Who is an employee? General principles

S.94(1) of the Employment Rights Act (ERA) 1996 provides "an employee has the right not be unfairly dismissed by his employer." In other words only an employee, as opposed to any other category of worker, has the right not to be unfairly dismissed. The meaning of employee is found at s.230. S.230(1) and s.230(2) provide:

(1) In this Act 'employee' means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment
(2) In this Act 'contract of employment' means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

An employee is to be contrasted with a worker. "Worker" is defined at s.230(3). This provides:

(3) In this Act 'worker' (except in the phrases 'shop worker' and 'betting worker') means an individual who has entered into or works under (or, where the employment has ceased, worked 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

In other words the term "worker" is generic encompassing both employees and other categories of worker. Thus the distinction is to be made between employee, whose meaning is found at s.230(1) and (2), and other categories of worker defined at s.230(3). It must be noted that s.230 applies to the term 'employee' as it is used throughout the ERA 1996. Hence it provides the definition of the term for the purposes of other claims besides unfair dismissal made under the Act. These include claims for declarations of terms and conditions under s.1 to s.11 and claims for redundancy payments under s.135 to s.165.

The statutory definition of employee is broad providing merely that an employee is someone employed under a contract of employment. The authorities frequently refer to a contract of employment as a "contract of service" as opposed to a "contract for services" or a contract with a self-employed independent contractor. It should also be noted that many of the older cases refer to employer and employee as "Master" and "Servant" respectively.

The broad approach to determining whether a worker is an "employee" provides Tribunals with considerable flexibility. It recognises that given the complex and ever changing nature of industrial relationships a rigid definition is unrealistic. It has enabled the jurisprudential evolution of the term "employee" to be driven by developments in such relationships. Above all it can be said that the statutory definition is predicated on an assumption that an employer-employee relationship is often recognised when seen but rarely capable of being clearly or restrictively defined.

Whilst s.230 has been construed broadly it is worth noting that the Equality Act (EQUA) 2010 (and before it the anti-discrimination legislation which it replaced) has a broader definition still of 'employee'. S.83(2)(a) of the Act provides 'employment' means employment under a contract of service or of apprenticeship or a contract personally to execute any work or labour, and related expressions shall be construed accordingly." This definition is wider than s.230. Whereas s.230 concerns solely a contract of service s.83(2)(a) covers contracts of service and any contract to personally execute any work or labour

General matters: Interaction with tax law, self-employment and global contracts

The elasticity of the approach to s.230 is graphically illustrated by how it differs from the approach in tax law and the nature of its interaction with the concepts of self-employment and global contracts.

It does not necessarily follow that because the worker is self-employed for the purposes of tax law that he is self-employed for the purposes of unfair dismissal law and hence not entitled to avail himself of the right conferred by s.94(1). This is shown in the decision of the EAT (Slynn J Presiding) in *Airfix Footwear Ltd v Cope* [1978] IRLR 396. Mrs Cope worked at home making heels for shoes manufactured by Airfix. She worked five days a week and in accordance with instructions issued to her by the company. She paid her own tax and national insurance contributions. Despite this the Tribunal and the EAT were both satisfied that she was an employee and hence entitled to claim unfair dismissal. This was because "the terms of the relationship, apart from the position in regard to tax or National Health Insurance, were as consistent with that of master and servant as with employer and independent contractor." In the circumstances the company had sufficient control over the way she performed her work for the relationship between the parties to be categorised as one of employer and employee.

It does not follow that because the worker is not self-employed he is an employee. This was made clear by the EAT (Wood J Presiding) in *Ironmonger v Movefield Ltd t/a Deerings Appointments* [1988] IRLR 461. A company called Unilever invited Mr Ironmonger to work for them as a clerk of works on one of their building projects. It was agreed that he would be engaged as a contract worker by an agency, Deerings, which would be responsible for deduction of tax and national insurance contributions and that he would be covered by their employers' liability insurance in respect of any injuries. The Tribunal found that he was not self-employed and that therefore he had to have an employer. The EAT held that the Tribunal had erred in law. "The error" they held "was to approach the case from the point of view of eliminating 'self-employment'". A contract, the EAT went on, "did not necessarily have to fall within the definition of a contract of employment or of self-employed." On the facts it could not be said that Deerings were the employers even though they assumed responsibility for his tax and national insurance.

The question of whether the contract in question is a contract of employment will sometimes arise in the context of what is said to be an umbrella or global contract. Slade LJ in *McLeod and others v Hellyer Brothers Ltd, Wilson and another v Boston Deep Sea Fisheries Ltd* [1987] IRLR 232 defined this in the following terms:

> The concept of a global contract of employment, though very familiar to practitioners in this field, is not easy to define with precision. It may become relevant in cases where the evidence discloses what on the face of it is a series of contracts for service or services between the same parties and covering a substantial period of time. On the particular facts of such a case it may be open to the Industrial Tribunal to properly infer from the parties' conduct (notwithstanding the absence of any evidence as to any express agreement of this nature) the existence of a continuing overriding arrangement which governed the whole of their relationship and itself amounted to a contract of employment.

In such cases there are gaps when one contract ends and before a subsequent one commences. The question thus arises as to whether the gap was covered by an overriding contract, or global contract, of employment. This will be discussed in this chapter in the context of considering mutuality of obligation and a course of dealing.

The traditional approach

The traditional approach to determining whether a worker was an employee was to apply the so called "control" test –namely whether, in broad terms, the worker was subject, as regards when, where and how he undertook his work, to the "control" of the other party to the contract –namely the putative employer. *Yemens v Noakes* [1880] 6 QBD 530 is an example of the recitation of the test. Bramwell J defined an employee, or, to use parlance favoured at the time, a "servant" as "a person subject to the command of his master as to the manner in which he shall do his work." The "control" test remains important both as regards the approach to s.230 and in other areas of law where an issue arises as to whether a worker is an employee. However, its meaning has been subject to judicial development and it has ceased to be the sole determinative factor.

"Control" and "mutuality of obligation"

The authorities have revealed that the irreducible minimum of a contract for employment includes the requirements of "control" and "mutuality of obligation." It has already been noted that "control" was, traditionally, the most determinative factor but that its meaning has been developed. "Mutuality of obligation" in broad terms requires that the putative employer is obliged to provide work and the putative employee is obliged to perform it. Again its true meaning has proven to be flexible and elusive.

Whilst not a case of unfair dismissal the decision of the High Court in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 has proved to be the basis upon which, in the context of claims for unfair dismissal, the jurisprudential development of the term "employee" has been built. The Minster claimed that the company was liable to pay national insurance contributions in respect of a driver whose services it engaged. The driver hire-purchased the vehicle he used for work from the company, it was painted with the company's colours and insignia, he wore the company's uniform, the company could require repairs to the vehicle and the driver was responsible for all the running and repair costs. If, due to illness, the driver was unable to discharge his duties he could hire another driver.

Mackenna J, in a famous and much cited passage, held:

> a contract of employment exists if these conditions are fulfilled: (i) The servant agrees that, in consideration of wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, express or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service.

As for control his Lordship held this "includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in so doing it, the time when, and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant. The right need not be restricted."

His Lordship held that the driver being required to repair the vehicle, entitled to hire another driver if he could not discharge his duties and make the vehicle available throughout the contract period were more consistent with "a contract of carriage than a contract of service."

Ready Mixed Concrete provides that the crucial ingredients of a contract of employment are the worker being subject to the other party's control to a sufficient degree (often known as the "control" test) and the other provisions of contract being consistent with a contract of employment. It has become clear, as will be shown in due course, that since *Ready Mixed Concrete,* for the latter requirement to be satisfied there must be mutuality of obligation. This will be discussed shortly. Firstly, however, it is

important to show how, in some cases, control can be a determinative factor. An illustrative example of this is the decision of the EAT (Lindsay J Presiding) in *Motorola Ltd v (1) Davidson and (2) Melville Craig Group Ltd* [2001] IRLR 4.

Mr Davidson was assigned by Melville Craig, an Employment Agency, to work at Motorola. Under the terms of his contract with Melville he was obliged to comply with all reasonable instructions and requests issued by Motorola. Furthermore, Motorola also had the right to insist that Melville terminate his contract. However, as it turned out, Motorola, and not Melville, suspended him, commenced disciplinary proceedings against him and dismissed him. Indeed Melville was unaware of the disciplinary matters. The EAT upheld the Tribunal's finding that Motorola had sufficient control over him and hence he was an employee of theirs' and not Melville. The EAT held that given that "when Mr Davidson attended for work, Motorola determined the duties he performed, when he did them and the means by which he was to do them" it was "unreal to ignore the existence of that practical degree of control simply because a direct legal right did not lie in Motorola under a contract it had made with Mr Davidson." Thus for there to be sufficient control for the worker to amount to an employee it does not necessarily matter that the control does not take the form of a direct legal or contractual right that the alleged employer has against the worker. It can suffice that as a matter of practicality the alleged employer exercises the relevant level of control.

The origins of the requirement that a contract, to be a contract of employment, must provide for mutuality of obligation can be found in the decision of the Court of Appeal in *O'Kelly and others v Trusthouse Forte plc* [1983] IRLR 369. The Claimants worked as caterers for Trusthouse in the Banqueting Department of the Grosvenor House Hotel. They did not have fixed hours. Rather they were "regular casuals" which meant that they were assured preference in the allocation of any available work. They were dismissed and the question arose as to whether they were employees. The Tribunal found that there were features in their working relationship with Trusthouse which were consistent with a contract of employment. These included them working under the direction and control of the alleged employers and using clothing and equipment supplied by them. The Tribunal also found there were factors in the relationship that were not inconsistent with a contract of employment. These included the workers being paid for work actually performed rather than receiving a regular wage or retainer and them not being remunerated on the same basis as permanent employees by, for example, not receiving sick pay and in not being included in the pensions scheme. However, the Tribunal concluded, the workers were not employees because they had the right to decide whether or not to accept work and the alleged employers were not obliged to provide it.

