2. 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.

The decision of the Court of Appeal in *White v Troutbeck* [2013] IRLR 949 graphically demonstrates how little the concept of control may require. The empoyers owned a farm in Surrey but lived abroad. They engaged the Claimants to manage and maintain the property. There was a written contract which was described as an "employment agreement". The Claimants were not paid PAYE but were entitled to 30 days paid annual leave. However, there was no day to day control particulary as regards management and maintenance. There were no fixed hours. They were paid a fixed sum each month. They were also entitled to live on the premises. The Tribunal found they were not employees due to the absence of control. The EAT and the Court of Appeal disagreed. Mummery LJ found that the "legal error in this case was in treating the absence of actual day-to-day control as the determinative factor rather than addressing the cumulative effect of the totality of the provisions in the agreement and all the circumstances of the relationship created by it." Whilst there was no day to day control there was *some* control – namely, the Claimants "were under a duty to carry out maintenance work in respect of the garden and the farm." Control was further evidenced by their entitlement to live on the premises it being, his Lordship observed, "unusual for independent contractors to live at a particular property in order to perform caretaking and management services." This along with their entitlement to paid annual leave and a contract which was described as an "employment agreement" was sufficient.

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* [2013] IRLR 99 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 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.

However, whilst the label is not determinative it can be relevant as evidence of what the parties intended. This is clear from the Court of Appeal's decision in *White v Troutbeck SA* [2013] IRLR 949. The case was discussed earlier in this chapter in the context of the meaning of control and mutuality of obligation. It will be recalled that the Court of Appeal found that the Claimants were employees due to a number of factors including the fact that the contract in question described itself as "an employment agreement." Mummery LJ accepted that such labels "are not necessarily the correct conclusion on the legal nature of the relationship." However, in the

circumstances, the label "was an expression of" the parties' "intentions confirming the objective analysis of the legal position."

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.

3. Who is an employee? Special cases

In the previous chapter the general principles for the purposes of determining whether the Claimant is an employee were set out. However, certain types of cases have given rise to particular difficulties and considerations in respect of the application of these principles. This chapter is concerned with these special cases.

Agency workers

As regards agency workers, difficulties arise from the tripartite relationship of worker, agency and the agency's client for whom the worker performs his duties (often referred to in the authorities as the "end-user"). Broadly speaking this relationship has seized the Courts and Tribunals with three questions. Firstly, does the worker have a contract with either the agency or the end-user? Secondly, if so is this a contract of employment? Thirdly, if the Claimant does have a contract of employment who, assuming the dismissal is unfair, is liable – the agency or the end-user?

The discussion starts with the decision of the EAT (Nolan J Presiding) in *Wickens v Champion Employment* [1984] ICR 365. There was no dispute that Ms Wickens was employed by the agency as one of its permanent staff. However, applying the law as it stood then the Tribunal had to be satisfied that the agency employed at least 20 people. As the permanent staff were below that number it was necessary to consider whether the temporary workers were employees. The agency was not bound to find work for them nor were they bound to accept bookings made on their behalf. If they were not offered work or if they did not accept they were not paid. The Tribunal found they were not employees. The EAT upheld their decision as the absence of mutuality meant that "the relationship between the employers and the temporaries seems to us wholly to lack the elements of continuity, and care of the employer for the employee, that one associates with a contract of service."

The Court of Appeal in *McMeechan v Secretary of State for Employment* [1997] IRLR 353 approached the matter by drawing a distinction between the general engagement that the worker has with the agency and the specific engagements in respect of each of his assignments. Mr McMeechan was a temporary worker engaged by an agency – Noel Employment Ltd. He carried out several engagements, for periods varying from a few days to two months, with various end-users. His final assignment lasted a mere four days. His contract with the agency described him as a "self-employed worker." For each assignment the agency issued him with a job sheet which he had to complete in order to claim payment. This was accompanied by a statement which provided, *inter alia*: that he was not obliged to accept work from the agency but if he did the common law duties of an employee applied, that whilst the agency would pay him PAYE he was not entitled to holiday pay, that the agency could end the assignment summarily and without reasons and that he was not obliged to serve any particular number of hours in a day. The Agency went into liquidation. Mr McMeechan applied to the Secretary of State for payments owed to him in respect of his final assignment. His application was refused on the grounds that he was not an employee. Whilst the Tribunal concurred with the Secretary of State the EAT did not. The EAT held that whilst there may not have been an overarching or umbrella contract between Mr McMeechan and the Agency the individual assignments amounted to contracts of employment between them. This was because the factors in the statement accompanying the job sheet that indicated he was employed – such as him being paid PAYE and owing to the agency the common law duties of an employee – outweighed those factors that suggested he was not an employee – such as him not being obliged to accept work.

