

Who Is An Employee?

WHO IS AN EMPLOYEE?

The first step is to identify who an employee is or rather if the personnel working for the company is actually an employee or not. This step is essential as the rights afforded to the employee might be different from the rights applicable to a contractual worker. For example, only persons with the status of 'employee' can claim unfair dismissal, maternity leave and redundancy rights.

Not everyone who work for others are considered to be employees:

- some fall instead into the wider category of 'workers' (who, depending on the jurisdiction you are based, might have a different set of employment rights)
- some work for others but remain independent contractors
- sometimes, as in the case of agency workers, a worker may have two likely employers and may not be clear if he is employed by either one (or both) of them.

Under English law, the workplace protections of the Equality Act 2010 affords protection to a category of in-dividuals which is wider than 'employees'. Instead of defining who has rights by reference to whether or not the individual has 'employee' or 'worker' status, rights are extended to all persons in 'employment' within the meaning of the Act.

Statutory Definitions of 'Employee'

(N.B. Here we are using the definition that is given under English law, this definition is comprehensive and self explanatory)

Employment Rights Act 1996

Under the ERA 1996, **an 'employee' is defined as an individual who has entered into or works under (or, where the employment has ceased, worked under) a 'contract of employment'.**

References: ERA 1996, s 230(1)

For these purposes, a 'contract of employment' is defined as a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

References: ERA 1996, s 230(2)

Transfer of Undertakings (Protection of Employment) Regulations 2006

Under TUPE, 'employee' and 'contract of employment' are defined more widely than in the ERA 1996:

References: TUPE, SI 2006/246, Reg 2(1)

- 'employee' means any individual who works for another person, whether under a contract of service or apprenticeship or otherwise, but does not include anyone who provides services under a contract for services
- 'contract of employment' means any agreement between an employee and his employer determining the terms and conditions of his employment

For the purposes of TUPE, 'employee' therefore includes not only a servant or apprentice, but also anyone who works for another in any capacity, except an independent contractor under a contract for services. However, it will not include:

- equity partners
- office holders

Determining Whether an Individual is an Employee: Overview

A contract of employment (sometimes called a contract of service) exists if the following four conditions are fulfilled:

(Refer the case of *Ready-Mixed Concrete (South East) v Minister of Pensions and National Insurance* [1968] 1 All ER 433)

- the individual undertakes to provide his own work and skill in the performance of some service in re-turn for remuneration.
- in performing that service, the individual is subject to a sufficient degree of control by the other party
- there is 'mutuality of obligation' between the parties, which means:
 - an obligation on the individual to do work that is offered by the other party, and

- an obligation on the other party to pay the individual (whether or not work is provided), and in some cases also an obligation to provide work
- the other provisions of the contract are consistent with its being a contract of employment

Personal Service

The requirement for personal service as a prerequisite for employee status means that the person contracting to do the work must agree under the contract to do it himself.

A promise simply to get the work done by somebody, even if the person who ultimately does the work is not the person contracting with the employer to do it, is not enough, ie a right under the contract to substitute another person (if the right is a genuine reflection of the true agreement between the parties, as explained below) negates any obligation to perform work personally.

A contract must be construed in the light of the circumstances in which it was made to determine whether or not it includes an obligation to do work personally. It must be determined whether it was the parties' intention, when the contract was made, that there should be an obligation to perform the work personally. It is not enough that that might have been their understanding or expectation.

Given the purposive approach to be taken in interpreting the true terms of an employment contract (referred to above), an express written right under a contract to substitute another person to do the work will only negate the personal service requirement, and hence stop someone acquiring employee status, if the right is a genuine reflection of the true agreement between the parties. For example, in *Autoclenz*, an express written term allowing substitution was introduced into the contract by the employer, but it was found not to reflect the true agreement between the parties, who in fact did not intend or envisage any such substitution ever occurring, and so the term could be disregarded.

(See: *Autoclenz v Belcher* [2011] IRLR 820)

Hence the insertion by an employer of a substitution clause into a contract, in an attempt to defeat the acquisition of employee rights, will not be successful if the clause does not reflect the true agreement between the parties, e.g., where, as a matter of fact, it was always intended

and envisaged that the employees would provide personal service and in actual fact they did so.

Having said that, the mere fact that a legal right to provide a substitute worker is never exercised in practice does not, on its own, mean that it is not a genuine right.

Where the individual has an unfettered right to appoint a substitute to work in their stead, without any sanction (and that is the true agreement between the parties), the personal service element is missing so that individual cannot be an employee.

By contrast, a limited right to send a substitute, subject to the employer's express approval, is not inconsistent with an obligation to provide work personally.

Control

The 'control' test seeks to determine whether the putative employer has the power to exercise a sufficient degree of control over the putative employee for the agreement between them to qualify as a contract of employment.

In the context, 'control' has been said to include the power of deciding:

(See *Ready-Mixed Concrete (South East) v Minister of Pensions and National Insurance* [1968] 1 All ER 433)

- the thing to be done
- the way in which it shall be done
- the means to be employed in doing it
- the time when, and the place where, it shall be done

In practical terms, the 'control' test will examine such things as the extent to which the employer:

- directs how, when and where the work is done
- keeps track of attendance and lateness
- decides when holiday can be taken
- is in charge of disciplining the worker

However, this does not necessarily mean that work must be carried out under the employer's actual supervision or control; the question is whether ultimate authority over the individual

in the performance of his work rests with the employer, so that he is subject to the employer's orders and directions.

