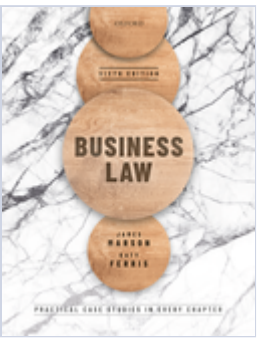


Business Law (6th edn)
James Marson and Katy Ferris

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# 19. Hiring Staff and Establishing the Contract of Employment

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## Abstract

This chapter discusses how employment relations affect all business organizations and why it is especially important to identify the status of individuals engaged in employment. It begins by considering the regulation of the employment relationship and identifies the tests to establish the employment status of individuals, as well as the reasons behind the significance of the distinction between an employee and independent contractor. The three common law tests that have been used to determine employee status—control, integration, and mixed or economic reality—are identified, and how it is most appropriate, in applying the tests, to begin with those established in *Montgomery v Johnson Underwood*, and then proceed to the final question in *Ready Mixed Concrete*. The chapter also identifies the terms implied into contracts of employment and the obligations these place on the involved parties.

**Keywords:** Keywords: employment relations, employment status, employee, independent contractor, common law tests, control, integration, mixed or economic reality

The status of individuals at work is vitally significant to both the individual and to the employer. Whether the individual is an ‘employee’, ‘worker’, ‘independent contractor’, or ‘employee shareholder’ determines rights and obligations. For example, only individuals with the employment status of ‘employee’ are eligible to claim a remedy for unfair dismissal or redundancy. Employees are also subject to implied terms in the employment contract—such as fidelity (the employee must give their loyalty and faithful service to their primary employer). It is important to remember from the outset that employment status is merely a gateway to

another right or duty—courts and tribunals will not determine the employment status of the individual unless there is, first, disagreement between the parties, and secondly, the right or duty being applied requires 'employee' status.

The parties may, for example, attempt to label the individual (such as in a contract of employment) as an 'employee', but the courts and tribunals look beyond the wording of the contract. They study the actual working relationship and terms of employment in reaching their conclusion as to employment status (*Weight Watchers (UK) Ltd v Her Majesty's Revenue and Customs*). For this reason, careful consideration of the case law is essential to identify the true status of individuals, and thereby the obligations on the parties.

## Business Scenario 19

Yeo works as a driver for the company 'Super' which operates an online transportation network business. Super arranges its business through engagement of individuals as independent contractors and views itself as a technology company. Through its 'App', via which drivers may register, the drivers are connected with passengers who require a taxi service to their chosen destination. Super exercises the following controls over the drivers' roles: It interviews all drivers prior to engagement; requires the drivers to provide details of passengers and the travel provided; it may unilaterally end any contract with a driver; it approves the choice of vehicle used by the drivers; it operates a complaint mechanism and uses a rating system (akin to a system of performance management); and the drivers are subject to disciplinary rules operated by Super (drivers may be forced to log off the App if they cancel taxi requests or fail to accept a sufficient number of trips). Super advertises itself as connecting 'Super drivers' with 'Super passengers' and requires strict rules of conduct between the drivers and their fare-paying passengers (such as not allowing personal information to be shared between them). The drivers, finally, are prohibited from publicly criticizing Super or publishing any information (on social media for instance) which may be construed as being negative about the company or the drivers' experiences of it.

p. 480 ↵ Super identifies the drivers as self-employed with each driver constituting a separate business. When Yeo wishes to enforce a right to be paid the national living wage he is refused as Super refer him to their terms and conditions of service which identify drivers clearly as a self-employed independent contractors.

The scenario will be referred to throughout the course of the chapter but at this stage do you think Yeo is an employee, a worker, or an independent contractor?

## Learning Outcomes

- Explain why the distinction of employment status is important (**19.2**)
- Distinguish between an employee and an independent contractor, through the evolution of the common law tests (**19.3–19.3.4**)
- Identify the status of employee shareholders (**19.4**)

- Identify the contractual terms employees are entitled to be notified of when commencing employment (**19.5**)
- Identify the implied terms applicable to employees (**19.6.1**)
- Identify the implied terms applicable to employers (**19.6.2**).

## 19.1 Introduction

This chapter begins the consideration of the regulation of the employment relationship. It identifies the tests to establish the employment status of individuals, and why the distinction between an employee and **independent contractor** is so significant. The three common law tests that have been used to determine **employee** status (control, integration, and mixed/economic reality) are identified, but when applying the tests it is most appropriate to begin with those established in *Montgomery v Johnson Underwood* (see **19.3.4**), and then proceed to the final question in *Ready Mixed Concrete* (see **19.3.4**).

The chapter also identifies the terms implied into contracts of employment and the obligations these place on the parties. Awareness of employment status is crucial when the further chapters involving dismissals and discrimination are considered and enable the reader to identify which type of 'worker' may qualify under specific legislation and those who will be ineligible to make a claim.

## 19.2 The reason for the distinction

Employees are subject to greater control and to the application of implied terms in their contract than are independent contractors. For an employer, they are responsible for paying the employee's tax and national insurance contributions, they may be responsible for torts committed by an employee (under vicarious liability), they have responsibilities for employees' health and safety at work, and may have to provide compensation in cases of unfair dismissal and redundancy (to name but a few). Employers also have the
p. 481 advantage of an employee's fidelity to the employer; employees have obligations to cooperate, adapt ↵ to new working conditions, and obey the lawful orders of the employer. Consequently, determining employment status is crucial for an employer and the individual to appreciate their obligations and responsibilities in the working relationship.

The protective employment rights applicable to employees are the most extensive. The following is a non-exhaustive list but provides an overview of the distinction between the rights enjoyed by individuals with the following employment status:

*Employee:*

- Unfair dismissal (Employment Rights Act (ERA) 1996, s. 94);
- Redundancy (ERA 1996, s. 135);
- A written statement of particulars of employment (ERA 1996, s. 1);

- Request to work flexibly (ERA 1996, s. 80F);
- Maternity leave (ERA 1996, s. 71)/adoption leave (ERA 1996, s. 75A)/paternity leave (ERA 1996, s. 76)—and associated pay (Social Security and Benefits Act 1992, s. 164);
- Protection through an employer's insurance scheme (Employers' Liability (Compulsory Insurance) Act 1969, s. 1);
- Employer's vicarious liability for torts committed in the course of employment (Equality Act (EA) 2010, s. 109);
- Time off to perform public duties (ERA 1996, s. 50); and all of the rights enjoyed by workers as outlined below.

*Workers:*

- Right not to be discriminated (EA 2010, s. 13) against and to equal pay through the Equality Act 2010 (EA 2010, s. 66);
- Right not to suffer a detriment on the grounds related to union membership or activities/non-membership of a trade union (Trade Union and Labour Relations (Consolidation) Act 1992, s. 146);
- Maternity, paternity, and adoption pay (but not leave);
- To be paid the national minimum wage (The National Minimum Wage Act 1998); paid holiday leave (Working Time Regulations 1998, reg. 13); and to be given rest breaks (Working Time Regulations 1998, reg. 12);
- Statutory sick pay (Social Security Contributions and Benefits Act 1992, s. 151);
- Protection against a detriment due to a worker making a protected disclosure (whistleblowing—the Public Interest Disclosure Act 1998, s. 2);
- Right to be automatically enrolled in a pension scheme (Pensions Act 2008, s. 3);
- Right not to be treated less favourably where the individual works part-time (the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, reg. 5); and protection of health and safety (Health and Safety at Work etc. Act 1974, s. 3 and more widely though the Management of Health and Safety at Work Regulations 1999, reg. 3, the Control of Substances Hazardous to Health Regulations 2002 (as amended), reg. 3, and the Control of Major Accident Hazards Regulations 1999, reg. 4).

*The genuinely self-employed:*

- Right not to be discriminated against through membership/non-membership of a trade union (the Trade Union and Labour Relations (Consolidation) Act 1992, s. 296); and
- Protection under the Health and Safety at Work etc. Act 1974.