The Court of Appeal agreed he was an employee but reached this finding via a different route. This was because it emerged during the course of argument that Mr

McMeechan was not so much submitting he was an employee of the agency throughout his time with them but specifically in respect of his final assignment. Waite LJ first considered whether in principle a contract for a single-engagement could amount to a contract of employment. He concluded that it could. He held that "it is logical to relate the claim to employment status to the particular job of work in respect of which payment is being sought." Furthermore, "there is nothing inherently repugnant, whether to good relations in the workplace or in law, about a state of affairs under which, in an employment agency case, the status of employee of the agency is allocated to a temporary worker in respect of each assignment actually worked – notwithstanding that the same worker may not be entitled to employee status under his general terms of engagement." It matters not that there are "standard terms and conditions which are intended to apply both to the general engagement and to the individual stints worked within it" as "the only result of that fusion is that the same conditions will have to be interpreted from a different perspective, according to whether they are being considered in the context of a single assignment.

His Lordship then addressed the single assignment in the present case. As for "the importation of common law duties" these favoured "the inference of a contract of service." His Lordship was conscious that the contract expressly excluded mutuality. However, he opined, those clauses were "irrelevant in this context". Whilst "in the different context of a general engagement" they could be "of crucial – even decisive – importance" in the case of "a specific engagement...there is nothing on which they can operate" as "the fact that the parties are not obliged in future to offer – or to accept – another engagement with the same, or a different, client must be neither here nor there." Accordingly Mr McMeehan had been an employee of the Agency in respect of the final assignment.

The difficulty with *McMeechan* is that it can be read as minimising the importance of mutuality which, as shown in the previous chapter, has been consistently held to be an irreducible minimum of a contract of employment. The Court of Appeal, in *Montgomery v Johnson Underwood Ltd* [2001] IRLR 269 were conscious of and addressed this difficulty. The facts will be recalled from the previous chapter. 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. In so finding, the Tribunal purportedly followed *McMeechan.* The EAT upheld their decision. The Court of Appeal did not.

It was shown in the last chapter that Buckley J affirmed that both control and mutuality constitute the irreducible minimum of a contract of employment. As for the passage in *McMeechan* where Waite LJ held that "absence of mutuality of obligation appears to us largely irrelevant to the specific engagement" his Lordship held "that paragraph may not be as dramatic as it appears at first sight" as Waite LJ "was referring to the specific terms in the agency's standard conditions which expressly excluded relevant obligations, but which were clearly only relevant to any overriding arrangement between the parties and thus there was nothing for them to operate on in the context of a specific contract." In the present case, however, "there are no similar terms to the standard conditions" and accordingly Mrs Montgomery was not an

employee of either the agency or the end-user. Thus in agency cases mutuality of obligation may not be relevant in cases of a specific assignment of a brief duration (it must be recalled that the duration of the assignment in *McMeechan* was four days). However, it will, it is submitted, be a crucial consideration as regards whether the general terms of engagement with the agency constitute a contract of employment.

Given that the end-user's day to day control emanates from the agency does it follow that the agency must be held to exercise the same degree of control and is, hence, the employer? "No" said the Court of Appeal in *Bunce v Postworth Ltd t/a Skyblue* [2005] IRLR 557. Mr Bunce had a temporary agreement with an Employment Agency Skyblue. The agreement obliged the agency to seek suitable assignments for him but Mr Bunce was not obliged to accept any assignments offered. One of his assignments was with Carillion Rail. During the course of the assignment day to day control was exercised by Carillion. They became dissatisfied with his work and asked the agency to terminate the contract. They duly obliged. Any claim for unfair dismissal against Carillion would have failed as Mr Bunce did not have the required qualifying period of employment. Therefore the claim had to be brought against the agency and he had to show that they employed him. The Tribunal, the EAT and the Court of Appeal all held that they did not.