The EAT and the Court of Appeal upheld their decision. Ackner LJ held:

> the assurance of preference in the allocation of any available work which the 'regulars' enjoyed was no more than a firm expectation in practice. It was not a contractual promise. The appellants, of course, expected the respondents to accept engagements rostered, but to suggest that a failure to accept amounted to a breach of contract is going too far. They were entitled to choose whether or not to attend, and however irritating it might have been to Trusthouse Forte if faced with a refusal it would have been quite unreal to conclude that either party would have thought it was a breach of contract.

It is especially noteworthy that the Court of Appeal upheld the Tribunal's decision despite the Tribunal finding that the Claimants worked under the direction and control of Trusthouse Forte. This suggests that ultimately the question of whether, for the purposes of unfair dismissal, the worker is an employee turns on whether there is mutuality of obligation – i.e. the worker is obliged to accept work and the other is obliged to provide it.

Whilst the mutuality of obligation approach can be restrictive the decision of the Court of Appeal in *Nethermere (St Neots) Ltd v Taverna and Gardner* [1984] IRLR 240

shows that, nonetheless, mutuality of obligation can be readily implied. Nethermere operated a garments factory. Mrs Taverna and Mrs Gardner worked for the company from home carrying out sewing work. The company provided them with sewing machines. They could fix their own hours, take holidays and time off when they pleased, and vary the number of garments to take on any particular day. Following a dispute about holiday pay they were dismissed. Both the EAT and the Court of Appeal upheld the Tribunal's finding that they were employees.

Dillon LJ accepted that "an arrangement under which there was never any obligation on the outworkers to do work or on the company to provide work could not be a contract of service." Stephenson LJ held that "there must, in my judgment, be an irreducible minimum of obligation on each side to create a contract of service." Kerr LJ in a similar vein opined that "the inescapable requirement concerning the alleged employees....is that they must be subject to an obligation to accept and perform some minimum, or at least reasonable, amount of work for the alleged employer."

Two points, regarding the importance of mutuality of obligation, emerge from the decision. Firstly, mutuality of obligation forms part of the irreducible minimum of a contract of employment. If there is no mutuality of obligation then the contract concerned is not a contract of employment. Secondly, however, the mere fact that the worker has considerable freedom in terms of the hours they work and the amount of work they take on will not mean *per se* that there is no mutuality. It suffices that the worker is obliged to accept a minimum or reasonable amount of work.

The Court of Appeal's decision in *Clark v Oxfordshire Health Authority* [1998] IRLR 125 again reveals that the demands of mutuality of obligation are flexible. Mrs Clark was a nurse. She had no fixed or regular hours. She was offered work as and when a temporary vacancy occurred. She had no entitlement to holiday pay or sick pay. Her pay was, however, subject to deductions in respect of PAYE and national insurance. Her contract also prescribed disciplinary and grievance procedures, encouraged union membership and imposed a duty of confidentiality. She worked for the authority for three years before she was dismissed. During those three years there was a period of two years when she provided no services and had four weeks' leave. The Tribunal found there was no global contract but failed to consider whether, when she did work, there was a specific engagement which amounted to a contract of employment. The EAT held that whilst mutuality of obligation was an important factor it must be considered in the light of the others terms of her contract and on this basis the EAT held there had been a global contract of employment. The Court of Appeal, however, held there was no global contract of employment and that the EAT had erred in law in finding otherwise.

Before the Court of Appeal it was submitted on behalf of Mrs Clark that the irreducible minimum of mutual obligation required to found a global contract of employment should be set at a low level and that there was sufficient mutuality in the present case. Sir Christopher Slade accepted that the "mutual obligations required to found a global contract of employment need not necessarily and in every case consist of obligations to provide and perform work. To take one obvious example, an obligation by the one party to accept and do work if offered and an obligation on the other party to pay a retainer during such periods as work was not offered would in my opinion, be likely to suffice."

However, "*some* mutuality of obligation is required to found a global contract of employment" and there was none in the present case. The Claimant relied on the confidentiality clause but his Lordship observed that this "would have stemmed merely from previous single engagements." Thus the Tribunal was correct to find there was no global contract. However, the Tribunal had erred in failing to consider whether the specific engagements could have amounted to a contract of employment. Accordingly the matter was remitted for consideration of this issue. Thus whilst the decision on one hand affirms the supreme importance of mutuality of obligation on the other hand it seemingly lessens the restrictiveness of this approach by holding that this does not

necessarily in every case mean that there are constant and ongoing obligations to provide and perform work. It suffices that there is *some* mutuality.

This dilution of what is required by way of mutuality is especially apparent in cases of causal or sessional employment. There it has been found that a right to refuse work and a right not to offer it does not prevent there being a contract of employment provided there is some, limited right to offer and to accept work. (see, for example, *Cotswold Developments Constructions Ltd v Williams* [2006] IRLR 181 and *St Ives Plymouth Limited v Haggerty* [2008] UKEAT/0107/08 discussed in detail in the next chapter). It remains to be seen to what extent this approach will apply in other cases.

Whilst mutuality is an essential ingredient of a contract of employment the decision of the Court of Appeal in *Montgomery v Johnson Underwood Ltd* [2001] IRLR 269 suggests that even when mutuality is present the absence of control will mean that the worker cannot be called an employee for the purposes of s.230. Mrs Montgomery was registered with an employment agency. She worked for a client company for two years. She was paid by the agency on the basis of time sheets approved by the client. The client became unhappy with her use of its telephone for personal calls and asked the agency to terminate her assignment which it duly did. She brought her claim for unfair dismissal against both the agency and the client. The Tribunal found that there were factors that pointed towards her being an employee of the agency – such as them being responsible for paying her – and factors that went against her being an employee of the agency – such as there being "little or no control, direction or supervision" and, furthermore, no mutuality of obligation. Nonetheless the Tribunal was satisfied that the number of factors indicating she was employed by the agency outweighed those that suggested otherwise and thus found that she was indeed employed by the agency. The EAT upheld their decision. The Court of Appeal did not.

Buckley J held that the concepts of "control" and "mutuality of obligation" are dynamic whose meaning will depend on the circumstances of the case and developments in industrial relations: "*Clearly as society and the nature and matter of carrying out employment continues to develop, so will the court's view of the nature and extent of 'mutual obligations' concerning the work in question and 'control' of the individual carrying it out*." However, this flexibility "does not permit those concepts to be dispensed with altogether." For whilst tribunals should "consider the whole picture to see whether a contract of employment emerges, it is thought important that 'mutual obligation' and 'control' to a sufficient extent are first identified before looking at the whole." Furthermore his Lordship could not agree that 'control" and 'mutual obligation' are "no more than matters to be weighed up with all the other factors."

As for mutuality of obligation his Lordship was willing to "accept that an offer of work by an agency, even at another's workplace, accepted by the individual for remuneration to be paid by the agency, could satisfy the requirement of mutual obligation." However, his Lordship was not prepared to find that this did definitely amount to mutuality of obligation in the present case as it "was not really explored before the tribunal" and because of the conclusion he had "reached on control." This conclusion was that there was no control given the "clear finding by the tribunal" which the Court was not entitled to interfere with. That said, his Lordship was "not prepared to say that an assignment provided and paid for by an agency could never, as a matter of law, give rise to 'sufficient control." Given that the Tribunal had found there was no control it followed that Mrs Montgomery was not employed by the agency.

Four points emerge from the decision. Firstly, the question is not solely determinative upon control and mutuality of obligation. All the factors must be weighed. Secondly, however, control and mutuality of obligation are the irreducible minimum and there can be no contract of employment when they are not present. Thirdly, their precise meaning will depend on the circumstances of the case. Hence Buckley J refused to rule out that offering work at another's workplace could amount to mutuality and an agency providing an assignment could amount to control. Fourthly, it seems that it will

not suffice that one of the fundamental requirements is present – both control and mutuality of obligation must be found. Whilst Buckley J did not say as much expressly this seems to be the principle underlying his assertion that it was not necessary to consider whether the offer of work by the agency amounted to mutuality given that he had found that there was no control. In other words the absence of one of the requirements *per se* meant that the contract could not be one of employment.

The EAT (Elias J Presiding) in *Stephenson v Delphi Diesel Systems Ltd* [2003] ICR 471 made clear why a contract to be a contract of employment must contain both mutuality and control. The facts have little bearing on the point in question. In discussing the general principle the EAT held:

> The significance of mutuality is that it determines whether there is a contact in existence at all. The significance of control is that it determines, if there is a contract in place, it can properly be classified as a contract of service, rather than some other kind of contract.

This seems to place control centre stage. However, it would be wrong to say that it limits the role of mutuality to determining whether there is a contract. Rather it provides that the presence of mutuality determines that the contract is one for labour or services generally. The presence of control ensures that it is specifically a contract of service, that is a contract of employment.

However, earlier the EAT (Elias J Presiding) in *Consistent Group Ltd v Kalwak and others* [2007] IRLR 560 had appeared to diminish the need for 'control' or at the least the extent to which 'control' is required. The Claimants were engaged by an agency, Consistent Group Ltd, to undertake work on behalf of its clients. Both the Tribunal and EAT were satisfied that there was mutuality of obligation. This was because the contract between the workers and the agency provided the agency were to honour a period of assignment and during that assignment the agency were to provide the workers with accommodation. The EAT held that this implied that whilst the workers stayed in the accommodation the agency was duty bound to provide work and the workers to accept it.

