and still growing, are unlikely to be employees.

The chink of light for agency workers is the willingness of the Court of Appeal to find an implied contract between the worker and end user. In *Dacas v Brook Street Bureau*<sup>22</sup> the possibility of inferring the existence of an employment contract between the worker and end user was discussed. This approach was adopted by an employment tribunal and approved by the Court of Appeal in *Cable and Wireless plc v Muscat*.<sup>23</sup> As long as the remuneration was being provided by the end user, it mattered not whether it was paid directly or indirectly. The latter case was a particularly strong one as Muscat had been directly employed before the re-arrangement involving the agency. It has been suggested the concept of implied

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<sup>19</sup> SI 2003/3319.

<sup>20</sup> Part 2, ch 7, Income Tax (Earnings and Pensions) Act 2003, and ss 2 and 6, Social Securities and Benefits Act 1992.

<sup>21</sup> Department of Trade and Industry, *Proposal for a Directive of the European Parliament and the Council on Working Conditions of Temporary Agency Workers: Regulatory Impact Assessment* (2000), [www.dti.gov.uk/files/file30165.pdf](http://www.dti.gov.uk/files/file30165.pdf) (30/10/06).

<sup>22</sup> [2004] IRLR 358.

<sup>23</sup> [2006] IRLR 354.

contract would be difficult to defend where the worker has been introduced by the agency to the end user.<sup>24</sup> In fact the President of the Employment Appeal Tribunal in *James v London Borough of Greenwich*<sup>25</sup> ruled that an implied contract is confined to rare cases. But, we must wait and see how the case law develops.

Once the irreducible minimum is established, a court or tribunal should look at all the provisions to see if they are consistent with a contract of employment. Such matters as level of control, provision of tools, method of payment and form of taxation are discussed. Employment tribunals frequently list all the factors suggesting employment, and those that do not, in order to help them come to a decision. The provisions, including any title attached to the relationship, are only persuasive and what weight should be given to any particular provision is difficult to ascertain. The uncertainty is heightened by the ruling that the question of employment status is generally a question of fact; only where a tribunal adopts the wrong law or is guilty of perversity should an appellate tribunal or court intervene.<sup>26</sup> Thus, there is the potential for one set of facts to lead to different conclusions with the appellate bodies being unable to intervene.

## **Tax Solution**

Self-employed people have considerable tax advantages over employees. Not only do they pay tax much later, but a wider range of expenses is allowed against income and a lower rate of national insurance contributions is payable. People have naturally tried to put themselves in a better tax position and the Inland Revenue has responded by attempting to close loopholes.

The building industry has long been associated with sham self-employment and the consequent lack of employment rights.<sup>27</sup> The Inland Revenue's answer has been to put the onus on the individual

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<sup>24</sup> F Reynold, "The Status of Agency Workers: A Question of Legal Principle", (2006) 35(3), *Industrial Law Journal*, 320-323.

<sup>25</sup> [2007] IRLR 168.

<sup>26</sup> Above, note 13.

<sup>27</sup> P Brown, *Report of Committee Inquiry* (1968), Cmnd 3714.

worker to prove he is truly self-employed. Thus, contractors, in making payments to sub-contractors, must deduct tax, unless the sub-contractor produces a certificate showing he is entitled to a gross payment. The key to entitlement to gross pay is being able to demonstrate you are genuinely carrying on your own business, according to section 60 of, and schedule 11 to, the Finance Act 2004.

The uncertainty as regards agency workers does not extend to taxation. They are treated, whatever their status, as employees of the agency and tax is deducted PAYE or Pay As You Earn, according to Part 2, chapter 7 of the Income Tax (Earnings and Pensions) Act 2003. In spite of this legislation there still remained those avoiding tax by providing their services through an intermediary. The intermediary would normally be a company and money would be extracted in the form of a dividend. PAYE would not apply and no National Insurance contributions would be payable.<sup>28</sup> This led to a budget statement and press release number IR35, explaining new anti-avoidance legislation,<sup>29</sup> which involves the creation of a hypothetical contract. This applies where a worker personally performs services for another, the client, and the services are provided through an intermediary. If, without the intermediary, there would be a contract of employment between the worker and client, the legislation bites and the worker is taxed in a similar way to an employee.