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## 19.3 Tests to establish the employment relationship

Being the highest form of law, the most obvious place to search in establishing how to identify an individual's employment status is statute. The Employment Rights Act (ERA) 1996 contains many of the laws relating to employment, and under s. 230(1) an employee is classed as 'an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment' (similar definitions exist in the Trade Union and Labour Relations (Consolidation) Act 1992, s. 295(1) and the Equality Act 2010, s. 83(2)). The term 'a contract of employment' is defined under s. 230(2), which reads ' … "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.' Ultimately, the legislation is unhelpful and very broad and requires reference to case law to extract the determining factors of employment status. As a consequence, the common law tests have evolved from 'control' and 'integration' to the modern 'mixed/economic reality' test.

It is important to recognize before the tests are discussed that no one test is conclusive and the courts and tribunals make the decision of the employment status based on mixed law and fact—the employment laws established from statute and the courts (through precedent) and the individual facts of the case. Indeed, Griffiths LJ commented that determining employment status 'has proved to be a most elusive question and despite a plethora of authorities the courts have not been able to devise a single test that will conclusively point to the distinction in all cases' (*Lee Ting Sang v Chung Chi-Keung*, see **19.3.4**). Also, note that in employment law, perhaps more than many other areas of law, social and political policy affects the decisions made by tribunals.

**Figure 19.1** identifies the evolution of the common law tests in establishing employment status. These are considered in greater detail in this chapter.

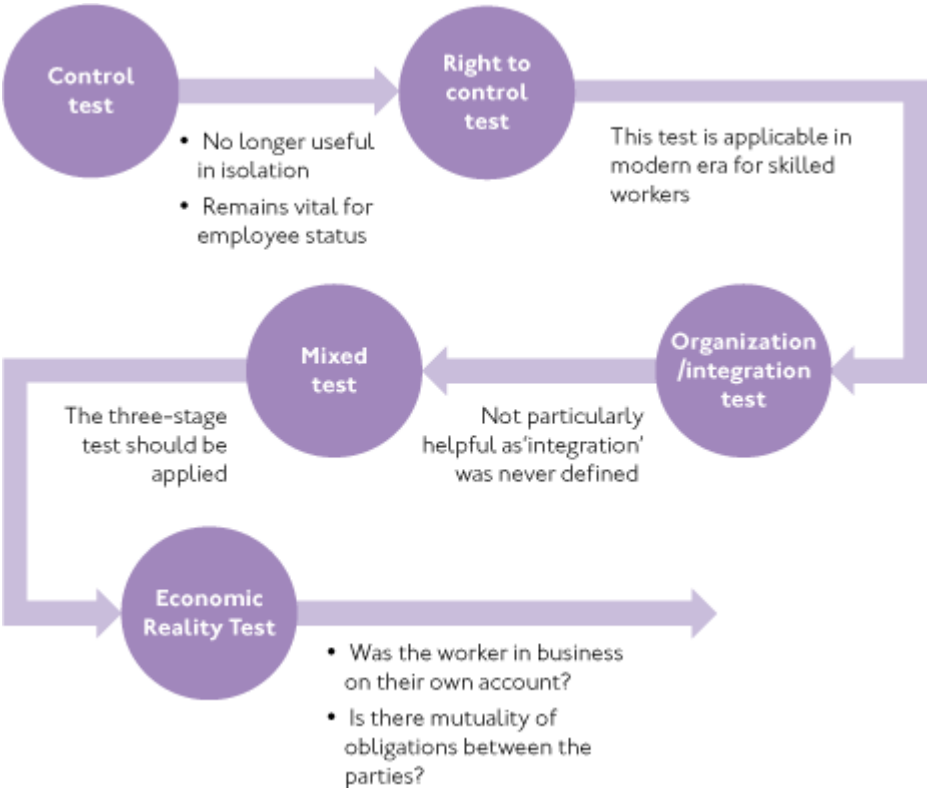


**Figure 19.1** Common law test in establishing employment status

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### 19.3.1 The Control Test

This initial test of employment status occurred through the master and servant distinction, where the master held control over the servant who was subservient to him/her. One of the first cases demonstrating the importance of control in establishing employment status was that of *Yewens v Noakes*, where Bramwell LJ stated: 'A servant [employee] is a person subject to the command of his master [employer] as to the manner in which he shall do his work.' This degree of control was easily seen in employment relationships where the employer exercised complete control over the actions of the individual. However, soon after the test had been established the nature of the control in employment relationships began to change.

### 19.3.2 The Right to Control

The control test necessarily evolved with the advent of an increasingly skilled workforce who did not require the level of control as seen when the test was established. This test has been applied to a surgeon:

### *Cassidy v Ministry of Health* (1951)

#### Facts:

The claimant attended the hospital with a broken wrist. It was incorrectly set and consequently did not heal. He brought an action for damages and it had to be determined whether the hospital was liable for the actions of the medical professionals involved in the actual work of setting the wrist in plaster.

#### Authority for:

Given that the surgeon involved was an integral part of the organization and he was controlled not as how to do the work—he was a skilled worker—but rather when and where he was working, there was sufficient control in existence to make him an employee. The hospital was therefore vicariously liable for the actions of this employee.

Another example of an individual exercising a high degree of independence in completing the tasks set by the employer is with a professional footballer.

### *Walker v Crystal Palace Football Club* (1910)

#### Facts:

Mr Walker was a professional football player engaged through a written agreement to serve Crystal Palace Football Club. The agreement was for a term of one year in which Walker was obliged to attend regular training sessions and observe the general instructions of the club. On 17 October 1908 Walker suffered an accident in a match that damaged his knee and this led to his inability to play any further part in the completion of the agreement. Crystal Palace paid his wages until the end of the agreement
p. 484 but declined to re-engage ↵ him afterwards. Walker claimed compensation for permanent incapacity due to his inability to earn wages from any suitable employment. The ability to claim was determinant upon Walker being considered a ‘workman’ (an employee). Crystal Palace contended that Walker could not be an employee due to lack of control exercisable by the employer. The Court of Appeal held there was evidence of control exercised by the football club and hence Walker was an employee. The employer obliged Walker to attend training sessions and follow instruction, and he had to play when ordered to. The fact that the football club did not control how he played, when he passed the ball or decided to shoot at goal or not, was not inconsistent as Walker was a skilled individual.

**Authority for:**

The control test used to establish an individual's employment status evolved to the 'right to control' test which was more applicable for skilled individuals.

The case established how, even at this early stage, the control test was evolving. With skilled individuals, the test is 'Does the employer have the right to control the individual?' The employer does not have to control the method in which tasks are completed (essentially how the individual works), but rather to control the individual as to when they work, where they work, the order in which tasks are to be completed, and so on.

Control was a useful test when it was first established. However, with modern working practices this was of limited usefulness when applied in isolation. Per Griffiths LJ in *Lee Ting Sang v Chung Chi-Keung and Another*: '... control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor'. Individuals increasingly are skilled and are employed away from the direct control of the employer. For example, if the manager of an airline employs a pilot, it may be unlikely that the employer can tell the pilot how to fly the aircraft. The pilot is employed as a skilled individual who can work under their own initiative and skill, making the control test an increasingly unrealistic isolated test. Many employers employ graduates or those with practical qualifications on the basis that these individuals already possess skills that require little supervision. Such individuals are provided with tasks and they utilize their skills in the completion of these, with little guidance or direct control exercised by the employer. Further, contracts of employment are considered to be contracts of personal service. This means that an employee has to perform the work personally and if they have the ability to subcontract the work or can provide a substitute, then it will be more likely that the individual will be held an independent contractor.

## *Express and Echo v Tanton* (1999)

**Facts:**

Mr Tanton was engaged as a self-employed driver. His contract identified the relationship as one between a contractor and client rather than employer and employee. There were elements of his contract which pointed towards him being an employee, but a clause in the contract allowed Tanton, if he was unwilling or unable to perform his duties, to substitute his duties by him employing another person for the task. This he did on a few occasions and for a longer time when he was ill for a six-month period.

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**Authority for:**

The Court of Appeal held that the delegation of duties to a substitute resulted in the individual being considered an independent contractor. An unfettered right to substitute the individual's work with someone else means the individual cannot be called an 'employee.'

The essential element of employment status is that an employee is synonymous with a contract of personal service.

### *James v Redcats* (2007)

#### Facts:

Ms James was a courier delivering parcels for the defendant. James used her own car for the deliveries and was allowed to work for other employers/businesses. However, James was subject to deadlines for deliveries and was provided with detailed instructions as to the manner in which her duties were to be carried out.