This left the question of control. The difficulty here was that the agency did not have day-to-day control of their work. However, the EAT held, that "control" is "not always a necessary condition." As for *Montgomery* when Buckley J held there was insufficient control "he was not saying as a matter of law there never could be sufficient control to constitute a contract of employment with the agency." Furthermore, a requirement for day-to- day control did not reflect the reality of many working arrangements:

> A cleaning company might send staff to clean premises in circumstances where the party for whom they clean exercises a greater degree of control than the company. Similarly a catering company may send staff into a works canteen in circumstances where the client retains significant control over what food is produced." Ultimately what, in the present case, was determinative was that the Claimants did their job "where and when they were told to by the agency.

It is perhaps not clear whether the effect of the decision is what counts is the degree of control or whether, as indeed the EAT expressly stated, control is not a necessary condition (although these words can be construed as meaning day-to- day control is not a necessary condition).

The Court of Appeal overturned the EAT's decision and remitted the matter to the Tribunal ([2008] IRLR 505). This was on the grounds that the EAT had erred in finding that a term, implied from the conduct of the parties, overrode a written term in the contract that expressly stated there was no mutuality. This part of the decision will be discussed at greater length in the section in this chapter concerned with the approach to identifying the relevant terms of the contract. For the present it suffices to note that the Court of Appeal did not challenge or criticise the principles enunciated by the EAT as to the meaning and importance of control. It is submitted that to this extent the EAT's decision remains good law.

Control and mutuality of obligation are quintessential ingredients of a contract of employment. They are not the sole requirements. The Tribunal will be required to weigh up other factors that go towards the worker being an employee – such as him being paid on a PAYE basis, being entitled to holiday pay and the alleged employer providing him with the tools for performance of his duties – and the factors that go towards the worker being self-employed – such as him being paid for work performed and being responsible for his own taxes. However, the absence of 'control' and 'mutuality of obligation' – the Court of Appeal in *Montgomery* and the EAT in *Stephenson* suggesting that both rather than merely one must be present – will mean, despite the existence of other factors consistent with a contract of employment, that the worker is not an employee and hence not entitled to claim unfair dismissal.

The precise meaning of 'control' and 'mutuality of obligation' is unclear and to an extent dynamic to reflect developments in industrial relations. In broad terms 'control" refers to the power to determine what duties are to be performed and when and how they are to be performed. That the requirement is flexible is made clear by the EAT in *Motorola* and the Court of Appeal in *Montgomery* holding that, in certain circumstances, an agency assigning an employee to work for one of its client companies could amount to control. Mutuality of obligation ordinarily means that the alleged employer is obliged to provide work and the alleged employee is obliged to perform it. However, this will not necessarily always be so. For example the Court of Appeal in *Clark* held, albeit *obiter*, that the alleged employer not providing work but remunerating the worker on a retainer basis when work is not available could satisfy the requirement of mutual obligation. What matters is that there is *some* mutuality. The nature of the mutuality required will depend on the circumstances of the case.

Mutuality of obligations and the wage/work bargain

The wage/work bargain refers to the putative employee's obligation to work and the putative employer's obligation to pay for that work. This has led to questions as to whether the obligation to pay must take the form of the wages being paid directly by the would-be employer.

The Privy Council considered the point in *Cheng Yuen v Royal Hong Kong Golf Club* [1998] ICR 131. Mr Chen Yuen was a caddie. The gold club allowed him to work from their premises. He would then caddie for a golfer. The club would pay Mr Cheng Yuen's his fees but would then recoup them from the golfer. Thus the golfer and not the club was ultimately responsible for the paying of the fee. He was not entitled to any of the benefits which the club's employees enjoyed. Accordingly the Privy Council found that he was not an employee of the club – rather the club acted as his agent collecting his fees from golfers. Accordingly Lord Slynn held that "the only reasonable view of the facts is that the arrangements between the club and the claimant went no further than to amount to a licence to permit the claimant to offer himself as a caddie for individual golfers on certain terms dictated by the administrative convenience of the club and its members."

This contrasts markedly with the decision of the EAT (Lady Smith Presiding) in *Cormie v Rodger (t/a Dalneigh Post Office & Stores)* [2012] UKEATS/0036/11. Mrs Cormie ran a sub-post office on behalf of Mr Rodger. He did not pay her a salary. Instead she was entitled to takings from customers. The Tribunal held that as she was not paid directly there could be no mutuality. The EAT disagreed and held:

> He [i.e. Mr Rodger] may not have been bound to pay her a salary but, in introducing her to Post Office Limited, he facilitated the payment to her of a regular income and, importantly, he allowed her to use the premises rent free (no sublease was entered into) and free of any tenant's responsibilities/liabilities in respect of them.

In *Stringfellows Restaurants Ltd v Quashie* [2012] EWCA Civ 1735 the Court of Appeal followed *Chen Yuen* rather than *Cormie*. Ms Quashie was a stripper. She was not paid a salary or indeed directly by the alleged employers. Rather she was paid vouchers by customers. The Tribunal found she was not an employee. The EAT disagreed but the Court of Appeal restored their decision.

Elias LJ held that "the most important finding" made by the Tribunal was its "inference from the evidence that the employer was under no obligation to pay the dancer anything at all." However, he accepted that "in some cases waiters or waitresses may be employed under a contract of service notwithstanding that they are paid substantially in tips left by customers." That said, he went on, "it is impossible to say that the only legitimate inference on the facts was that the club was paying the dancers." Furthermore the "fact that the dancer took the economic risk is also a powerful pointer against the contract being a contract of employment." His Lordship accepted that it was "not necessary to go so far" as to hold that "absent an obligation on the employer to pay a wage…the relationship can never as a matter of law constitute a contract of employment. But it would, I think, be an unusual case where a contract of service is found to exist when the worker takes the economic risk and is paid exclusively by third parties."

Where does the Court of Appeal's decision leave *Cormie* ? Can there ever be a contract of employment where there is no obligation on the employer to pay a wage? *Cormie* can perhaps be distinguished on the grounds that in that case, unlike in *Quashie,* there was an obligation on the putative employer to secure or arrange for payment from a third party. Mrs Cormie was paid from money paid by customers to the Post Office. In contrast Ms Quashie's customers paid her directly. Thus it can be said that the absence of an obligation to pay a wage will not necessarily mean there can be no contract of employment. Indeed it must be recalled that Elias LJ would not go so far as to find that the absence of such an obligation precludes the finding of a contract of employment and that he accepted that waiters or waitresses paid predominantly in tips can be employees. The most then that, perhaps, can be said of the Court of Appeal's decision is that it turned on its own facts – namely the finding by the Tribunal that there was no obligation of any kind to pay a wage (whether in the form of a salary or in the form of an obligation to procure a payment from a third party).

Personal service and the right of substitution

When a worker's contract contains a clause permitting him to hire another to perform his duties when he is unable or unwilling to do so will this mean that the contract is not a contract of employment? This was one of the considerations before MacKenna J in *Ready Mixed Concrete*. The alleged employee "must hire a driver to take his place if he should be for any reason unable to drive at any time when the company requires the service of the vehicle." Furthermore he had to do all this "at his own expense." His Lordship held that these factors were consistent "with a contract of carriage" rather than a contract of employment.

However, his Lordship did not go so far as to say that the entitlement to hire another to perform one's labour will always mean that the contract cannot be a contract of employment. The Court of Appeal in *Express and Echo Publications Ltd v Tanton* [1999] IRLR 367 considered the matter further. Mr Tanton's contract contained a clause that provided: "*In the event that the contractor is unable or unwilling to perform the services personally, he shall arrange at his own expense entirely for another suitable person to perform his service.*" The Tribunal and the EAT both agreed that this did not prevent him being an employee. The Court of Appeal disagreed. Peter Gibson LJ held that "where, as here, a person who works for another is not required to perform his services personally, then as a matter of law the relationship between the worker and the person for whom

he works is not that of employee and employer." The clause was "wholly inconsistent" with a contract of employment.

The EAT (Lindsay J Presiding) in *MacFarlane and another v Glasgow City Council* [2001] IRLR 7 declined to follow *Tanton*. The Claimants were gymnastic instructors. They worked at a Sports Centre operated by the Council. If they were, for any reason, unable to take a class they would arrange for a replacement from a register of coaches maintained by the Council. The Council, and not the Claimants, would pay them. The Claimants were presented with a new contract which substantially changed their terms and conditions. They resigned and claimed unfair constructive dismissal. The Council asserted that they were not employees. The Tribunal, applying *Tanton*, agreed. The EAT held they had erred in law.

The EAT distinguished *Tanton* on the following grounds:

> Firstly, the appellants in our case could not simply choose not to attend or not to work in person. Only if an appellant was unable to attend Council could she arrange for another to take her class. Secondly, she could not provide anyone who was suitable as a replacement for her but only someone from the Council's own register. To that extent the Council could veto a replacement and also could ensure that such persons as were named on the register were persons in whom the Council could repose trust and confidence. Thirdly, the Council itself sometimes organised the replacement (without, it seems, protest from the appellant concerned that it had no right to do so). Fourthly, the Council did not pay the appellants for time served by a substitute but instead paid the substitute direct. There is no finding as to what the substitutes were paid, nor that they were paid the same as the appellants, nor that the appellants had any say in what the substitutes were paid.

In *Tanton* "the individual there, at his own choice, need never turn up for work. He could, moreover, profit from his absence if he could find a cheaper substitute." The effect of *Tanton* was "that if a contract contains a provision that the individual need not perform any services personally then it cannot be a contract of service." In contrast in the present case "in limited circumstances, it would not be a breach of the individual's contract if, the individual being unable to attend, she arranged for another person approved by the employer to attend in her place." The EAT was unable to find, however, that the only possible conclusion was that the Claimants were employees. They thus remitted the matter to the Tribunal.