What is sufficient control will vary from case to case. The more highly skilled the employee, the less the de-gree of control to be expected; in some cases the control may be no more than notional.

In order to assess whether the putative employer has sufficient control, the starting point is to look at the ex-press terms of the contract. If they do not deal fully with the matter, the question must be answered by con-sidering next what may be implied.

Mutuality of Obligation

For there to be a contract of employment, there must be mutuality of obligation between the parties to it. This has been said, in broad terms, to mean that there must be an 'irreducible minimum of obligation on each side'.

The precise nature of the obligations owed by each party to the other has been characterised differently in different cases.

Putting the point negatively, if there is genuinely no obligation on the employer to provide any work or pay, and none on the putative employee to accept any work provided, then the relationship is too casual to con-stitute a contract of employment, ie the mutuality of obligation test will not be satisfied.

If instead of looking at absence of obligation, one tries to define positively what level of obligation will suffice on each side of the bargain, the required obligation on the putative employee is perhaps the easier to formu-late of the two: it seems fairly clear that an employee must be obliged to accept and do such work as is of-fered to him under the contract (although in some cases an obligation to accept and do some reasonable proportion of the work offered has been viewed as sufficient).

Umbrella Contracts

In some cases, although, on each occasion that a putative employee actually does work, there is no doubt that he is working on that occasion under a contract of employment, the question arises as to whether the gaps between such working assignments are also covered by some overarching 'umbrella contract'. This issue will often be important in determining whether an

individual has sufficient continuity of employment to bring a particular type of claim, such as unfair dismissal: if the gaps are covered by an umbrella contract of employment, a sufficient period of continuous employment will be established. This will of course depend on the question of whether there remained an 'irreducible minimum of obligation on each side' during those gaps.

It has been held that where a contract expressly states that there is no obligation on the part of the putative employer to provide work, or on the part of the putative employee to accept any work offered, this will mean there is insufficient mutuality of obligation for it to be a contract of employment. However, in light of the Supreme Court's subsequent ruling in *Autoclenz* such an express term will only be effective if it describes the true agreement between the parties. If it does not, the term can be disregarded. Hence an employer will not stop an individual from acquiring employee status by inserting such a term in his contract if the lack of mutuality claimed by it is not reflected in the reality of the agreement between the parties.

Whether terms are consistent with agreement being a contract of employment

It is impossible to draw up a complete list of criteria to be considered when deciding whether a contract is:

- one of employment, or
- one under which an independent contractor is providing his services

For instance, it may be that an independent contractor is prepared, for the duration of an assignment, to provide personal service, submit to an employment-like level of control, and agree to the degree of mutuality of obligation normally associated with employment, and yet is still in fact providing services under the auspices of his own independent business, ie he is not in fact an employee.

When looking at whether the contract is with an employee, or with someone who is a performing the required services as a person in business on his own account, some of the features which may point towards or away from employee status are:

- remuneration and how it is paid:
 - a regular wage or salary tends towards a contract of service
 - profit sharing or the submission of invoices for set amounts of work done, towards independence

- provision of capital and degree of risk -- how far, if at all, does the worker invest in his own future?
- provision of tools and equipment
- whether the worker is tied to the employer, or free to work for others (especially rival enterprises)
- whether there is a 'traditional structure' of employment in the trade
- whether the worker is subject to the company disciplinary procedure and other procedures and policies
- provision of benefits such as:
 - paid holiday
 - sick pay
 - subsidised gym membership
 - medical expenses insurance
- the extent to which the worker is 'part and parcel' of the employer e.g.,
 - participates in staff training
 - participates in staff events e.g. New Year parties
 - has an employee, visitor or temporary ID pass to the employer's premises
- arrangements for the payment of income tax and national insurance
- how the arrangement is terminable -- a power of dismissal points towards employment

Individuals Without 'Employee' Status May Still be 'Workers'

All persons who have employee status also fulfil the statutory definition of a 'worker' for the purpose of the statutory protections that are accorded to that wider category of working individuals. Conversely, not all workers will have characteristics such as to qualify for 'employee' status.

It follows that, even if an individual does not qualify for employee status, he may still qualify as a 'worker'.

The tests that need to be passed for 'employee' and 'worker' status can be summarised as follows:

Test to be passed	Whether required for employee status	Whether required for worker status
Personal service	Yes	Yes
Individual doing work not doing so in context of their own business, ie: (a) individual not in fact providing services as an independent contractor and (b) person receiving services not a client or customer of the individual's business	Yes	Yes
Control	Yes	No
Mutuality of Obligation	Yes	Only to the extent necessary to determine that there was an intent to create a legally binding relationship, i.e., that there is a contract at all

Hence an individual will not be an 'employee', but will be a 'worker', if:

- he fails either or both of:
 - the control test
 - the (wider, employee-type) mutuality of obligation
- but nonetheless:
 - he passes the personal service test and
 - the other party to the contract (for whom he is doing the work) is not a client or customer of his profession or business undertaking

In these circumstances, his 'worker' status will mean that:

- he possesses all the employment protections afforded to 'workers':
- he does not, however, have the protections only extended to employees