#### Authority for:

In a claim regarding access to the National Minimum Wage, the Employment Appeal Tribunal identified where a tribunal should consider an individual as a worker. The essential question is 'whether the obligation for personal service is the dominant feature of the contractual relationship or not. If it is, then the contract lies in the employment field.'

Therefore, with the limitation of the control test, wider consideration of the employment relationship had to be undertaken. This led to the integration/organization test.

### Consider

What level of control exists over the drivers of Super? Does Super have the right to control the drivers to a sufficient degree to make Super their 'master'? These are skilled individuals, but Yeo and his colleagues get their passengers through registration via the App, they have to ensure their vehicles comply with standards set by Super, and they are not allowed to share information—such as the driver issuing the passenger with their phone number (essentially facilitating solicitation of customers). It appears that there is a significant level of control exercisable by Super over Yeo.

## 19.3.3 The Integration/Organization Test

Due to the problems encountered in utilizing the control test in isolation, the courts began to extend the
p. 486 mechanisms and tests to identify employment status. Lord Denning, ↵ who had been instrumental in developing contract law in his judgments, had an opportunity to consider employee status:

## *Stevenson, Jordan and Harrison v Macdonald and Evans* (1952)

### Facts:

Mr Evans-Hemming had been employed as an accountant with Macdonald and Evans and following his employment ending, he produced a textbook on business management that consisted of lectures based on his experiences with the firm. He then purported to assign the copyright to the book to a publishing firm. Stevenson, Jordan & Harrison were the publishers to whom Mr Evans-Hemming had submitted the book and Macdonald and Evans brought an action to restrain its publication. It did so on the basis that the contents of the book infringed confidential information, and that the copyright belonged to Macdonald and Evans not Mr Evans-Hemming. It was to be decided whether Mr Evans-Hemming was an employee or not at the time of the writing of the text to conclude ownership of the copyright. In determining the employment status Denning LJ considered that:

> 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 only accessory to it.

This definition uses common sense and its logic will be obvious to all, but it is unfortunate that Denning did not define the word 'integrated' to assist in identifying where the demarcation between employee and independent contractor lay. Integration can be interpreted widely and this even prompted Denning later in the judgment to state: 'It is often easy to recognize a contract of service [employee] when you see it, but difficult to say wherein 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 taximan, and a newspaper contributor are employed under a contract for services.' This enabled lawyers, the judiciary (e.g. Mackenna J in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions & National Insurance*, discussed later), and academic commentators to differ on the usefulness of the test as a precedent. Given this limitation, the case law continued with the development of the mixed/economic reality test.

### Authority for:

The greater an individual's integration into the workforce, the more likely they are to be held an employee. The more that the individual is on the periphery of the workforce, the more likely they are to be an independent contractor. This case was of limited use as a precedent however.

### 19.3.4 The Mixed/Economic Reality Test

The previous tests of control and integration had limitations in enabling individuals, employers, and indeed the tribunals to assess, with any real certainty, employment status. Therefore, these tests were extended through the following cases that began establishing the mixed test, utilizing the previous tests and addressing new and relevant questions to ↵ be asked to help establish employment status. A very important case in the development of the law in this area was *Ready Mixed Concrete*, which established three questions that a tribunal should seek to answer in reaching its conclusion:

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#### *Ready Mixed Concrete v Minister of Pensions and National Insurance* (1968)

**Facts:**

Ready Mixed Concrete carried on a business of making and selling ready mixed concrete and similar materials. It separated the business of manufacturing and delivering the concrete and introduced a scheme of owner-drivers who would provide the service. The drivers did not have set hours, they did not have fixed meal breaks, they did have an obligation to follow directions given to them by the company as to loading and parking of the lorries, holidays had to be arranged with the firm to ensure no more than one owner-driver was on holiday at a time, they had to wear the company's uniform, they had to carry out all reasonable orders from any competent servant of the company, they could not alter the lorry in any way, and they had to maintain the lorry and keep it painted in the company's colours.

Following a query regarding responsibility for tax payments from one of the drivers, it had to be determined whether the contracts established employee status, or whether the firm was correct and the drivers were independent contractors. Mackenna J considered the facts and established three conditions that would identify the existence of a contract of service:

1. The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master (this was essentially the requirement of 'mutuality of obligations').
2. He agrees, expressly 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 (the right to control test).
3. Other provisions of the contract that are inconsistent with its being a contract of service (a negative question requiring determination of examples of factors which would point towards status as an independent contractor—e.g. whether the person performing the services provides their own equipment, whether they hire their own helpers, the existence of their financial risk, the degree of responsibility for investment and management, whether they have an opportunity of profiting from sound management in the performance of their task, and payment of expenses).

In the application of these tests it was held that the owner-driver subject to the case was an independent contractor. This was due to the lack of control and the inconsistencies of employee status such as his ownership of the lorry, his duty to maintain the lorry, he was not obliged to take any work, he had no set hours or instruction as to how to complete the jobs undertaken, and he could send a substitute.

### Authority for:

The three-stage test identified in the case has been used to establish employment status. Having answered the two tests as provided in the *Montgomery* case (discussed later) in the affirmative, the third test in *Ready Mixed Concrete* is applied.

p. 488 ↵ In applying the third element of the *Ready Mixed* tests, it may be worthwhile making a physical list of consistent and inconsistent features to assist in determining employment status. **Figure 19.2** demonstrates this approach with the facts of the case.

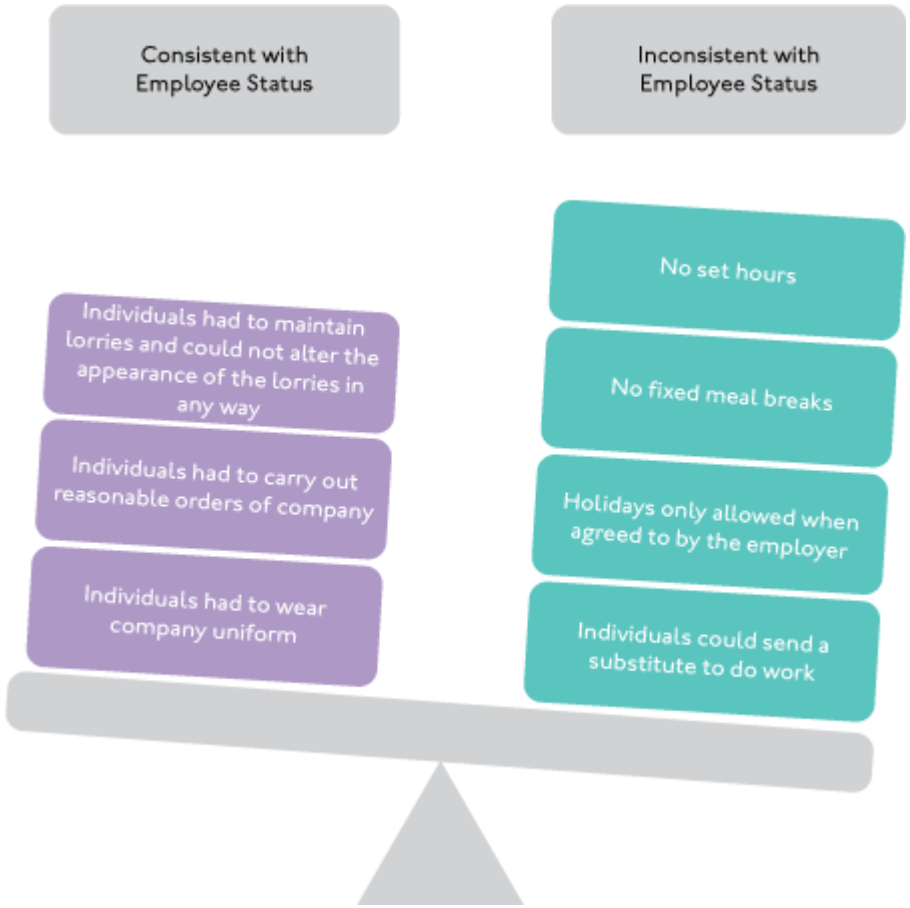


**Figure 19.2** Determining employment status

### Consider

We have already observed that a level of control exists over Yeo. If we follow the authority in *Ready Mixed Concrete* we can see that features of an employment contract do exist. The drivers provide their own vehicles, they have to maintain these to standards set by Super, they are subject to common disciplinary rules, and the drivers have to provide details of fares and passengers to the company. Drawing up a physical list, we would be able to see there are more consistent features with this being a contract of employment than inconsistent features.