At first glance it is difficult to reconcile *Tanton* and *MacFarlane* as in both cases the Claimants were not obliged to perform their labour personally provided they found a substitute. The only real basis for distinguishing the cases is that the relevant clause in *Tanton* appeared to give the Claimant in that case greater freedom than the corresponding clause in *MacFarlane*. Hence the decision seems to provide that the effect of the substitution clause depends on the extent of the freedom it confers on the Claimant to arrange his working affairs.

The EAT (Underhill J Presiding) in *Byrne Brothers (Formwork) Ltd v Baird and others* [2002] IRLR 96 agreed that the reach of *Tanton* was limited. The Claimants were building trade workers. Their contracts contained the following clause:

> The subcontractor is free to employ at his own cost whatever suitably trained additional labour which may be necessary to fulfil the requirements of the agreement. Where the subcontractor is unable to provide the services, the subcontractor may provide an alternative worker to undertake the services but only having first obtained the express approval of the contractor.

They claimed holiday pay in respect of a Christmas break they had taken. Resolution of this issue depended on whether they satisfied the definition of "worker" under reg.2(1) of the Working Time Regulations 1998. This definition includes, but it is not restricted to, someone engaged under a "contract of employment." The Tribunal held that this requirement was satisfied. The EAT agreed holding the substitution clause brought "the essential facts of the present case ... within the ratio of *MacFarlane* rather than *Tanton*. The power which the applicants had under the contract to appoint a substitute is qualified and exceptional."

The EAT (Clark J Presiding) in *Staffordshire Sentinel Newspapers Ltd v Potter* [2004] IRLR 752 reconciled *Tanton* and *MacFarlane*. Mr Potter was a home delivery agent. Clause 5.2 of his contract provided that he was not required to discharge his duties personally and "in the event that he/she does not want to do so for any reason (including holiday) or is unable to do so for any reason (including illness)...will ensure that he/she engages suitable people to ensure that his/her obligations under this agreement are fully complied with." He was dismissed and brought a claim for unfair dismissal. The Tribunal held that the right was not unfettered as the substitute had to meet with the company's approval. Accordingly they found he was an employee. The EAT disagreed.

As for *Tanton* and *MacFarlane* the EAT held "they are not inconsistent with each as a matter of principle, indeed they are entirely consistent." The effect of *MacFarlane* was that "what may be a contract for personal service does not cease to be such simply because there is a right to send along a substitute in a limited sense." In contrast the "relevant contractual clause in *Tanton* was extreme. The individual need never turn up for work." As for the present case "the fact that from time to time the respondent did not approve a substitute proffered by Mr Potter is entirely consistent with the provision of clause 5.2 for a suitable person." In other words what was determinative was not so much that there were fetters on the choice of substitute but the fact that the clause potentially gave the Claimant significant freedom to decide whether to turn up for work.

The EAT (Elias J Presiding) in *Consistent Group Ltd v Kalwak and others* [2007] IRLR 560 considered when the right of delegation might be unlimited. The facts of the case have already been outlined. It suffices to note that the substitution clause in question permitted, in accordance with the EAT's construction of it, to delegate "only where there is some reason why he cannot do it." The EAT agreed "that the fact that a substitute must be sufficiently skilled and experienced to do the job would not of itself negate a conclusion that there was an unfettered power to delegate. Plainly a van driver can only delegate to someone who can drive." A substitution clause will only mean *per se* that the Claimant is not an employee when the duty "which can be delegated in all circumstances" is such "that there is no personal obligation imposed on the worker to do anything at all." Furthermore, "the fact that there is a limited or occasional right to delegate is not inconsistent with the contract to perform work personally."

It is thus clear that personal service, along with control and mutuality of obligation, is part of the irreducible minimum of a contract of employment. The absence of personal service or a contractual right to provide a substitute will, *per se*, irrespective of whether control and mutuality are present, mean that the contract in question is not a contract of employment. The exception to this rule is when the substitution clause is limited or fettered and does not go so far as to entitle the Claimant not to turn up for work whenever he wishes.

The approach to identifying the relevant terms of the contract: A course of dealing

It is clear that the irreducible minimum of a contract of employment is control, mutuality of obligation and personal service. The next question that arises is what approach applies in identifying the relevant terms of the contract and in particular to determining whether the contract contains the irreducible minimum. In cases where the entirety of what the parties have agreed is reduced into express, written terms the focal point of the inquiry will often be the written contract. In other cases there will be no written contract, or the written contract will not contain the entirety of what was agreed or it will be said the conduct of the parties shows that a relationship between them has developed and that a new, varied contractual agreement can be implied. Such an implied contract is one that is said to have come into being by virtue of a course of dealing.

The EAT (Slynn J Presiding) in *Airfix Footwear Ltd v Cope* [1978] IRLR 396 found that a contract of employment had emerged via a course of dealing. Mrs Cope was a home based worker. She repaired heels for shoes on behalf of Airfix. There was no written contract between the parties. Over a period of seven years, five days a week, Airfix delivered to her 12 dozen pairs of heels each day for her to work on. On this basis the Tribunal found that a contract had emerged between the parties that provided for mutuality of obligation in that Airfix were obliged to provide her with the work and she was obliged to accept it. The EAT upheld the Tribunal's decision and held "that there had grown up between them a continuing relationship in the sense of a continuing contract. We consider that the Tribunal was, on the material before it, well entitled to come to that conclusion on the particular facts of this case."

The Court of Appeal in *Nethermere (St Neots) Ltd v Taverna and Gardner* [1984] IRLR 240 also found mutuality of obligation via a course of dealing. Nethermere operated a garments factory. Mrs Taverna and Mrs Gardner worked for the company from home carrying out sewing work. The company provided them with sewing machines. They could fix their own hours, take holidays and time off when they pleased, and vary the number of garments to take on any particular day. Following a dispute about holiday pay they were dismissed. Both the EAT and the Court of Appeal upheld the Tribunal's finding that they were employees.

Dillon LJ, with whom Stephenson LJ agreed, held:

> I see no reason in principle why the existence of a contract of service may not be inferred from a course of dealing, continued between the parties over several years.

How then in this case could mutuality of obligation be implied? His Lordship explained:

> The fact that machines were supplied by the company to each of the applicants indicates at the least an expectation on both sides that applicants would be doing work for the company which was provided for them by the company, and I find it unreal to suppose that the work in fact done by the applicants for the company over the not inconsiderable periods which I have mentioned was done merely as a result of the pressures of market forces on the applicants and the company under no contract at all.

Furthermore the evidence that it was up Mrs Taverna and Mrs Gardner to decide how much work they did was "capable of being read as imparting an obligation on the outworkers for the company." Similarly evidence that "it was the van driver's duty to be as fair as he could is capable of being read as imparting an obligation on the company to provide a reasonable share of work for each outworker whenever the company had more work available than could be handled by the factory." Kerr LJ dissented on the grounds that there is no authority for the proposition "that even a lengthy course of dealing can somehow convert itself into a contractually binding obligation."

The Court of Appeal in the consolidated cases of *McLeod and others v Hellyer Brothers Ltd, Wilson and another v Boston Deep Sea Fisheries Ltd* [1987] IRLR 232 was called upon to consider whether a course of dealing had led to a contract of employment despite there being periods when there was no mutuality. The Claimants in both cases were trawlermen. They were engaged by their employers under a "crew agreement" for each person engaged aboard a fishing vessel. Once the engagement came to an end they were registered as unemployed and claimed social security benefits. They were dismissed when they took their vessels out of commission. The issue was whether they had the relevant continuity of service, namely two years, so as to be entitled to redundancy payments. Resolution of this question depended on resolution of the issue as to whether, between engagements, they were employed under a global contract of employment. The Tribunal said they were. The EAT and the Court of Appeal said they were not.

Slade LJ noted that in between engagements the Claimants were entitled to work for other employers. His Lordship thus held "we do not see how it is possible to infer from the parties' conduct the existence in between crew agreements of a trawlerman's

obligation to serve, which is part of the irreducible minimum of obligation on the part of the employee required to support the existence of a contract of service." Furthermore the absence of a rota for sharing out work in between crew agreements meant that it could not be said of the employers that "by their conduct" they had "placed themselves under a continuing obligation to offer employment to any particular individual after the termination of a crew agreement to which he was a party." On behalf of the Claimants it was submitted that the absence of a duty to provide work between engagements was explicable on the grounds that the employers had a contractual right to lay off their employees indefinitely. His Lordship held that whilst this may be so he could not accept that "an unrestricted right on the part of an employer to lay off an employee for an indefinite period could ever be consistent with the continuing existence of a contract of employment between the two of them after a period of lay off had begun, at least unless there were mutual obligations between the parties which continued to exist during such a period."

Put succinctly the Claimants were not engaged under a contract of employment during the gaps between the assignments as they could work for others and because during those gaps the putative employers were entitled to lay them off. Given how fact sensitive the question of mutuality is, particularly in the context of determining whether a contract of employment can be inferred from a course of dealing, it would be unwise to suggest that the case is authority for the wide proposition that there can be no contract of employment when there are periods when no work is provided and the Claimant may work for another. Rather the case is perhaps authority for the narrower proposition that such considerations will often go against inferring that a contract of employment has emerged through a course of dealing. Ultimately, however, a wide variety of considerations will often have to be taken into account.

It is thus clear that a contract of employment can be inferred from a course of dealing. This approach, as indicated at the outset of this discussion, may apply in circumstances where it can be said that the relationship between the parties has developed. In other cases, however, the conduct of the parties may be considered; not to determine whether and in what sense the relationship has developed but in order to determine what the parties actually agreed at the outset. It is to this that the discussion now turns.