The lack of statutory guidance on employment status, thus, does not present such problems to revenue law due to its tailor-made measures. The law can at times be used to give tax benefits. Thus, to encourage divers and their supervisors to explore the seabed for oil and gas, section 314, Income and Corporation Taxes Act 1988 dictates that such workers are taxed as self-employed workers. But, the legislation, having the greatest impact, aims to treat workers generally as employees. Income tax, raised in a consistent and universal way, has long been regarded as a fair way of raising revenue.<sup>30</sup> By closing the loopholes the Inland Revenue is aiming to

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<sup>28</sup> HM Revenue and Customs, *Intermediaries Legislation (IR35), Background*, (2006), [www.hmrc.gov.uk/ir35](http://www.hmrc.gov.uk/ir35) (23/10/06).

<sup>29</sup> Part 2, ch 8, Income Tax (Earnings and Pensions) Act 2003, and Social Security Contributions (Intermediaries) Regulations 2000 (SI 2000/727).

<sup>30</sup> A Smith, *Wealth of Nations* (1776), [www.adamsmith.org/smith/won-intro.htm](http://www.adamsmith.org/smith/won-intro.htm) (26/10/06).

make taxation consistent and universal and, thus, taxation becomes fairer, but the legal system as a whole becomes less fair. Tax law does not resolve the true legal relationship; the worker may or may not be an employee. If he is not an employee, his employer will not be vicariously liable and he will not be entitled to many employment rights, but he will have to pay tax as an employee. Personally the worker will have the bad, but none of the good, consequences of employment status.

## Tort Solution

Without legislation vicarious liability in tort seems to be taking its own path or paths. Still leading texts describe the tests to determine employment status on the basis that the tests are the same for tort and employment law.<sup>31</sup> But, it has been argued that employment status should depend on the legal question asked. McKendrick<sup>32</sup> argued that vicarious liability was the most efficient method of ensuring the injured party is compensated. The employer is closely associated with the tort as it is committed in the course of his business and he can distribute loss through increased insurance premiums by raising the price of the product. McKendrick saw nothing irrational in classifying a worker as an employee for the purposes of vicarious liability, but not for the purposes of other areas of law.

There has been concern that judges tended to treat safety cases more seriously and, thus, were more likely to find employment status. This for some<sup>33</sup> was confirmed by the words of Henry LJ in *Lane v Shire Roofing Company (Oxford) Ltd*<sup>34</sup>:

When it comes to the question of safety at work, there is a real public interest in recognising the employer/employee relationship when it exists, because

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<sup>31</sup> W V H Rogers, *Winfield and Jolowicz on Tort*, 17<sup>th</sup> edn (Sweet and Maxwell: London, 2006), p 884.

<sup>32</sup> E McKendrick, "Vicarious Liability and Independent Contractors – A re-examination", (1990) 53 *Modern Law Review*, 770-784.

<sup>33</sup> See G Pitt, *Employment Law*, 5<sup>th</sup> edn (Sweet and Maxwell: London, 1997), pp 66-67.

<sup>34</sup> [1995] IRLR 493, 496.

of the responsibilities that the common law and statutes such as the Employer's Liability (Compulsory Insurance) Act 1969 places on the employer.

Another view could be that the judge was simply stating how important the case was before him; he certainly did not say employment rights were less important.

Doubts over the views of the judiciary were allayed by Sedley LJ in *Dacas v Brook Street Bureau (UK) Ltd.*<sup>35</sup> In this unfair dismissal claim the judge thought the conclusion that a cleaner working through an agency was employed by nobody was not credible. He argued that if the case had related to the negligence of the cleaner, the High Court or a county court would almost certainly have found the client employer vicariously liable. The client employer would need to prove the cleaner was employed by another or nobody to escape liability, and this was thought to be very unlikely. The judge commented that counsel, advancing a submission that the cleaner worked under something other than a contract of employment and that in consequence the Council should escape vicariously liability, "could look forward to a bad day in court". Sedley LJ was clearly not happy taking a different approach depending on the type of case and agreed with Mummery LJ that, had the client employer been a party to the appeal, an implied contract of employment might have been established.