A further essential factor to consider and be addressed in establishing the employment status of an employee
p. 489 is **mutuality of obligations**. ↵

### *Carmichael v National Power Plc* (1999)

#### Facts:

The claimant was a guide at the Blythe power station between 1989 and 1995. The contract expressed that the engagement was on a 'casual as required basis'. When the claimant queried her employment status the tribunal remarked that her case 'founders on the rock of absence of mutuality'.

#### Authority for:

When the claimant was not working for the power company there was no contractual relationship between the parties. She was merely employed when necessary by the company and there was no obligation on it to offer any further work, or indeed for it to be accepted by the claimant. Hence, there was no mutuality of obligations between the parties.

More recently the UK courts and tribunals have been influenced by the American jurisprudence of the 'economic reality' of the employment relationship. Independent contractors are considered to be in business on their own account, employees are not. The following case identified the moving definition and test of who is an employee.

### *Market Investigations Ltd v Minister of Social Security* (1969)

#### Facts:

The claimant research company had engaged groups of individuals on full-time and part-time bases to conduct interviews. The part-time workers (subject to a significant aspect of the case) were not provided with sick or holiday pay, they could work for other employers, they were not obliged to accept work offered, and there was mutual recognition of the contract being one for services.

#### Authority for:

The most significant question to ask regarding an individual's employment status is whether they are in business on their own account. Per Cooke J: 'If the answer to that question is "yes", then the contract is a contract for services. If the answer is "no", then the contract is a contract of service.'

Whether someone is in business on their own account may be evidenced through a series of questions raised in the following case:

### *Lee Ting Sang v Chung Chi-Keung* (1990)

#### Facts:

The claimant worked at a building site, on a casual basis, for a sub-contractor. He was injured at work and argued he was an employee in order to recover compensation.

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#### Authority for:

The Privy Council approved Cooke J's test regarding the necessity of control in determining status as an employee, but further held that it could no longer be considered a sole determining factor. Other questions to be considered include:

1. whether the man performing the services provides his own equipment;
2. whether he hires his own helpers;
3. what degree of financial risk he takes;
4. what degree of responsibility for investment and management he has;
5. whether and how far he has an opportunity of profiting from sound management in the performance of his task.

However, it is essential to note that in *Hall v Lorimer* the court stated that the (increasing) tests developed in the case law should not be proceeded through mechanically.

### *Hall v Lorimer* (1993)

#### Facts:

Mr Lorimer was a vision-mixer who, in 1985, left his current job to become a freelance contractor (seemingly to avail himself of tax benefits available to independent contractors—a 25 per cent deduction of business expenses from his total turnover). He enjoyed a successful career for the first three years of this trade with approximately 20 clients. He used equipment provided by the studios where he worked and he had no formal conditions of employment with the clients.

#### Authority for:

In a claim for unfair dismissal the Court of Appeal held that he was self-employed, even though he did not own the equipment used for the work. Where an individual has several clients, it was not available to them to simply pick one and argue successfully that it has employed the claimant. That Lorimer had claimed the business expenses as tax deductions was a significant factor in the court's reasoning.

Tribunals have the discretion to come to their own conclusions, and attach whatever weight they wish to the factors present. For example, if the tribunal believes that the employer deducting the individual's tax and National Insurance at source is indicative of employee status, as the tribunal has heard all of the evidence, it should be in the best position to reach such a conclusion. However, the tests noted earlier should be used as they provide an effective indication as to the direction the tribunals will take in determining employment status. ↵

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### Consider

Super formed its business model on ensuring it appeared that the drivers were in business on their own account. Yeo and his colleagues had to supply their own vehicle, pay for their fuel and licences, they did not have to wear any uniform, and the drivers were responsible for their own tax and National Insurance contributions. What is problematic for Super is that it interviews the drivers prior to engagement, refers to them as 'Super drivers' and ranks them through performance review systems. It does not allow the drivers to solicit customers (and cut Super out of any arrangement for travel). Further, the fact that the drivers pay their own tax and national insurance is largely irrelevant to the realities of their employment relationship with Super—the label of the drivers being 'self-employed' is just that, a label—nothing more!

The cases identified in the mixed test section provide a list of questions that can be used in assessing employment status. Two final cases must be addressed as the most recent (and leading) authorities in this area.

### *Montgomery v Johnson Underwood* (2001)

#### Facts:

An individual had found work through an employment agency and remained in the same employment on placement with a customer for more than two years. When the placement ended the claimant argued she was an employee and entitled to seek a remedy for unfair dismissal.

#### Authority for:

To establish employment status the individual must demonstrate an element of control exercisable by the employer (although this could amount to a general idea of how the work is done rather than control over how the work is done). Secondly there must be an irreducible minimum of mutual obligations. Where these fundamental factors are satisfied, the tribunal may then proceed to consider the other factors of an employment relationship.

These questions should always be considered in light of whether the individual truly is in business on their own account (see **Table 19.1** for an overview). If not, they are more likely to be considered an employee. The essential features of employment status are identified in **Table 19.1**.

**Table 19.1 Features of the employment relationship**

| **Features of the employment relationship** | | | | | | |
|---|---|---|---|---|---|---|
| **Employment status** | **Control exercisable by the employer (*essential*)** | **Integrated into the business** | **A contract of personal service (e.g. no ability to subcontract)** | **On business on own account (*fundamental*)** | **Mutuality of obligations (*essential*)** | **Tax and NI taken at source (*indicative not conclusive*)** |
| Employee | *Yes* | *Yes* (but difficult to define) | *Yes* | *No* | *Yes* | *Yes* |
| Independent Contractor | *No* | Not necessarily | *No* | *Yes* | *No* | *No* |

In the following case the Court of Appeal identifies and distinguishes the previous authorities and explains
p. 492 these in relation to the business model adopted by the employer. ↵

### *Pimlico Plumbers & Charlie Mullins v Gary Smith* (2018)

#### Facts:

Mr Smith was a plumber and carried out plumbing duties for the appellant between 2005 and 2011. After suffering a heart attack in 2011, Smith claims he was unfairly or wrongfully dismissed on 3 May 2011. The appellant had 75 office staff and 125 people like Smith carrying out plumbing and maintenance work on their behalf. In an agreement signed in 2005, Smith was labelled a 'sub-contracted employee'.

#### Authority for:

The Supreme Court held that Smith was a worker and not a self-employed contractor. Pimlico exercised control over Smith. Smith had an obligation to perform the work personally (with a very restrictive right of substitution) and Pimlico was not a client or customer of his.

### Consider

Whether mutuality of obligations exists between the parties is crucial for status as an employee. However, the right that Yeo is seeking to engage—to be paid the national minimum wage—is applicable to those with the status of a worker. Therefore in the case of Yeo, whilst there does not appear to be any guarantees of work for him or for him to accept work offered (although this may be evident through a longer working relationship), this is not as crucial as it would be if he were seeking status as an employee. Yeo, being subject to the interview and performance reviews, evidently has to perform the job personally, and this is a significant guide to his status as a worker.

Ultimately, it is for the tribunal to determine the status of the individual having taken into account all the relevant facts and applying the relevant legal tests. For example, in *Exmoor Ales Ltd and Another v Herriot* the
p. 493 EAT accepted the tribunal's decision that an individual ↵ working on an exclusivity pay contract was an employee. This was based on its assessment of the inconsistencies with the contract being one of employment—the individual had to pay her own tax, prepared the contracts of other staff but not her own, and she was not a member of the employee share scheme. However, her exclusivity of employment, lack of the right to appoint a substitute in her absence, the control exercisable by the employer and mutuality of obligations were decisive factors in holding her as an employee.