The approach to identifying the relevant terms of the contract: The written terms and the conduct of the parties

Whether and to what extent the terms of the contract are to be determined by consideration of the written terms or the conduct of the parties is a question that has tended to arise in two circumstances. Firstly, when the terms agreed by the parties are partly reduced in writing but also to be deduced by the conduct of the parties and thus it can be said that the written agreement is incomplete. Secondly, when there is a written agreement but it can be said that the agreement is either a sham or does not reflect what the parties in fact agreed.

Before the authorities are discussed it is first necessary to consider what is meant by a sham. The leading case is the decision of the Court of Appeal in *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786 . There Diplock LJ held that "for acts or documents to be a 'sham,' with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create legal rights and obligations which they give the appearance of creating. No unexpressed intentions of a 'shammer' affect the rights of a party whom he deceived." This was not an employment case and the question has arisen, and will form part of this discussion, as to what role it plays in identifying the irreducible minimum of a contract of employment.

The question as to whether the worker's contract is a contract of employment, as determined by reference to the written contract or the conduct of the parties, arose before the Court of Appeal in *Express and Echo Publications Ltd v Tanton* [1999] IRLR 367. Mr Tanton's written contract contained a clause providing that if he was unable or unwilling to provide his services personally he had to arrange at his own expense for another suitable person to perform the service. From time to time, but not frequently, Mr Tanton did provide a substitute driver and sought, from the Tribunal, a statement as to his terms and conditions of employment. The Tribunal accepted that frequent utilization of the clause could change the whole nature of the agreement between the parties. However, the fact remained that Mr Tanton had only used the clause occasionally. This and the fact that the other aspects of the parties' conduct were consistent with a contract of employment, such as Mr Tanton wearing a uniform provided by the company and driving a vehicle from the company's pool, led the EAT to uphold their decision. The Court of Appeal did not.

Peter Gibson LJ held:

> to concentrate on what actually occurred may not elucidate the full terms of the contract. If a term is not enforced, that does not justify a conclusion that such a term is not part of the agreement. The obligation could be temporarily waived. If there is a term that is inherently inconsistent with the existence of a contract of employment, what actually happened from time to time may not be decisive, given the existence of that term.

His Lordship then gave the following example:

> if under an agreement, there is a provision enabling, but not requiring, the worker to work, and enabling, but not requiring, the person for whom he works to provide that work, the fact that work was from time to time provided would not mean that the contract was a contract of service.

In other words whether the contract concerned is a contract of employment may depend not so much on how the relevant terms were performed in practice but the plain meaning of the terms themselves. This approach is consistent with the basic doctrine of contract law that the terms of the contract are the reflection of what the parties agreed when they entered into the contract. In the present case his Lordship was satisfied that the substitution clause was wholly inconsistent with a contract of employment – this aspect of the decision was discussed earlier in this chapter.

It does not follow that the conduct of the parties is necessarily irrelevant in determining the terms of the contract. The circumstances in which it is relevant were enunciated by the House of Lords in *Carmichael v National Power* [2000] IRLR 43. Mrs Carmichael and Mrs Leese read advertisements, issued by National Power, for the posts of station guides. The advertisements said that "employment will be on a causal as required basis." They applied and were interviewed for the posts. National Power then sent them a letter which stated that they were "pleased to note that you are agreeable to be employed....on a casual as required basis." Mrs Carmichael and Mrs Leese proceeded to sign and to return to National Power letters which said "I am pleased to accept your offer of employment as a station guide on casual as required basis." They were paid by the hour for work actually performed rather than on a salaried basis. However, they were paid after deduction of income tax and national insurance. At first they worked only a few hours a week. Several years later they were working an average of 25 hours a week. However, on several occasions they had been unavailable for work and on each occasion they were not disciplined. They sought, from the Tribunal, a declaration as to their written terms and conditions. The Tribunal declined to give it on the grounds that they were not employees. The Tribunal reached this conclusion on the basis that the conduct between the parties showed an absence of mutuality of obligation. This was despite the fact that some factors, such as the fact they were paid on a PAYE basis, went towards them being employees. The EAT held that this was a question of fact and accordingly they were not entitled to interfere with the Tribunal's decision.

The Court of Appeal took a different approach. They found that the contract should be determined solely by reference to the written letters. The subsequent conduct of the parties was irrelevant as it was of no consequence what the parties thought they had agreed. The letters had to be read objectively. In order to give the contract business efficacy an objective reading of those letters imposed on National Power an obligation to provide the Claimants with work when it was available. This was sufficient to amount to mutuality of obligation.

The House of Lords disagreed. Resolution of the matter depended upon whether the construction of the contract was a question of law or a question of fact. Lord Hoffman noted the common law principle that the "construction of documents is a question of law" and held that this would apply to a contract of employment when "the parties intend all the terms of their contract (apart from any implied by law) to be contained in a document or documents." However, a different approach applied when "the intention of the parties, objectively ascertained, has to be gathered partly from documents but also from oral exchanges and conduct. In the latter case, the terms of the contract are a question of fact. And of course the question of whether the parties intended a document or documents to be the exclusive record of the terms of their agreement is also a question of fact."

Lord Irvine LC held that if the matter "turned exclusively" on "the true meaning and effect of the letters" then he "would hold as a matter of construction that" there was no obligation to provide casual work "nor on Mrs Lease and Mrs Carmichael to undertake it." However, the parties had not "intended them to constitute an exclusive memorial of their relationship." Lord Hoffman observed that the letters "were not drafted by a lawyer and their language was extremely concise" and thus they could not be construed as a complete contract of employment. The approach of the Court of Appeal "would be orthodox doctrine in a case in which the terms of the contract had been reduced to writing." However, in the present case "the terms of the contract are based upon conduct and conversations as well as letters." Accordingly, "most people would find it very hard to understand why the tribunal should have to disregard" that National Power "were under no obligation to provide work" and the Claimants "under no obligation to perform it." The conduct and conversations, as opposed to the letters, formed that part of the contract which was to be determined as a question of fact. That was a question solely for the Tribunal. On the facts they had found the case foundered "on the rock of absence of mutuality", and that was a finding which the EAT, the Court of Appeal and the House of Lords could not disturb.

The Court of Appeal in *Stevedoring and Haulage Services Ltd v Fuller and others* [2001] IRLR 627 found on the facts before them that the contract was entirely reduced to writing and was not elucidated by the conduct of the parties. The Claimants were dock workers. Their contract provided "you are not an employee of the company; your services being utilised only when mutually agreed, with no obligation by either party other than to honour a specific pre-agreed period of engagement." However, the Claimants worked for the company on more days than not, they did not work for another employer and they were offered work before other casual labour. A rota system ensured that those who said they were not available for work but were not offered it were rewarded and those who were offered work for which they were not available were penalised. They sought a declaration for particulars of employment under s.1 – in effect a request for a declaration that they were employees. This was granted by the Tribunal. Their decision was upheld by the EAT. It was reversed by the Court of Appeal.

Tuckey LJ held:

> in this field the search for an agreement or its terms should not be confined to a consideration or construction of the documents unless it is clear that the parties intended them to be the exclusive record of their agreement, if any. The parties' intention may be inferred from other sources, including subsequent conduct. We think this point is self-evident, but it is made clearly in the opinions of Lords Irvine and Hoffman in *Carmichael v National Power* [2000] IRLR 43.

In the present case the terms of the agreement expressly made clear there was no mutuality of obligation. Therefore his Lordship could not see "any way in which the ET's implied terms could be incorporated" into the agreement as "the implied terms flatly contradict the express terms contained in the documents: a positive implied obligation to offer and accept a reasonable amount of causal work (whatever that means) cannot be reconciled with express terms that neither party is obliged to offer or accept any casual work. None of the conventional routes for the implication of contractual terms will work. Neither business efficacy nor necessity require the implication of implied terms which are entirely inconsistent with a supposed contract's express terms." This approach reflects the basic principle of contract law that a term cannot be implied if it contradicts an express term.

The EAT (McMullen J Presiding) in *Bridges and others v Industrial Rubber plc* [2004] UKEAT/0150/04 similarly found that the Claimants were not employees principally on the basis of what was stipulated in the express, written terms. Industrial Rubber plc manufactured a wide range of rubber products. The Claimants were engaged as homeworkers and were responsible for trimming waste rubber attached to the company's products. Their written contract with the company provided, *inter alia*, that the "Company shall be under no obligation to offer Work to the Homeworkers and the Homeworker shall be under no obligation to accept Work from the Company." However, the Claimants were paid on a PAYE basis, the company provided them with the tools for the work to be done and they were entitled to holiday pay, sick pay and maternity pay. They were dismissed and the question arose as to whether they were employees. The Tribunal and the EAT held that they were not.

The EAT considered *Tanton* and held that it provided that "the central question is to determine what the contract required the parties to do" and that "if there is an express term deciding that matter, it is not relevant to discuss or take evidence upon how the contract was operated between the parties." The EAT also noted the distinction made in *Carmichael* between contracts whose terms are reduced into writing and contracts whose terms are ascertained both in writing and in all oral exchanges. The EAT held that the present case was one "where the correct approach to this relationship is to regard it as regulated by a contract which is reduced into writing." Adopting this approach the written agreement made it clear there was no mutuality of obligation and the factors that went towards there being a contract of employment – such as the Claimants being paid on a PAYE basis and being entitled to holiday pay and sick pay – carried less weight.

The EAT (Clark J Presiding) in *Real Time Civil Engineering v Callaghan* [2005] UEAT 0516/05 again stressed the overriding importance of the written, express term. Mr Callaghan was a light goods vehicle driver. The vehicle he used was owned and insured by Real Time. He took day to day instructions from Real Time's Management and was expected to work until his deliveries were completed. He worked regular hours determined by Real Time. However, his contract contained the following clause: "*The sub-contractor [the Claimant] may, at his absolute discretion, send a substitute or delegate to perform the works. This right to send a substitute or delegate is unfettered and unlimited and agreement of the contractor is not required in any circumstances, nor does notice of sending a substitute or delegate need to be given to the contractor.*" In practice the Claimant never sent anyone to attend in his place. He was dismissed. The Tribunal found that he was an employee and that there was mutuality of obligation in the contract. As for the substitution clause the Tribunal attached little weight to it as it was not operated in practice.