The Court of Appeal in *Hawley v Luminar Leisure plc*<sup>36</sup> confirmed that liability in such circumstances depends on control. A doorman, supplied by an agency to a night club run by Luminar Leisure, struck an innocent customer and caused permanent brain damage. The High Court followed *Mersey Docks and Harbour Board v Coggins and Griffiths*,<sup>37</sup> where the House of Lords had decided that, when an employee was loaned by the permanent employer to another, that permanent employer would be liable unless he proved control had passed to the other. The judge in *Hawley* explained that in the context of deemed temporary employment the paramount test is that of control and on the facts the night club was

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<sup>35</sup> Above, note 23.

<sup>36</sup> [2006] IRLR 817.

<sup>37</sup> [1947] AC 1.

liable. A unanimous Court of Appeal confirmed this approach and decided the judge was quite entitled to find that Luminar Leisure had become the deemed employer. This case can be seen largely as a reiteration of the principle established in the *Mersey Docks case*, but it can also be seen as confirmation of the judicial attitude described by Sedley LJ in *Dacas*. The doorman in *Hawley* was treated as an employee although, given he was an agency worker and largely controlled by the end user, there was the potential for this assumption to be challenged. Vicarious liability seemed inevitable in this case and the main issue to decide was on which employer liability should fall. Vicarious liability fell on the end user, who exercised detailed control over the doorman.

The case law shows an intention to put vicarious liability on the shoulders of the appropriate employer, but the legal reasoning is ambiguous. The idea that there is an implied contract with the end user may establish employment status for all purposes; alternatively, the idea that control is needed for vicarious liability determines tort liability, but leaves many questions unanswered as regards employment status.

## **Employment Law Solution**

Certain employment rights are now given to, not only employees but also, those defined by statute as workers. A statutory worker (as opposed to the broad but inexact term, “worker”) is, according to section 230(3), Employment Rights Act 1996, an individual who has entered into or works 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.

Discrimination law protection in employment is similarly, but not identically, extended beyond employees.

The statutory worker definition essentially requires both a

contract and personal performance, and excludes a person running his own business. How broad this definition is will depend on the way it is applied by the tribunals and courts. The detailed consideration in *Byrne Bros (Formwork) v Baird*<sup>38</sup> led the Employment Appeal Tribunal to decide that mutuality of obligations was as much an essential for a statutory worker as for an employee. No rationale was offered for importing this term into the statutory worker definition, but the judge stated it was an essential in all contracts and, thus, seemed to be identifying the concept of consideration to prove there was a contract.<sup>39</sup> Given that casual workers have frequently failed to prove employment status because of the lack of mutual obligations, it is a concern it may prevent statutory worker status being established.<sup>40</sup> Perhaps this was inevitable as long as the statute demands a contract. Similar concerns arise from the requirement of personal service. The key may be whether the tribunals and courts, as in *Byrne Bros*, attempt to take a purposive approach and protect those who are in a subordinate and dependent position. Certainly they should recognise shams and not be distracted by clauses introduced to avoid statutory worker status.

In determining the meaning of the term, worker, for the purposes of Article 141 of the EC Treaty on Equal Pay, the European Court of Justice, in *Allonby v Accrington and Rosedale College*,<sup>41</sup> said it should not be interpreted restrictively, but did not include independent providers of services, who were not in a subordinate position. It meant a person who, for a certain period of time, performed services for, and under the direction of, another person, in return for which he received remuneration. This definition, without notions of contract and mutuality, has much to commend it and hopefully will influence development in the UK.

Statutory workers now have important protection, which includes legislation on unlawful deductions, working time and minimum pay. Considerable hope was raised when a government

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<sup>38</sup> [2002] IRLR 96.

<sup>39</sup> See *Cotswold Developments Construction Ltd v Williams*, above, note 14.

<sup>40</sup> See D. Brodie, "Employees, Workers and the Self-employed", (2005) 34(3) *Industrial Law Journal*, 253-260.

<sup>41</sup> [2004] ICR 1328.

working party was set up to see if rights such as unfair dismissal should be extended to statutory workers.<sup>42</sup> This review's conclusions have now been published and no extension of rights is proposed.<sup>43</sup> The Government was concerned that change might undermine flexibility. It concluded that the current legal framework reflects the wide diversity of working arrangements and the different levels of responsibility and rights in different employment relationships. So, at present the concept of statutory worker, which has no relevance to tort, is unlikely to deliver enhanced employment rights.