## 19.4 Employee shareholders

Employers may wish to engage individuals who do not qualify for certain rights. This might be achieved through engagement of independent contractors, but some employers may actually wish to hire employees who will not qualify for rights including unfair dismissal and redundancy. This was established in 2013. The creation of a fourth type of employment status (employee shareholder) allowed an individual to work under an employment contract with either the employer's company or the employer's parent company. The important aspect of this employment status was that the individual must have been provided with shares in the company with a minimum value of £2,000 (this relates to the market value of the shares per the Taxation of Chargeable Gains Act 1992, ss. 272–273)—there was no upper limit.

Employee shareholders would legally waive their rights to protections in the following areas:

1. unfair dismissal (ERA 1996, s. 94) (unless the dismissal is on the basis of an automatically unfair reason, is in breach of the Equality Act 2010, or is to do with a health and safety ground)—ERA 1996, s. 108(2);
2. statutory redundancy payment (assuming they qualify in the same way as currently exists—ERA 1996, s. 135). (These are two of the most significant protections at work and it must be clear to the individual that whilst being provided with £2,000 worth of shares in the business may be a useful incentive, they are much more vulnerable when the employment relationship is terminated.);
3. the statutory right to request flexible working (except in the two-week period following the return from parental leave—ERA 1996, s. 80F);
4. statutory rights relating to requests for time off to undertake training (ERA 1996, s. 63D).

As from 1 December 2016, no more employee shareholders would be created, although those who held the status and wished to continue with it would be permitted to do so.

## 19.5 The written statement of particulars

The employer has an obligation, under ERA 1996, s. 1, to provide employees with a copy of the written particulars of the employment. This must be provided within two months of the start of the employment. Note, however, that this document is not a contract of employment or a substitute for it. In *Systems Floors v Daniel* the EAT held that whilst the written particulars is not a replacement for a written contract, 'it provides very strong *prima facie* evidence of what were the contracts between the parties'. The written particulars
p. 494 provide important information that attempts to clarify many of the important terms ↵ in the contract. Section 1 includes the following information as admissible evidence before an **Employment Tribunal**:

> (3) (a) **the names of the employer and employee,**
>
> (b) **the date when the employment began, and**
>
> (c) **the date on which the employee's period of continuous employment began.**
>
> (4) (a) **the scale or rate of remuneration or the method of calculating remuneration,**
>
> (b) **the intervals at which remuneration is paid (that is, weekly, monthly or other specified intervals),**
>
> (c) **any terms and conditions relating to hours of work.**
>
> (d) **any terms and conditions relating to any of the following—**
>
> (i) **entitlement to holidays, including public holidays, and holiday pay,**
>
> (ii) **incapacity for work due to sickness or injury, including any provision for sick pay, and**
>
> (iii) **pensions and pension schemes,**
>
> (e) **the length of notice which the employee is obliged to give and entitled to receive to terminate his contract of employment,**
>
> (f) **the title of the job which the employee is employed to do or a brief description of the work for which he is employed,**
>
> (g) **where the employment is not intended to be permanent, the period for which it is expected to continue or, if it is for a fixed term, the date when it is to end,**
>
> (h) **either the place of work or, where the employee is required or permitted to work at various places, an indication of that and of the address of the employer,**
>
> (j) **any collective agreements which directly affect the terms and conditions of the employment including, where the employer is not a party, the persons by whom they were made.**

These terms are essential evidence for many of the statutory-based claims under which employees may seek protection. Outlining when the contract of employment began (due to the fact that unfair dismissal and redundancy have minimum periods of service before qualification is gained; and the levels of compensation are calculated on the number of years in service), the notice period that is required (particularly relevant for wrongful dismissal claims on fixed-term contracts), the sources of obligations and terms (such as through works handbooks and collective agreements), and payments for illness or absences from work each help the parties to identify their rights and obligations. When these terms are missing, as the document or the contract outlining the terms of the employment have not been provided, it makes it considerably more difficult to raise claims against an employer. The Employment Act 2002, s. 38 provides that in cases of unfair dismissal, redundancy, or discrimination, if no written statement of particulars had been provided by the start of the proceedings, then a minimum of two weeks' wages, and a maximum of four weeks' wages (currently capped at £525 per week) is awarded.

p. 495 ↵ At ERA 1996, s. 2(6), the right to written particulars exists even where the person's employment is terminated before the expiry of two months' time. In *Stefanko and Others v Maritime Hotel Ltd* the EAT held that waiting staff engaged for only six weeks were entitled to receive the particulars and when these were not given, the claimant was entitled to an increased award (damages) as provided for in the Employment Act 2002, s. 38. An exception does prevent the requirement for written particulars to be granted to a person who has worked for the employer for a period of less than one month.

An important update to this area of law will apply from 6 April 2020. The Employment Rights (Employment Particulars and Paid Annual Leave) (Amendment) Regulations 2018 (S.I. 2018/1378) require that written particulars be provided from the first day of employment. The Employment Rights (Miscellaneous Amendments) Regulations 2019 (S.I. 2019/731) extends the right to written particulars to workers (and not just employees as is the current law).

## 19.6 Implied terms in contracts of employment

Implied terms in contract law were considered in **Chapter 8**. They are present in employment law, and can have a fundamental effect on the obligations to both the employer and employee. As implied terms, they are part of the contract between the parties, and of course by being implied they are by necessity never written in the employment contract or spoken in the negotiations. Such implied terms are just one reason why the document provided to employees under s. 1 of ERA 1996 is not the contract of employment, although many of the provisions will overlap. It is vital to be aware of the location of the implied terms. Some will derive from statutes (such as a pay equality clause in employment through the Equality Act 2010); and custom in a particular employment may provide terms. For example, the courts may imply terms where the practice is notorious and reasonable.

### *Sagar v Ridehalgh* (1931)

#### Facts:

A mill owner in Lancashire deducted wages from an employee for cloth that had been damaged due to poor workmanship. This was the practice of the mill owner and thus, claimed the employer, implied into the contract.

#### Authority for:

The implication of the term was held as fair, was common practice in the locality and for that trade. Therefore it was implied into the employee's contract.

Works handbooks are also a common source for implied terms as the employer can establish terms that are to affect a large number of individuals, and instead of incorporating these terms into each employee's contract they are maintained in the document, which can be accessed by the employees at their convenience. This does not mean that employees can rely completely on this document to identify their obligations and the employer
p. 496 may unilaterally modify the terms contained within if this is reasonable. ↵

### *Dryden v Greater Glasgow Health Board* (1992)

**Facts:**

The employer introduced a new no-smoking policy and the claimant argued that its introduction was a breach of contract and breached the trust and confidence between the parties. Dryden used this argument to resign and claim constructive dismissal.

**Authority for:**

The EAT held the new policy as a 'works rule' which had no contractual effect (and thus could not be a breach of the employment contract). Employers were entitled to make rules which impacted on the conduct of employees and, beyond this not being a contractual term, there was also no implied term that employees were permitted to smoke at the workplace.

However, terms are present in the contract that are relevant and may assist the employee in establishing claims to protect their rights.

### *Christopher Keeley v Fosroc International Ltd* (2006)

**Facts:**

The claimant was made redundant. According to the works handbook, employees with his continuous service were entitled to receive an enhanced redundancy payment (above the statutory minimum). He did not receive the enhanced payment and brought his claim for breach of contract. The argument presented in the first case was that such provisions in the handbook are aspirational or procedural, but not contractual.

**Authority for:**

The Court of Appeal considered that redundancy provisions are by their nature apt for incorporation into the contract. This applies where employers mention enhanced redundancy payments in works handbooks and, in the event that these payments are discretionary, the employer should ensure this is made clear.

### 19.6.1 Implied Terms on the Employee

The contract of employment, the details in the written particulars provided to the employee, and the negotiations between the parties before the employment relationship is established each include express terms. However, it is of vital importance that it is recognized that contracts of employment are supplemented by many implied terms that have significant effects on the rights and duties of the parties. There are many implied terms imposed on employees and these have been developed and extended through the common law. There are too many to include in this text and those included here do not constitute an exhaustive list, but the
p. 497 more important examples include mutual trust and confidence. ↵

#### *Donovan v Invicta Airways Ltd* (1970)

**Facts:**

The claimant was an airline pilot. He was asked to fly an aircraft in conditions which he considered to be unsafe and, further, was subject to abusive action from the employer.