It was submitted, on behalf of Mr Bunce, that whilst Carillion, as a matter of practical reality, may have exercised control, this control originated from their contractual relationship with the agency and hence the agency were the employers. Keene LJ rejected this submission as "the law has always been concerned with who *in reality* has the power to control what the worker does and how he does it. In the present case, during the periods when the appellant was working on an assignment, it was the client, the end-user, who had the power to direct and control what he did and how he did it." His Lordship distinguished *McMeechan*, where, it will be recalled, the agency was found to be the employer, on the basis that in that case there was evidence, in the form of the nature of the specific agreement for each contract, that the agency retained direction and control over the worker.

The EAT (Elias J Presiding), however, in *Consistent Group Ltd v Kalwak and others* [2007] IRLR 560 found that the Claimant was employed by the agency. The Claimants were Polish. The agency recruited them in and transported them from Poland. Their written contracts with the agency expressly stated that they were not employees. However, it obliged them to "honour a specific pre-agreed period of engagement." It did provide they could work for others but only if "there is no conflict with or circumvention of the sub-contractor's ability to provide services for Consistent or to clients." The agency also provided the workers with accommodation.

The EAT upheld the Tribunal's decision that the Claimants were employees of the agency. The EAT was satisfied that the obligation to honour a pre-agreed period of engagement made it clear there was a contract. Mutuality of obligation, rendering the contract a contract of employment, "would be a necessary implication of the arrangement that at least whilst the staff were being accommodated by the agency, and were obliged to provide the rent, they would have a right to priority for any work which was available as against those not so accommodated." There was mutuality between engagements as the contract provided in effect that a worker could not work for others if that "would prevent him being available to work for them as they would wish" and was "plainly a contractual obligation imposed on the employee even when he is not subject to a particular engagement." The EAT accepted there was "detailed control" given the workers "were recruited in Poland, transport and accommodation was provided in circumstances where they were not really in a position to refuse them, and there were severe practical and legal limits on their working elsewhere whilst the contract was maintained." Overall there was a picture of "persons who went to work with no more practical alternative than ordinary employees; it was their job and they did it where and when they were told to by the agency." Thus even when the agency

does not directly determine the worker's day to day work control can be found, *albeit* in a limited sense, when the practical reality is that agency, nonetheless, has significant influence as regards where and when the worker works.

As noted in the previous chapter the Court of Appeal overturned the decision and remitted the matter to the Tribunal on the basis that the EAT had erred in finding an implied term of mutuality of obligation when there was an express term that stated otherwise (*Consistent Group Ltd v Kalwak and others* ([2008] IRLR 505). However, the principle enunciated by the EAT that in certain circumstances it can be said that the agency assumes the role of employer by directing how and when the workers perform their duties was not criticised or challenged. It is thus submitted that to this extent the EAT's decision remains good law.

The principal focus of the cases discussed thus far has been whether the worker was an employee of the agency. The EAT (Lindsay J Presiding), however, in *Motorola Ltd v (1) Davidson and (2) Melville Craig Group Ltd* [2001] IRLR 4 held the end-user was the employer. The case was discussed in the previous chapter in the context of considering the meaning of "control." 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. In the previous chapter it was shown that this was because of "control." However, it must be noted that Motorola relied solely on "control" as opposed to other ingredients of the contract of employment and matters that may be particular to agency cases. Accordingly the EAT remarked:

> We must emphasise that we have concentrated upon 'control.' As to whether we would have concluded, more widely, as did the employment tribunal, we say nothing; Motorola chose to argue only as to the 'control' component and we, too, have limited observations to that subject.

Accordingly it is submitted that the decision should be confined to its own circumstances and that no general proposition can be drawn from it that a worker is an employee of the end-user, and not the agency, when 'control' is present as between the worker and the end-user.

The Court of Appeal, in *Franks v Reuters Ltd and another* [2003] IRLR 423 also considered when the Claimant can be an employee of the end-user. Mr Franks entered into a temporary works agreement with First Resort Employment Ltd – an employment agency. Whilst the agreement obliged First Resort to try and find work for him they were not obliged to provide it and nor was he obliged to accept it. First Resort had a contract with Reuters. The contract provided that each temporary worker, who First Resort supplied to Reuters, would be an employee of Reuters throughout the duration of the assignment. Mr Franks accepted a temporary placement as a driver with Reuters. This became a permanent arrangement. The hours he worked were set by Reuters although it was the agency who remunerated him in respect of those hours. When Reuters told him, after he had worked for them for five years, they no longer required his services he brought a claim for unfair dismissal against both them and First Resort. The Tribunal found, and the EAT agreed, that he was not an employee of either company as there was no mutuality of obligation. As for Reuters the Tribunal found there was no mutuality as the Claimant could have gone back to the agency at any time saying he no longer wished to work for Reuters.