The EAT reversed their decision. The EAT accepted that "this appears to be a contract of employment." Furthermore, in reference to the Tribunal's finding of mutuality of obligation, the EAT held "mutuality of obligations is as much a part of the irreducible minimum for a contract of service as the element of personal service. We uphold that decision on appeal." As for the substitution clause and the fact that the

Claimant did not send anyone in his place the EAT found, after referring to *Carmichael*, "how the contract operates in practice is no basis for simply displacing an express term in the written agreement." Accordingly the express previsions of the substitution clause *per se* meant that Mr Callaghan's services were not engaged under a contract of employment.

Similarly the importance to be attached to express written terms determined the Court of Appeal's approach in *Consistent Group Ltd v Kalwak and others* [2008] IRLR 505. The facts and the decision have already been discussed in the section in this chapter on control and mutuality of obligation. It was noted that the EAT had held that the Tribunal was entitled to find that the contract in question was one of employment. This was despite the fact that the contract contained an express, written clause providing there was no mutuality. The basis of the EAT's decision was that in the circumstances it was clear that the putative employers had assumed control over how the Claimants carried out their work.

The Court of Appeal, however, disapproved this approach. This was due to the obligations clause. Rimer LJ held:

> It is not the function of the court or an employment tribunal to recast the parties' bargain. If a term solemnly agreed in writing is to be rejected in favour of a different one, that can only be done by a clear finding that the real agreement was to that different effect and the term in the contract was included by them so as to present a misleadingly different impression.

However, it does not follow that the contract is a contract of employment simply because a clear reading of its written, express terms indicate that that is the case. Those words must be construed in their context. This is the effect of the decision of the Court of Appeal in *Protectacoat Firthglow Ltd v Szilagyi* [2009] IRLR 565. Mr Szilagyi entered into what purported to be a partnership agreement with a Mr Nesbitt. The agreement expressly referred to the Partnership Act (PARTA) and provided that profits would be equally shared. The purported partnership entered into a written agreement with Protectacoat. It provided that (1) Protectacoat were not obliged to provide them work, (2) that they could work for others, (3) they would provide their own equipment, (4) they did not have to work any specific hours provided that the hours they worked were acceptable to the client and (5) fees would be agreed before work was carried out. However, in practice (1) Mr Szilagyi was required to attend and leave Protectacoat's premises at specific times, (2) Protectacoat provided him with the tools and equipment he used, (3) they paid for the fuel for a van he used for work, (4) he was paid on a PAYE basis and (5) even though his agreement stated he could work for others, another who worked for Protectacoat who had a contract which contained the same term was dismissed for working for another. The Tribunal, the EAT and the Court of Appeal all agreed that, despite the express terms of the written contract, he was an employee. This was on the grounds that the written contract was a sham.

Smith LJ referred to *Snook*. She held that it "is not of uniform assistance in determining whether an agreement is in fact a sham." Rather "the court or tribunal has to consider whether or not the words of the written contract represent the true intentions or expectations of the parties, not only at the inception of the contract but, if appropriate, as time goes by." She considered the Court of Appeal's decision in *Kalwak*. She expressed reservations as to Rimer LJ's approach as "to speak of terms 'solemnly agreed in writing' is more redolent of a commercial agreement reached between two parties of equal bargaining power than the kind of 'take it or leave it' situation which can prevail in some agreements in the field of work." She accepted that in "a commercial agreement, usually both parties will be in a position to require that the terms should reflect the nature of the agreement." However, in "the field of work, it is sometimes one party and only one which dictates the terms of the 'agreement'. The reality may well be that the principal/employer dictates what the written agreement will say and the contractor/employee must take it or leave it." For the agreement to amount to a sham "it

is sufficient if the court concludes that the agreement as written did not reflect the true intention (or expectations) of the parties." It is not "necessary to identify anyone who it was intended to deceive."

Similarly Sedley LJ held:

> although there will be in many cases (as there was in this one) an intention to conceal or misrepresent the actual relationship, there is no logical reason why this should be a universal requirement. The courts not uncommonly have to decide whether the entirety of a contractual relationship is constituted or evidenced by a document which one party says is definitive, without any need to decide whether that party has studied to deceive or is simply mistaken.

This approach taken to the weight to be attached to the written terms was taken again by the Court of Appeal in *Autoclenz Ltd v Belcher and others* [2010] IRLR 70. The Claimants were car valets. Their contract contained the following clause*: "You will not be obliged to provide your services on any particular occasion nor, in entering such agreement, does Autoclenz undertake any obligation to engage your services on any particular occasion.*" The contract also contained the following substitution clause: "*For the avoidance of doubt, as an independent contractor, you are entitled to engage one or more individuals to carry out the valeting on your behalf, provided that such an individual is compliant with Autoclenz's requirements of sub-contractors as set out in this agreement.*" However, the Tribunal found that there was mutuality as it was understood by both sides that Autoclenz were obliged to provide the Claimants with work if it was available. As for the substitution clause the Tribunal were satisfied that it did not reflect what the parties agreed as the evidence before them indicated that it was understood that Autoclenz expected the Claimants to turn up for work and expected them to perform the work personally that they provided. Accordingly the Tribunal found they were employees. The EAT disagreed on the grounds that the Court of Appeal's decision in *Kalwak* indicated that if the written terms are not consistent with the relationship being one of employer and employee then the conduct of the parties is irrelevant. The Court of Appeal, however, restored the Tribunal's decision.

Smith LJ held:

> the court or tribunal must consider whether or not the words of the written contract represent the true intentions or expectations of the parties (and therefore their implied agreement and contractual obligations), not only at the inception of the contract but at any later stage where the evidence shows that the parties have expressly or impliedly varied the agreement between them.

Her Ladyship then considered the approach to determining whether the written terms represent the true intentions and expectations of the parties:

> That will, of course, include the written term itself, read in the context of the whole agreement. It will also include evidence of how the parties conducted themselves in practice and what their expectations of each other were. Evidence of how the parties conducted themselves in practice may be so persuasive that the tribunal can draw an inference that that practice reflects the true obligations of the parties. But the mere fact that the parties conducted themselves in a particular way does not of itself mean that their conduct accurately reflects the legal rights and obligations. For example, there could well be a legal right to provide a substitute worker and the fact that that right was never exercised in practice does not mean that it was not a genuine right.

In others words the Tribunal must consider all the circumstances, both the conduct of the parties and the written agreement. Neither the written terms nor the conduct of the parties are in and of themselves determinative. The weight to be attached to each depends on the circumstances of the case.

Aitkens LJ agreed but held that the focus of the inquiry is "what was agreed, either as set out in the written terms or, if it is alleged those terms are not accurate, what is proved to be their actual agreement at the time the contract was concluded" rather than on, as Smith LJ had held, the "true intentions and expectations" of the parties. This is because difficulties could arise "if one party intended or envisaged one thing but one did not." His Lordship further held:

> the circumstances in which contracts relating to work or services are concluded are often very different from those in which commercial contracts between parties of equal bargaining power are agreed. I accept that, frequently, organisations which are offering work or requiring services to be provided by individuals are in a position to dictate the written terms which the other party has to accept. In practice, in this area of the law, it may be more common for a court or tribunal to have to investigate allegations that the written contract does not represent the actual terms agreed and the court or tribunal must be realistic and worldly wise when it does so.

Their decision was upheld by the Supreme Court (*Autoclenz Ltd v Belcher and others* [2011] IRLR 820). Lord Clarke referred to the passage in the judgment of Aitkens LJ, cited above, where he stressed that what matters is what was agreed when the contract was concluded rather than as Smith LJ had held, the true intentions and expectations of the parties. Lord Clarke, in reference to that passage, held "I agree" and thus the approach of Aitkens LJ must be regarded as constituting the law. He further held that "the relative bargaining power of the parties must be taken into account in deciding whether the terms of any agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part." In other words it may often be appropriate to resolve any ambiguity in the contract in favour of the party in the weaker bargaining position which almost invariably will be the employee.

His Lordship also referred to the decisions of the EAT and the Court of Appeal in *Kalwak*. He referred to the passage in Rimer LJ's judgment, cited above, where his Lordship had held that a clause could only be recast by a clear finding that the parties had intended it not to represent their intentions and that the intention behind the clause in question was to present a misleading impression as to what was agreed. Lord Clarke "unhesitatingly" preferred "the approach of Elias J" in the EAT. He held that the Rimer LJ's approach and the dicta of Diplock LJ in *Snook* were "too narrow an approach to an employment relationship of this kind."

The authorities cover two different circumstances where it can be said that the conduct of the parties does not reflect the written terms. Firstly, when, in the circumstances, the conduct of the parties does not indicate that what is set out in the written terms was not in fact what was agreed. An example of such a case is *Tanton*. An express term giving the Claimant an unfettered right of substitution was not exercised in practice. However, that did not indicate that the substitution clause had not been agreed. It was simply the case that circumstances had not arisen that required it to be invoked. Similarly in *Stevedoring* an express term provided there was no mutuality of obligation. In practice the Claimants were provided with regular work and were offered it before casual labour. However, in the circumstances that did not suggest that the parties had agreed there would be mutuality.