**Authority for:**

Following the claimant's resignation and action for constructive dismissal it was held that the employer's conduct had fundamentally breached the trust and confidence between them. Continued employment was impossible, justifying Donovan accepting the employer's breach.

Note that whilst trust and confidence embodies respect between the parties, that does not prevent criticism of either. The High Court has held a Board of Directors may talk in negative terms about an employee, but extending this to a campaign of vilification of an employee will breach the mutual trust and confidence between the parties. If the breach is sufficiently serious, it may amount to a repudiatory breach, for which the employee is entitled to accept, resign, and seek damages. For the employee to gain protection against a repudiatory breach by the employer it is important for the employee not to have breached the same term, or they will lose the right to claim constructive dismissal.

### *RDF Media Group Plc v Clements* (2007)

**Facts:**

An employee resigned from his employment and the employer, invoking a restraint of trade clause, placed the employee on 'garden leave' during the resignation period. Negative comments about the employee were leaked to the press and amounted to a prima facie breach of trust and confidence. However, prior to this the employee had divulged confidential corporate information to a competitor he was intending to work for.

**Authority for:**

The employee's claim of constructive dismissal failed. An employee cannot rely on a subsequent breach of the contract to justify a constructive dismissal if he has already breached that trust and confidence between the parties.

There is an obligation of fidelity (faithful service) where the employee must not work in competition with the employer and they must give their faithfulness to the employer. This restricts the employee from taking on other employment, without express permission, if it may interfere with their employment with the first
p. 498 employer. ↵

### *Hivac Ltd v Park Royal Scientific Instruments Co.* (1946)

**Facts:**

Five employees engaged by Hivac began working, on Sundays—a non-working day—for its only competitor. Despite this work being conducted in the employees' own time, Hivac sought an injunction to prevent them from continuing with this work.

**Authority for:**

The employees were subject to the implied term of fidelity. It was inconsistent with their contracts of employment that they would take action which could potentially conflict and cause considerable harm to their employer's business. This extended to action taken in their spare time.

Fidelity has caused problems in the employment relationship when employees have followed the exact terms of their contract, yet their actions were held to be breaching the duty of faithful service.

### *Secretary of State for Employment v ASLEF (No. 2)* (1972)

**Facts:**

Following a dispute between workers and the employer, the trade union ASLEF advised its members to follow the exact instructions for workers as included in the works handbook. This included refusing to work overtime or on their designated rest-day. This is often referred to as 'working to rule' and is a form of industrial action.

**Authority for:**

The Court of Appeal held that even though the workers were following the contract, this action was not to fulfil a health and safety requirement, rather it was designed to disrupt the employer's work. It continued that if the union and the workers wished to take part in lawful industrial action, specific formalities were available and had to be followed. This action was a breach of the workers' obligation to serve their employer faithfully.

The issue of faithful service has extended to ensure that the employee does not steal from the employer, take other employees or customers when they leave to establish a new business, and they must not solicit bribes.

### *Boston Deep Sea Fishing and Ice Co. v Ansell* (1888)

**Facts:**

The managing director of the company received secret commissions when placing orders for new boats and provided business to corporations in which he held shares.

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**Authority for:**

The Court of Appeal held such actions to be against the implied duties on the director to give faithful service to his employer. Where a potential conflict of interest is evident, the employee should inform their employer of this fact and thus enable the employer to take the most appropriate action.

Employees who are fiduciaries have the duty to disclose the misdeeds of others (*Sybrom Corporation v Rochem Ltd*). This places an obligation on such an employee to inform the employer if they are aware or have knowledge of wrongful actions by colleagues.

### *Sybrom Corporation v Rochem Ltd* (1983)

#### Facts:

Mr Roques was employed as the manager of Sybron's European zone. During his employment he, along with other senior employees, was part of a conspiracy to establish competing companies—including Rochem. This resulted in them directing contracts meant for Sybrom to these newly formed companies. The fraud was only discovered following Roques' retirement and the claimant sought to recover the pension and other benefits acquired by Roques.

#### Authority for:

The defence presented was that Roques was under no duty to disclose his own misconduct. This was clarified in *Tesco Stores Ltd v Pook* (2004) and *Item Software (UK) Ltd v Fassihi* (2004) where the Court of Appeal held that a director/senior manager *was* under such a duty. Individuals under a fiduciary duty (such as managing directors) are subject to an implied term of volunteering and disclosing the misdeeds of others to which they are aware.

Employees are under a duty of cooperation (see *Secretary of State for Employment v ASLEF (No. 2)* discussed earlier) and must work with their employer in the best interests of the business. Even if the employee dogmatically adheres to the textual reading of the contract of employment, if this is used to cause harm to the employer, the employee will breach their obligation to cooperate.

Employees must exercise reasonable skill and judgement in their employment so as not to endanger colleagues and clients. This extends beyond the issue of health and safety.

### *Janata Bank v Ahmed* (1981)

#### Facts:

Mr Ahmed was engaged as a bank manager and in the course of his duties he agreed loans and mortgages to customers who were 'bad risks'. This led to loses of nearly £35,000 which the bank sought to recover.

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#### Authority for:

The court held that Ahmed had breached the implied term of exercising reasonable care, skill, and judgement. He was ordered to repay the money.

Employees have a duty to obey lawful orders from the employer.

### *Pepper v Webb* (1969)

**Facts:**

A gardener was employed by the defendant and towards the end of his employment his work and attitude had recently diminished. When asked to undertake some planting duties he responded to the employer 'I couldn't care less about your bloody greenhouse and your sodding garden.' Consequently he was summarily dismissed.

**Authority for:**

The Court of Appeal agreed with the employer's decision to dismiss. They had given the gardener a reasonable and lawful order, and his willful disobedience was a fundamental breach of the contract.

The duty exists even if this extends beyond their actual job description.

### *Macari v Celtic Football and Athletic Co.* (1999)

**Facts:**

The claimant was the manager of the football club. His contract required him to live within a 40-mile radius of the city where the club was based (Glasgow). In fact he lived further away and following the appointment of a new managing director, the claimant was warned that he must adhere to this term and also to report to the managing director on a weekly basis. The claimant did not relocate and after arranging a five-week holiday without the consent of the managing director he was summarily dismissed.

**Authority for:**

The employer had made a lawful and reasonable instruction of its employee and the non-compliance amounted to a repudiation which permitted the employer to treat as a fundamental breach. The employer's motives may be considered in such an event, but this did not release the employee from having to follow their obligations under the contract.

p. 501 Lawful orders can include mobility clauses in the contract. ↵

### *United Kingdom Atomic Energy Authority v Claydon* (1974)

**Facts:**

The employee was provided with an instruction to work in another base in the UK and he refused, despite a mobility clause being included in his contract of employment.

**Authority for:**

The employee was in breach of contract for refusing this lawful order. The court did say, however, that any express mobility clause is subject to an implied term that it must be used reasonably.

The employee may be expected to go beyond the exact scope of their contract, and this may amount to covering for an absent member of staff (*Sim v Rotherham Metropolitan Borough Council*). The 'lawful' element of the employee's duty does not extend to situations where by doing so they would endanger themselves.

### *Ottoman Bank v Chakarian* (1930)

**Facts:**

An employee, an American Turkish national, was asked, as part of his employment duties, to return to Turkey to work. However, he feared that if he did go to Turkey he was at risk of being murdered.

**Authority for:**

His fear was based on genuine grounds, his employer knew of the risk to his safety and therefore Chakarian's refusal was considered not to breach the implied term.

Neither does the term require the employee to follow an employer's instruction that would be to commit a criminal act.

### *Morrish v Henleys* (1973)

**Facts:**

The employee was dismissed when he refused to falsify the company's accounts over the quantities of petrol assigned to his vehicle.

**Authority for:**

The dismissal was considered unfair. The employee was not in breach for his refusal to become involved in such unlawful action and agree to the changes made by the employer to the records. The implied term is for employees to follow an employer's lawful order—this does not extend to unlawful orders.

p. 502 ↵ There also exists the duty to adapt to new working conditions.

### *Cresswell v Board of Inland Revenue* (1984)

**Facts:**

The Inland Revenue transferred its method of working from a manual system to a computerized one (this was before the prevalence of home computers and people's familiarity with them). Cresswell and other individuals did not wish to use these and sought a declaration from the court that the employer could not force the change in systems as this was not provided for under the contract of employment.