## **Ethical Solution**

The problem from an ethical point of view is that the law imposes responsibility on the shoulders of the employer, but such responsibility is easy to avoid. In fact the greater the imbalance between employer and worker power, the more likely the employer is able to escape responsibility. Tax, tort and employment law are all developing devices to close loopholes with some success, but, if this continues, the law, already complex, will be inaccessible to all but a handful of experts.

In employment law, as the number of employment rights expands, the moral dilemma increases year by year. Members of our society are excluded from rights others take for granted. Equality, in a Dworkin sense, is lacking. The law and the state are failing in not showing "equal concern for the fate of all citizens".<sup>44</sup> In doing this, an underclass is created. Perhaps this is not so serious for those who temporarily work under such conditions as many students do; what is serious is the reality for many that the only alternative to unemployment is labour without security or other rights.

The history of attempts at defining employment status is complex because of differing views. Where there is much agreement is how to treat a person in business on his own account. Thus, the rule 35 legislation aims to close loopholes in taxation law, but will

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<sup>42</sup> Department of Trade and Industry, *Discussion Document on Employment Status* (2002), [www.dti.gov.uk/files/file27471.pdf](http://www.dti.gov.uk/files/file27471.pdf) (23/10/06).

<sup>43</sup> Department of Trade and Industry, *Success at Work: Protecting Vulnerable Workers, Supporting Good Employers* (2006), [www.dti.gov.uk/files/file27469.pdf](http://www.dti.gov.uk/files/file27469.pdf) (23/10/06).

<sup>44</sup> Above, note 8.

not treat as an employee any person who is genuinely carrying on his own business. In a similar way the statutory worker definition excludes those carrying on a business undertaking. A way forward could be to clearly define a person in business, while attaching employee rights and responsibilities to other workers.

In the American case, *US v Silk*,<sup>45</sup> the Supreme Court asked whether workers were employees “as a matter of economic reality”. The judges went on to decide that drivers, who owned their own trucks, were in fact “small businessmen”. A year later, Lord Wright, in the Privy Council case, *Montreal Locomotive Works Ltd v Montreal and Attorney General for Canada*,<sup>46</sup> explained that all elements should be examined and said:

In this way it is in some cases possible to decide the issue by raising as the crucial question whose business is it, or in other words by asking whether the party is carrying on the business, in the sense of carrying it on himself or on his behalf and not merely for a superior.

These authorities were cited not only in the *Ready Mixed case*<sup>47</sup> but also in *Market Investigations v Minister of Social Security*,<sup>48</sup> where Cooke J asked if a person was “in business on his own account”. He thought no exhaustive list could be compiled of relevant considerations to determine the question, but stated:

The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors which may be of importance are such matters as whether the man performing services provides his own equipment, whether he hires his own helper, what degree of financial risk he takes, what degree of responsibility for financial investment management he has, and

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<sup>45</sup> (1946) 331 US 704.

<sup>46</sup> [1947] IDLR 161.

<sup>47</sup> Above, note 11.

<sup>48</sup> [1968] 2 All ER 732.

whether and how far he has an opportunity of profiting from sound management in the performance of his task.

Cooke J's observations have been cited with approval by the High Court, Court of Appeal and Privy Council.<sup>49</sup> Importantly, Mummery J, in *Hall v Lorimer*,<sup>50</sup> emphasised the need to avoid check lists and advised that you should stand back to gain a qualitative appreciation of the whole.

Asking if a person is "in business on his own account" tells us too little as it begs too many questions, ie, it is not dissimilar to asking whether a person is self-employed. Still, as with all tests, the essentials need articulating, as Cooke J attempted. This was picked up by the Court of Appeal in *Lane v Shire Roofing*,<sup>51</sup> where Henry J, quoting *Silk*'s question as to whether the men were employees "as a matter of economic reality", said:

The answer to this question may cover much of the same ground as the control test (such as whether he hires his own equipment and hires his own helpers) but may involve looking to see where the financial risk lies, and whether and how far he has an opportunity of profiting from sound management in the performance of his task.