The second set of circumstances is when the conduct of the parties does suggest that the terms set out in the written contract do not reflect what in fact the parties agreed. *Protectacoat* and *Autoclenz* are examples of such cases. In such cases the written terms will either be a sham in the *Snook* sense, that is the parties or the author of the contract, in most cases the employer, intended to deceive, or they will simply not reflect what was agreed. It is clear following Lord Clarke's disapproval of the Court of Appeal's approach in *Kalwak* that is not necessary to ask whether there was any deception. In these circumstances the terms of the contract have to be gleaned from the conduct of the parties.

The correct approach is simply to consider all the circumstances, both the express terms and the conduct of the parties, in every case in order to identify the relevant terms. Once this is done the question is then asked whether these terms contain the irreducible minimum of a contract of employment – i.e. control, mutuality of obligation and personal service. The reason why the Tribunal must take such a proactive approach as opposed to simply confining their inquiry to consideration of the written terms is that

in reality the written terms will be drafted and dictated by the putative employer and the putative employee will have little or no bargaining power.

The meaning of the written terms is a question of law and the conduct of the parties is a question of fact. However, to a certain extent the approach enunciated by Smith LJ in *Protectacoat* and *Autoclenz* merges the two approaches in that the meaning prescribed by law to the written terms can be displaced by the conduct of the parties. However, this will only be in cases when the written terms do not in fact reflect what was agreed. In other cases the meaning of the written terms remains a matter of law.

Alternative approaches

Whilst it is clear that the authorities provide that, for the purposes of s.230, control, mutuality of obligation and personal service are the irreducible minimum of a contract of employment it should not be forgotten that ultimately the term "employee" is not precisely defined. Accordingly, alternative approaches to determining the meaning of "employee," found outside the scope of the ERA 1996 and the law of unfair dismissal, should not be forgotten as they may, depending on the circumstances and given the elasticity of s.230, bear some relevance to determining whether a worker is an "employee" in the context of a claim for unfair dismissal.

One alternative is the "organisation test." This was formulated by the Court of Appeal in *Cassidy v Minister of Health* [1951] 1 ALL ER 574. A hospital was held vicariously liable for negligence of one its surgeons. A finding of vicarious liability depended on a finding that the surgeon was employed by the hospital. The hospital maintained that he was not, as they did not control how he discharged his duties. Denning LJ, as he was then, rejected the utility of the control test in the circumstances. His Lordship held:

> it is no answer for them to say that their staff are professional men and women who do not tolerate any inference by their lay masters in the way they do their work.

His Lordship suggested the following approach:

> The reason why the employers are liable in such cases is not because they can control the way in which the work is done...but because they employ the staff and have chosen them for the task and have in their hands the ultimate sanction of good conduct, the power of dismissal.

Similarly Somervell LJ observed that there are many contracts where the master cannot control the manner in which the work is done - such as in the case of the captain of a ship. His Lordship held that "one perhaps cannot get beyond this: 'was the contract a contract of service within the meaning which an ordinary person would give under the words'?"

Another but similar test, again formulated by Denning LJ, is the 'integral part of the business test'. The test was set out in the Court of Appeal's decision of *Stevenson Jordan & Harrison v McDonnell & Evans* [1952] 1 TLR 101. This concerned a case under the Copyright Act 1911. S.5(1) of the Act provides that the author of a work is the first owner of its copyright. However, when the author is employed by some other person and the work was made during that employment then, in the absence of an agreement to the contrary, the employer is owner of the copyright. A management engineer purported to assign to publishers the copyright in a book based largely on information obtained while he had worked for the company. Denning LJ held:

> It is often easy to recognise a contract of service when you see it, but difficult to say where the difference lies. A ship's master, a chauffeur, and a reporter on the staff of a newspaper are all employed under a contract of service; but a ship's pilot, a taxi-man, and a newspaper contributor are employed under a contract for services. One feature which seems to run through the instances is that, under a contract of service, a man is employed as part of the business, and his work is done as

an integral part of the business; whereas, under a contract for services, his work although done for the business, is not integrated into it but is only accessory to it.

Applying this test the Court held that the author's work was in part performed under a contract of employment and in part outside of it and thus only that material acquired under the contract of employment engaged the Copyright Act.

Another alternative is the "business on your own account test" formulated by the High Court in *Market Investigations Ltd v Ministry of Social Security* [1969] 2 QB 173. Market Investigations was a market research company. It engaged the services of a number of full-time interviewers. The interviewers were not under no obligation to accept work, they were usually asked to work for two or three days during a 10 to 14 days period and during this time they could work for other organisations and they had no contractual right to time off, holidays and sick pay. Both the Minister of Social Security and the High Court found that the interviewers were employees.

Cooke J held that "the fundamental test to be applied is this: Is the person who has engaged himself to perform these services performing them as a person in business on his own account?" His Lordship found that "no exhaustive list has been compiled and perhaps no exhaustive list can be compiled of the considerations which are relevant in determining" whether there is a contract of employment. He further held:

> nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. 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 that may be of importance are such matters as whether the man performing the service provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his tasks.

This test was actually followed and approved in an unfair dismissal case by the Court of Appeal in *Young & Woods Ltd v West* [1980] IRLR 201. When Mr West commenced working for Young & Woods the company gave him a choice. Either he could be paid PAYE as an employee or he could be on their books as self-employed and hence be responsible for paying his own taxes. He opted for the latter. The company asserted that his claim for unfair dismissal was barred by him being self-employed. The Tribunal, the EAT and the Court of Appeal all found, however, that he was an employee. Stephenson LJ referred to the test laid down by Cooke J and said "I too would adopt that test."

Adopting that test his Lordship held:

> it would, in my judgment, be impossible to regard Mr West – self-employed though he asked to be treated, self-employed though his employers agreed that he should be treated and the Inland Revenue agreed that he should be treated – as a person in business on his own account.

This test was approved by the Court of Appeal in *O'Kelly* - another unfair dismissal case. It has already been noted that Ackner LJ attached determinative weight to the Tribunal's finding that there was no mutuality of obligation. However, it should be noted that Lord Donaldson MR held:

> In the instant appeal the Industrial Tribunal directed itself to 'consider all aspects of the relationship, no single factor being in itself decisive and each of which may vary in weight and direction, and having given such balance to the factors as seems appropriate, to determine whether the person was carrying on business on his own account.' This is wholly correct as a matter of law and it is not for this court or for the EAT to re-weigh the facts.

This test was also applied and approved by the EAT (Waterhouse J Presiding) in an unfair dismissal case – namely, *Addison and others v London Philharmonic Orchestra Ltd* [1981] ICR 261. The Claimants were part-time sessional musicians engaged on a freelance basis by the orchestra. They applied to the Tribunal for a statement of terms and conditions. Both the Tribunal and the EAT rejected the applications on the grounds that they were not employees. The EAT referred to the test enunciated in *Market*

Investigations and held that the Tribunal was entitled to find that "the applicants all in effect run their own business most of the time." It is submitted that had the mutuality of obligation test been applied it would have yielded the same result – namely that the Claimants were not employees.

This approach was also approved by the Privy Council in *Lee v (1) Chung and (2) Shun Shing Construction Engineering Co Ltd* [1990] IRLR 236. The Claimant was a contractor working on the alleged employer's building site. He did not price the work, he had no responsibility for management or for investment in the building site and he did not hire his own helpers. He did, however, work from time to time for other contractors. However, when the work of the alleged employers was urgent they would give him priority and require the contractor for whom he was working to find someone else. He suffered an accident on the building site and the question arose as to whether he was an employee.

The Privy Council was satisfied that he was. Lord Griffiths, in reference to *Market Investigations*, held that the "matter had never been better put than by Cooke J" and that "all the indica mentioned by Cooke J...point towards the status of an employee rather an independent contractor." On the facts the Claimant was a "skilled artisan earning his living for more than one employer as an employee and not as a small businessman venturing into business on his own account."

However, the Court of Appeal cast doubt on the scope of the test in *Hall (HM Inspector of Taxes) v Lorimer* [1994] IRLR 171. Mr Lorimer was a freelance vision-mixer. He worked for different production companies and his assignments seldom lasted more than a day or two. He performed his work at studios owned or hired by production companies. He did not supply any tools or equipment of his own. Furthermore he did not contribute to the production costs and nor did he participate in any profits or losses. The inland revenue assessed his earnings as received under a contract of employment. Thus they sought to charge income tax on his gross earnings rather than net earnings after deduction of expenses.

The Special Commissioner, the High Court and the Court of Appeal however all held he was self-employed. Nolan LJ held:

> the question, whether the individual is in business on his own account, though often helpful, may be of little assistance in the case of one carrying on a profession or vocation. A self-employed author working from home or an actor or a singer may earn his living without any of the normal trappings of a business. For my part I would suggest there is much to be said in these cases for bearing in mind the traditional contrast between a servant and an independent contractor. The extent to which the individual is dependent upon or independent of a particular paymaster for the financial exploitation of his talents may well be significant.

Accordingly in the present case the fact that "Mr Lorimer customarily worked for 20 or more production companies and that the vast majority of his assignments, as appears from the annexures to the stated case, lasted only for a single day" meant that he was not an employee.

However, the traditional contrast between servant and independent contractor did not lead to a finding of a contract of employment in the Court of Appeal's decision in *Lane v Shire Roofing Co Ltd* [1995] IRLR 493. Mr Lane was a roofer. He traded as a one man firm and was categorised as self-employed for tax purposes. He was hired by Shire Roofing on a "payment by job" basis. Whilst re-roofing a house he fell off his ladder and sustained serious injuries. If he was employed by Shire Roofing they owed him a duty of care. The High Court held he was an independent contractor and hence the company was not liable.

The Court of Appeal found otherwise. Henry LJ held that there "are good policy reasons in the safety at work field to ensure that the law properly categorises between employees and independent contractors." His Lordship held that considerations such as "control" or "was the workmen carrying on his own business, or was he carrying on that

of his employers?" have to be "asked in the context of who is responsible for the overall safety of the man doing the work in question." In the present case that was Shire Roofing and hence Mr Lane had been employed by them and they were liable.