**Authority for:**

There was an implied term allowing the change in working systems and the employer's unilateral right to alter the terms of the contract in light of this change. Walton J remarked on the expectation of an employee to adapt to new working conditions. Further, the obligation on the employer in such a situation is to provide adequate training for the employees and to give them time to adapt to the changes.

## 19.6.2 Implied Terms on the Employer

Again, this is by no means an exhaustive list, but a relevant example of an obligation imposed on employers has been the duty to pay wages.

### *Devonald v Rosser & Sons* (1906)

**Facts:**

The employer closed the workplace due to lack of business. Two weeks later the employer gave all employees one month's notice of the termination of the contract. Devonald claimed pay for the two weeks before the notice was given.

**Authority for:**

The pay was granted because there was an implied duty that the employer would pay the employee.

This is often where the amount in wages or the frequency of the payments has not been agreed between the employee and employer. If no express agreement is made the employee should be paid a reasonable wage and within a reasonable time. (Payment should be made after the first week. The latest the employee should be paid is by the end of the first month, and then in monthly increments thereafter.) The employer also has the duty to pay a fair proportion of wages if industrial action is accepted (*Royle v Trafford Metropolitan Borough Council*). In *Miles v Wakefield MDC* the House of Lords held that where the superintendent registrar of births, deaths, and marriages took industrial action by refusing to work on Saturday mornings, the employer was entitled to withhold 3/37ths of his wages as Mr Miles was unavailable for work. The employer must pay wages
p. 503 in money, rather than a ↵ previous practice of paying in tokens redeemable in the employer's business, and no unlawful deductions can be made against the wages paid to the employee.

There is generally no obligation on the employer to provide work for the employee (*Collier v Sunday Referee Publishing Ltd*). As long as they provide the wages agreed then the employer may ask the employee to stay away from the place of employment (in examples where there is a decline in orders and there is no work for the employee to do). However, the exception to this is where the nature of the job requires work then the employer must provide it. Examples include those employees who get paid by the piece, those working on commission who require work to earn money, those employment situations where the skills of the employee must be maintained (such as doctors/surgeons), and where publicity is required (such as professional musicians/actors). In *Clayton & Waller v Oliver* an actor who had been given the lead role in a musical production, and was then removed from the role and offered a substantially inferior one, was entitled to seek damages due to the employer's actions, which had damaged his reputation.

The employer has an obligation to maintain the health and safety of their workers and this means the appropriate training of all staff, and safe systems of work to be put in place (*MacWilliams v Sir William Arrol & Co. Ltd*). As part of the requirements to protect employees' health at work, the employer must take out insurance for the benefit of employees working in the United Kingdom, under the Employer's Liability (Compulsory Insurance) Act 1969. This insurance protects employees in the event of an accident at work, or from illnesses that are attributable to their employment, and ensures that in the event that an employer is unable to compensate the employee, the insurance will.

Employers generally have no obligation to provide employees with a reference when leaving the employment and seeking a new position (unless an implied term is applicable or there is an express clause to the contrary). Some employers are reluctant to provide a reference due to the fact that what they say may not be very complimentary and they do not wish to fall victim of the law of defamation. Also, the employer may not wish to be regarded as having provided an inaccurate reference that amounts to a negligent misstatement and be subject to a liability claim. In *Spring v Guardian Assurance Plc* the House of Lords held that a reference that gave a poor impression of the former employee, even though these were beliefs genuinely held by the employer, was negligent as it was likely to cause the employee economic loss. There was an implied term in the employment to take reasonable care and skill in preparing a reference. Note that it is not uncommon for an

employer to provide a poor employee with a particularly good reference simply to 'get rid' of the employee. Such tactics should, consequently, be adopted with caution. It should also be noted that there may be implied into the contract a duty to provide a reference where it has been provided for other employees, or if it has been agreed as part of a settlement issue in a grievance dispute.

As its name suggests, employers, like employees, also have the obligation to maintain mutual trust and confidence and to not take action likely to destroy it.

### *Isle of Wight Tourist Board v Coombes* (1976)

#### Facts:

1 March 1976 was a Monday. On this day Mrs Coombes, who had worked for the Isle of Wight Tourist Board for 15 years and was now personal secretary to its director, was asked to undertake work which
p. 504 was not part of her general duties and, when she complained to ↵ the director, a colleague of Coombes ventured an opinion on the matter. Coombes told the colleague to keep out of it and at this point the director turned to the colleague, in the presence of Coombes and stated 'Don't worry about her. She's always an intolerable bitch on a Monday morning'.

#### Authority for:

The comment of the director was inappropriate and was a fundamental breach of the contract, destroying as it did the trust and confidence between them. Mrs Coombes was successful in her action for constructive dismissal.

An example of an extension of the term, albeit very fact specific and which, as held by the House of Lords, does not create a general right was seen in the following case.

### *Malik v Bank of Credit and Commerce International* (1997)

#### Facts:

The Bank (the BCCI) was embroiled in one of the first major banking scandals in the UK and caused the collapse of the bank. Thousands of people lost their jobs as a result. This included the claimant. Beyond losing their job, the claimant argued he was entitled to damages due to the breach of trust and confidence of the directors in running a fraudulent business. This had caused them hardship in finding future employment due to their involvement with the BCCI (a 'stigma' head of loss).

**Authority for:**

The House of Lords held that an employer must not 'without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee'.

Mutual trust imposes obligations on the employer to prevent actions including bullying:

## *Waters v Commissioner of Police for the Metropolis* (2000)

**Facts:**

A female police officer made a complaint of serious sexual assault against a fellow officer and was subject to retaliatory action. She complained that the Commissioner had failed in their duty to protect her.

**Authority for:**

p. 505 The House of Lords remarked: 'If an employer knows that acts being done by employees during their employment may cause physical or mental harm to a particular fellow employee ↵ and he does nothing to supervise or prevent such acts, when it is in his power to do so, it is clearly arguable that he may be in breach of his duty to that employee. It seems to me that he may also be in breach of that duty if he can foresee that such acts may happen and, if they do, that physical or mental harm may be caused to an individual.'

and stress faced by an employee (e.g. through an unreasonable workload):

## *Barber v Somerset County Council* (2004)

**Facts:**

The claimant had been employed as a head of department in a school. Following changes made at the school he found the changes and an increase in hours very stressful. He raised these concerns to his employer but they did nothing to relieve the stress and the claimant became ill and eventually suffered a nervous breakdown.

**Authority for:**

Employers may generally operate on the assumption that an employee is up to the requirements of their job. However, the House of Lords identified that an employer may have a duty to the employee to identify any steps that may be taken to assist them when the employee is having difficulty coping with their responsibilities. The employer had failed in this respect and was liable in negligence to the claimant.

If these are left unattended they may lead to successful claims for constructive dismissal and also possible tort actions against the employer for damages.

### Consider

Yeo and other 'Super drivers' are subject to confidentiality clauses in their agreement with Super and are prohibited from speaking negatively about the company. This is evidence of an implied term not to breach the trust and confidence between the parties. This is a term which is more akin to employee status than an independent contractor as such terms do not, generally, apply to the self-employed.

## Conclusion

The chapter has outlined the fundamental distinction between individuals who are employees and those who are independent contractors. The tests have been developed through the common law and have demonstrated that the current method is to begin with the tests identified in *Montgomery v Johnson Underwood*, and then if these questions are answered in the affirmative, to continue and apply the third question provided in *Ready Mixed Concrete* (and issues
p. 506 raised in *Market ↵ Investigations*). Whilst many employment rights are being introduced that affect 'workers' (such as the National Minimum Wage Act 1998, the Working Time Regulations 1998, and the Equality Act 2010) not simply employees, there are still many areas of employment law where rights and obligations fall on the employee and not the independent contractor. The independent contractor gains tax advantages, the ability to work for many different employers, and can deduct expenses incurred in their employment, which employees cannot. They are, however, excluded from many protections through statutory rights that may leave them vulnerable if they are dismissed, made redundant, injured at work, or become pregnant. These factors are considered in the following chapters.