The test concentrates on the definition of self-employment rather than employment status and, thus, identifies who is not entitled to employment rights and will not make another vicariously liable. Identifying risk and opportunity for profit as key indicators means that a high degree of independence is sought.

The concept of a person, who bears the risk and has an opportunity for profit, coincides both with the popular understanding of the entrepreneur and with the Marxist view of the capitalist gaining surplus value.<sup>52</sup> Such a person would not include a hotel worker on an hourly rate under a zero-hours contract; it would not

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<sup>49</sup> *Hall (HM Inspector of Taxes) v Lorimer* [1994] IRLR 171; *Ferguson v Dawson & Partners* [1976] 1 WLR 1213; *Lee Ting Sang v Chung Chi-Keung* [1990] ICR 409.

<sup>50</sup> Above, note 50.

<sup>51</sup> Above, note 35, 496.

<sup>52</sup> E Mandel, *Marxist Economic Theory* (Merlin: London, 1972).

include a building worker on an hourly rate even where substitution is a possibility under the contract. The easy escape route provided by the Multiple Test and the irreducible minimum is lacking.

The Economic Reality Test is clearly likely to embrace a person investing considerable sums in a business, but such investment is not essential. The person delivering the professional services to a variety of employers may not invest a substantial sum in the business, but, in operating in this way, he takes financial risks and has the opportunity to profit. The variety of employers would help to indicate his independence.<sup>53</sup>

For many the nature of employment is fast changing. A high premium is placed on flexibility and in the knowledge-based economy<sup>54</sup> and the courts have supported this approach by placing a duty on employees to adapt.<sup>55</sup> At the same time, highly skilled employees, given their expertise, often work with limited supervision. Such persons' income, partly or wholly, depends on the success of the business. This independence at work and dependence on the success of the business does not necessarily lead to a conclusion of self-employment. This would only occur if he took it upon himself to be responsible for the management and profitability of a business. A court or tribunal would have to decide whether the risk carried was more appropriate to an employee or independent contractor.

The Economic Reality Test is clearly not dominant today. The Court of Appeal's judgement in *Nethermere* which has received the House of Lords' approval, clearly rejects the argument that it is the "fundamental test". It ruled that it would only be applicable where there is a choice between a contract of service and contract for services, explaining that there could be a third type of contract or no contract at all. In spite of it not being currently in favour, we would be unwise to forget too quickly a test that identifies the key elements of being in business and prevents the unethical evasion of legal responsibility.

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<sup>53</sup> See *Hall (HM Inspector of Taxes) v Lorimer*.

<sup>54</sup> H Collins, "Regulating the Employment Relation for Competitiveness", (2001) 30(1) *Industrial Law Journal*, 17-47.

<sup>55</sup> *Creswell v Inland Revenue* [1984] ICR 508.

## Conclusion

The key concern, that employment status is easy for an employer to evade, remains. The Government, proud of its success in achieving full employment goals, celebrates the wide diversity of working arrangements and the different legal relationships.<sup>56</sup> In deciding against extending employment rights to statutory workers, it adopts the employer view that reform was likely to result in a reduction in temporary work and a lack of permanent work to replace it. This is unconvincing as the main unfair dismissal right is only available to those employed for more than a year. It is unlikely that many truly temporary contracts need to last for a year or more. In spite of this the Government sees labour market flexibility as the key and rejects reform.

Clearly the reality in the UK and elsewhere in Europe is a variety of employment relationships,<sup>57</sup> but the answer is not to define minutely each relationship. This would lead to complexity far beyond our current experience and is likely to be unworkable. The ethical solution is to consider who has the shoulders to bear both the burden of vicarious liability and the burden of no employment rights. These burdens, the author believes, should only fall on those who are truly in business on their own account. The key to this status is having the opportunity for profit and the risk of loss. With appropriate adaptation to include not-for-profit organisations, the Economic Reality Test does offer the best hope of a definition that can inform different areas of law and avoid complexity.

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<sup>56</sup> See above, note 44.

<sup>57</sup> M Freedland, "From the Contract of Employment to the Personal Work Nexus", (2006) 35(1) *Industrial Law Journal*, 1-29.