It is clear that the approaches set out in the cases just discussed are broader than the approach set out in the s.230 cases. For example in *Market Investigations* there was no mutuality of obligation and yet the interviewers were found to be employees. Furthermore, the cases falling outside the ERA do not follow an entirely consistent approach. For example the classic distinction between employee and independent contractor meant that the Claimant in *Lorimer* was self-employed but was of little relevance in *Lane*. What is clear is that the meaning of employee is inherently elusive and malleable and that its precise meaning will depend on the circumstances of the case. Here policy considerations may often be determinative as in *Lane*. Whilst in contrast it can be said there is greater clarity in the s.230 jurisprudence with the authorities consistently attaching determinative weight to the irreducible minimum of control, mutuality and personal service it must not be forgotten that the meanings of the terms themselves are elastic. Accordingly in certain circumstances some utility may be found in the alternative approaches in the context of a claim for unfair dismissal. This is particularly so as regards "the in business on your own account" test. Not only has the test been consistently approved but it has also been applied in cases of unfair dismissal although in one case, *O'Kelly*, the decision also turned on mutuality and in another, *Young & Woods*, the principal issue and focus of the argument was self-description. It is to this that this discussion now turns.

Self-description

It is apparent that the test for determining employee status is objective. Does it follow from this that it is irrelevant whether the parties describe the party as a contract of employment or a contract for services? The Court of Appeal seemed to answer this question in the affirmative in *Ferguson v John Dawson & Partners (Contractors) Ltd* [1976] IRLR 346. Mr Ferguson was working on a flat roof. He fell and suffered serious injuries. Whether John Dawson was liable depended on whether the contract they had with him was a contract of employment. It was accepted that both sides regarded him as a self-employed labour sub-contractor. Nonetheless the Court of Appeal was satisfied that he was an employee. Megaw LJ held:

> a declaration by the parties, even if it be incorporated in the contract, that the workman is to be, or is to be deemed to be, self-employed, an independent contractor, ought to be wholly disregarded – not merely treated as being conclusive – if the remainder of the contractual terms governing the realities of the relationship, show the relationship of employer and employee....I find difficulty in accepting that the parties, by a mere expression of intention as to what the legal relationship should be, can in any way influence the conclusion of law as to what the relationship is.

In the circumstances of the case the terms did indeed indicate that Mr Ferguson was an employee.

This decision sits unhappily with the Court of Appeal's decision in the unfair dismissal case of *Massey v Crown Life Insurance Company* [1978] ICR 590. Mr Massey was the manager of one of the Crown Life's branches. He was, for the first two years of his contact, paid on a PAYE basis. Then, following advice from his accountant, he asked Crown Life if he could be engaged as self-employed for tax purposes. Crown Life agreed. Later he was dismissed and brought a claim for unfair dismissal. The Court of Appeal upheld the Tribunal's finding that he was not an employee. Lord Denning MR opined that "if the true relationship of the parties is that of master and servant under a contract of service, the parties cannot alter the truth of that relationship by putting a different label upon it." However, his Lordship further held:

it seems to me on the authorities that, when it is a situation which is in doubt or which is ambiguous, so that it can be brought under one relationship or another, it is open to the parties to stipulate what the legal situation between them shall be."

As for the present case his Lordship went on:

It is significant that the Tribunal found that both sides agreed that the agreement was, and was intended to be, a genuine transaction and not something which was done solely for the purposes of deceiving the Inspector of Taxes.

Lawton LJ held:

in the administration of justice the union of fairness, common sense and the law is a highly desirable objective. If the law allows the man to claim that he is a self-employed person in order to obtain tax advantages for himself and then allows him to deny that he is a self-employed person so that he can claim compensation, then in my judgment the union between fairness, common sense and the law is strained almost to breaking point.

This left the difficulty of *Ferguson*. Lord Denning MR held "that case turned on its own facts." Lawton LJ distinguished it on the basis that in that case "there was very little evidence indeed as to what the contract was" and thus "the court had to imply terms, and the terms which had to be implied were consistent solely with the relationship of master and servant." However, the fact remained that whereas in *Ferguson* the Court held that the label the parties give to the contract is irrelevant, in *Massey* it was held to be determinative.

The Court of Appeal in *Young & Woods* declined to follow and distinguished *Massey*. As noted in the discussion on alternative approaches, earlier in this chapter, the Claimant, Mr West, opted to be placed on his employer's books as self-employed so that he rather than they would be responsible for paying his taxes. His employers claimed that this barred his subsequent claim for unfair dismissal. Stephenson LJ referred to *Massey* and held that it would not "justify me in concluding that, wherever there is an agreement openly made that a particular person shall be treated by a company as self-employed, it follows that he must accept the position and cannot claim compensation for unfair dismissal as if he was not self-employed but an employee. It must be the court's duty to see whether the label correctly represents the true legal relationship between the parties in that case as in every other."

His Lordship went on to hold that the Claimant's work "should be classified not by appearance but by reality." Furthermore his Lordship was "satisfied that the parties can resile from the position which they had deliberately and openly chosen to take up and that to reach any other conclusion would be, in effect, to permit the parties to contract out of the Act and to deprive, in particular, a person, who works as an employee within the definition of the Act under a contract of service, of the benefits which this statute confers upon him." Similarly Ackner LJ held "it is now well settled that the label which the parties choose to use to describe their relationship cannot alter or decide their true relationship."

The Court of Appeal in *Autoclenz Ltd v Belcher and others* [2010] IRLR 70 stressed not only the limited value of how the parties label the status of the worker but also the limited value of what the parties wished the relationship to be. The case has been previously discussed. The contract, besides expressly stipulating there was a right of substitution and no mutuality, also stated in express terms that the Claimants were sub-contractors and not employees.

Nonetheless the Court of Appeal upheld the Tribunal's finding that they were employees. Smith LJ held:

what Autoclenz *wished* to create was not material; what mattered was what Autoclenz *did* create, both by the drafting of its documents and by the requirements it imposed on the valeters. It matters not how many times an employer proclaims that he is engaging a man as a self-employed contractor; if he then imposes requirements on that man which are the obligations of an employee

and the employee goes along with them, the true nature of the contractual relationship is that of employer and employee.

Like the Court of Appeal in *Massey* her Ladyship was conscious that it seemed unattractive that a worker could describe himself as self-employed to avail himself of the tax benefits of that status yet still be an employee for the purposes of claiming compensation for unfair dismissal. However, unlike the Court of Appeal in *Massey* she held that this did not mean that the worker's status does not engage s.230 given that the approach is objective and does not turn on the perception of the parties. She held:

> I can see that the argument of the employee is rather less attractive where, for many years, he accepts that he is a self-employed contractor and benefits from the rather more favourable taxation arrangements which are available to people running their own businesses. However, it seems to me that, even where the arrangement has been allowed to continue for many years without question on either side, once the courts are asked to determine the question of status, they must do so on the basis of the true legal position, regardless of what the parties had been content to accept over the years. In short I do not think that an employee should be stopped from contending that he is an employee merely because he has been content to accept self-employed status for some years.

A question of fact or a question of law?

Is the question of whether a contract is a contract of employment or a contract for services a question of fact or a question of law? In *Young & Woods* Stephenson LJ held it was a question of law:

> in these cases of service or services as in the case of lease or licence, whether the true inference from the facts, the true construction or interpretation of a written agreement or of an agreement partly oral and partly written or of a wholly oral agreement, is a matter of law on which there is a right and a wrong view, and if an industrial tribunal comes to what in the view of this court is a wrong view of the true nature of the agreement, it can and should find an error of law on the part of the industrial tribunal.

However, Lord Griffiths in the Privy Council's decision in *Lee* held:

> Whether or not a person is employed under a contract of service is often said in the authorities to be a mixed question of fact and law. Exceptionally, if the relationship is dependent solely upon the true construction of a written document it is regarded as a question of law...But where, as in the present case, the relationship has to be determined by an investigation and evaluation of the factual circumstances in which the work is performed, it must now be taken to be firmly established that the question of whether or not the work was performed in the capacity of an employee or as an independent contractor is to be regarded by an appellant court as a question of fact to be determined by the trial judge.

Lord Hoffman endorsed this approach in *Carmichael*. As previously noted his Lordship held:

> But I think that the Court of Appeal pushed the rule about the construction of documents too far. It applies in cases in which the parties intend all the terms of their contract (apart from any implied by law) to be contained in a document or documents. On the other hand, it does not apply when the intention of the parties, objectively ascertained, has to be gathered partly from documents but also from oral exchanges and conduct. In the latter case, the terms of the contract are a question of fact. And of course the question of whether the parties intended a document or documents to be the exclusive record of the terms of their agreement is also a question of fact.

Therefore the question of whether the contract is a contract of or for services is a mixed question of fact and law. The construction of documents is a question of law. Two questions, however, are a question of fact. Firstly, the question of the terms to be ascertained from oral exchanges and conduct. Secondly, whether the parties intended the written document or documents to be the exclusive record of their agreement.

Conclusions

In most cases of unfair dismissal the question of whether the Claimant is an employee will turn on control, mutuality of obligation and personal service. However, this is not necessarily an exhaustive approach. Here it should be borne in mind that other approaches, in cases outside the ERA, have been used and that one of them, "the business on your own account test," has been applied in cases of unfair dismissal. The test is objective and hence it will matter little how the parties themselves describe their relationship unless the position is ambiguous in which cases this could be of significant evidential value. The test is also a mixed question of fact and law and depending on the circumstances of the case this may require consideration of the conduct of the parties as well as any written documents.