## Summary of main points

## Employment status

- The Employment Rights Act, s. 230 defines employment status where 'an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment'.
- As the statute is deliberately broad in scope the courts have developed the following tests:
  - *Control test:* This continues to be a vital element of establishing employee status; it cannot, however, be used in isolation, and must form part of the wider range of questions established in *Montgomery*, *Ready Mixed Concrete*, and *Market Investigations*.
  - *Integration/organization test:* Here, the more the individual was integrated into the organization the more likely they would be considered an employee. This test was not often used following the decision.
  - *Mixed/economic reality test:* This test uses the criteria from *Ready Mixed Concrete*, *Lee v Chung*, *Market Investigations*, and *Montgomery* in establishing employment status.
- Since 2013, the status of 'employee shareholder' was introduced, which provides the individual with shares in the (employer/employer's parent) company in return for him/her waiving certain protective employment rights.

## Reason for the distinction

- The following are examples of why it is important to differentiate between employees and independent contractors: the rate of income tax and responsibility for National Insurance payments; the statutory rights of unfair dismissal, redundancy, and various maternity rights, which are only available to employees; and the employer having potential liability for the torts committed by their employees in the course of their employment.

## Written particulars

- This is not the contract of employment, although similar information may be contained in the document.
- This document must be provided within two months of the employee starting employment.
- It contains important information regarding the parties; the terms of the employment including duties, sources of obligations, and pay; whether the employment is for a fixed time or permanent; and pension details (among others).

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## Terms implied into the contract

- Due to the problems of attempting to include all the terms of the employment relationship into a single document, terms have been implied into the contract through the courts, customs, and statutes.
- Duties and obligations on the employee include mutual trust and confidence, fidelity, duty to disclose the misdeeds of others, cooperation, to use reasonable skill and judgement, obey lawful orders, and to adapt to new working conditions.
- Duties and obligations on the employer include to pay wages; in the case of industrial action being accepted by the employer, to pay a fair proportion of wages; to provide work for the employee; to maintain the health and safety of their workers; and employers also have the obligation to maintain mutual trust and confidence in the employment relationship.

## Summary questions

## Essay questions

1. ‘Through the last one hundred years, legislative and common law initiatives have failed to establish a single definitive test to establish the employment status of individuals.’

   Critically assess the above statement and identify reforms in the law that you deem expedient.

2. Lord Slynn, in *Spring v Guardian Assurance Plc* [1994], observed that ‘the changes which have taken place in the employer/employee relationship … [have seen] … far greater duties imposed on the employer than in the past, whether by statute or by judicial decision, to care for the physical, financial or even psychological welfare of the employees.’

   Discuss the above statement in relation to the development of implied terms in

   contracts of employment.

## Problem questions

1. Jennifer has been employed by All Bright Consumables (ABC) Ltd for the past two years. ABC retails electronic home entertainment equipment. Her tasks include offering sales advice, stock-taking duties, restocking the shelves, and accepting deliveries from suppliers. Jennifer works 40 hours per week and is entitled to six weeks paid holidays each year; however, these must be agreed in advance with her manager and she cannot take her holiday if another member of staff is on holiday at the same time.

   She is occasionally required to work in other regional branches when necessary, although Jennifer may claim expenses for the travel involved. Jennifer’s contract identifies her as an independent contractor, and it also contains a restraint of trade clause. She is responsible for paying her own income tax and National Insurance.

Following a disagreement with her employer regarding stock irregularities, Jennifer has been dismissed from work. She would like to know her employment status in order to identify if she may pursue a claim of unfair dismissal.

With reference to appropriate case law, identify how a tribunal may decide the employment status of Jennifer.

2. Enzo is a maintenance engineer for ABC in its electronic gadgets department (servicing burglar alarms). Enzo is
p. 508 engaged to service the products sold by ABC to its customers in the customers' own premises. Enzo is provided with a list of customers and the priority of those jobs, but he is otherwise left to determine his workload and when he completes the jobs in the day. Following the completion of each job, Enzo obtains a signature from the customer and passes this back to ABC as proof of him completing the job. ABC then invoices the customer directly.

   Enzo uses his own vehicle to make the visits to the customers' premises and he is paid without any deduction of income tax or National Insurance contributions. ABC considers that Enzo will make his own arrangements with HM Revenue and Customs personally.

   Yesterday, whilst on a call to one of ABC's major customer's, Enzo was involved in an accident at work. The accident occurred as the customer had alarms placed in particularly difficult to reach locations. The ladders provided by ABC to Enzo did not reach these locations. Enzo contacted ABC about this but was told that this was a very important customer, and he must complete the service at that visit. As such, whilst attempting to do so, he fell and sustained a serious injury to his arm and shoulder.

   The result of the accident has left Enzo hospitalized for four weeks and he is unlikely to return to work for at least six months. ABC has informed Enzo that as he is an independent contractor he is not eligible to claim from its insurers, nor is he able to claim sick pay.

   Advise Enzo as to his employment status and any claim he may make for his losses against ABC.

You can find guidance on how to answer these questions **here** *<https://oup-arc.com/access/content/marson6e-student-resources/marson6e-chapter-19-indicative-answers-to-end-of-chapter-questions?options=name>*.

## Further reading

### Books and articles

Anderman, S. (2000) 'The Interpretation of Protective Employment Statutes and Contracts of Employment' *Industrial Law Journal*, Vol. 29, No. 3, p. 223.

Boyle, M. (2007) 'The Relational Principle of Trust and Confidence' *Oxford Journal of Legal Studies*, Vol. 27, No. 4, p. 633.

Brodie, D. (2004) 'Health and Safety, Trust and Confidence and *Barber v Somerset County Council*: Some Further Questions' *Industrial Law Journal*, Vol. 33, No. 3, p. 261.

Clarke, L. (2000) 'Mutuality of Obligations and the Contract of Employment: *Carmichael and Another v National Power PLC' Modern Law Review*, Vol. 63, No. 5, p. 757.

Davidov, G. (2005) 'Who is a Worker?' *Industrial Law Journal*, Vol. 34, No. 1, p. 57.

Davies, A. C. L. (2007) 'The Contract of Intermittent Employment' *Industrial Law Journal*, Vol. 36, No. 1, p. 102.

Marson, J. (2013) 'Anatomy of an Employee' *European Journal of Current Legal Issues*, Vol. 19, No. 3.

Taylor, S. and Emir, A. (2019) Employment Law: An Introduction (5th Edition) Oxford University Press: Oxford and New York.

### Websites and Twitter links

http://www.danielbarnett.co.uk *<http://www.danielbarnett.co.uk>*

p. 509 ↵ @daniel_barnett

Daniel Barnett is a barrister specializing in employment law. This resource includes commentary on legislative reforms, and case law materials, often from the lawyers involved in the case. The service is free and is an excellent source of information—I highly recommend you sign up for the mailing service.

http://www.legislation.gov.uk/ukpga/1996/18/contents *<http://www.legislation.gov.uk/ukpga/1996/18/contents>*

The Employment Rights Act 1996.

http://www.justice.gov.uk/tribunals/employment *<http://www.justice.gov.uk/tribunals/employment>*

Employment Tribunals.

https://www.gov.uk/employment-tribunal-decisions *<https://www.gov.uk/employment-tribunal-decisions>*

The Ministry of Justice site of Employment Tribunal decisions available online. Note, this is seen as a matter of transparency and a positive step. However, there has been criticism that it may enable employers to use the resource as a system to identify if a potential recruit has previously taken an employer to a tribunal and use that information negatively.

https://www.tax.service.gov.uk/check-employment-status-for-tax/setup *<https://www.tax.service.gov.uk/check-employment-status-for-tax/setup>*

A website established by the tax office to determine the employment status of the user. This is different to how employment status is identified for employment law purposes, but is quite an interesting and useful tool.

#ukemplaw

A very useful source of discussion and commentary on topical employment issues in the UK.

## Online Resources

**Visit the online resources** *<https://oup-arc.com/access/marson6e-student-resources#tag_chapter-19>* for further resources relating to this chapter, including self-test questions, an interactive glossary, and key case flashcards.

## Related Links

Visit the online resources for this title *<https://arc2.oup-arc.com/access/marson6e>*

Test yourself: Multiple choice questions with instant feedback *<https://learninglink.oup.com/access/content/marson-and-ferris-concentrate4e-resources/marson-and-ferris-concentrate4e-diagnostic-test>*

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