The Court of Appeal, however, found that the Tribunal had erred. Mummery LJ held:

> a question of law arises from the decision of the tribunal. That question is whether it is legally correct for a tribunal to conclude that an individual is not an employee without first determining as a fact whether, on a consideration of all the relevant evidence (including what was said and done, as well as any relevant documents), there was an implied contract of service between Mr Franks and Reuters.

The Tribunal had erred in that "their findings of fact do not appear to be based on a full and properly directed consideration of all the relevant evidence relating to the work relationship between Mr Franks and Reuters." Furthermore, he went on, the evidence "demonstrates that there was certainly a contractual background of the work done by Mr Franks for Reuters." The temporary worker agreement between Mr Franks and First Resort were not determinative of the issue of mutuality of obligation as between Mr Franks and Reuters. However, it did "form part of the factual matrix of the relations between Mr Franks and Reuters." Also relevant was the contract between First Resort and Reuters and documents which indicated that Mr Franks was to work in accordance with instructions issued by Reuters. Furthermore, his Lordship went on, whilst "a person cannot become an employee simply by reason of the length of service for which he does work for the same person" it is "not irrelevant evidence" as "dealings between parties over a period of years, as distinct from the weeks or months typical of temporary or casual work, are *capable* of generating an implied contractual relationship." As the Tribunal had not addressed these matters the case fell to be remitted.

The decision requires comment. Firstly, the Court of Appeal made it clear that before the question of whether the Claimant is an employee of the end-user can be addressed there must first be a finding of an implied contract between the Claimant and the end-user. Secondly, whilst the contractual relationship between the Claimant and the agency is by no means determinative it is relevant background evidence. Thirdly, the principle of a contract of employment arising from a course of dealing, enunciated, as shown in the previous chapter, by the EAT in *Airfix* and the Court of Appeal in *Nethermere,* can apply in determining whether there is a contract between the Claimant and the end-user.

In *Dacas v Brook Street Bureau (UK) Ltd* [2004] IRLR 358 the Court of Appeal also found that in certain circumstances the Claimant can be an employee of the end-user. Mrs Dacas was a cleaner. She was registered with Brook Street Bureau – an Employment Agency. For a number of years she was assigned by Brook Street to work on their contract with Wandsworth Borough Council. The council exercised day to day to control over her and supplied her with cleaning materials, equipment and an overall and determined her working hours. The agency set her rate of pay and paid her out of payments made to them by the Council. Thus ultimately, it could be said, the Agency was the paymaster. Due to her involvement in an altercation the Council asked Brook Street to remove her from the contract. They did so and she brought claims for unfair dismissal against both. The Tribunal found that she was an employee of neither. The EAT found she was an employee of the agency. The agency appealed to the Court of Appeal but the Council did not. Nonetheless the Court did consider whether she had been an employee of the Council. They found that she had been.

Mummery LJ held:

> like other simple contracts, a contract of service does not have to be in any particular form. Depending on the evidence in the case, a contract of service may be implied – that is, deduced – as a necessary inference from the conduct of the parties and from the circumstances surrounding the parties and the work done.

As for the present case, his Lordship could "see no insuperable objection in law to a combination of transactions, embracing an express contract for services between Mrs Dacas and Brook Street, an express contract between Brook Street and the Council and an implied contract of service between Mrs Dacas and the Council, with Brook Street

acting in certain agreed respects as an agent for Mrs Dacas and as an agent for the Council under the terms of the express written agreements."

His Lordship went on to hold that Mrs Dacas "has a contract, which is not a contract of service, with the employment agency, and that the applicant works under an implied contract, which is a contract of service, with the end-user and is therefore an employee of the end-user with a right not to be unfairly dismissed." Such an approach, he declared, accorded with "practical reality and common sense." His Lordship explained:

> The objective fact and degree of control over the work done by Mrs Dacas...over the years is crucial. The Council in fact exercised the relevant control over her work and over her. As for mutuality of obligation, (a) the Council was under an obligation to pay for the work that she did for it and she received payment in respect of such work from Brook Street, and (b) Mrs Dacas...was under an obligation to do what she was told and to attend punctually at stated times.

Sedley LJ agreed and in so doing applied the principle of a contract arising from a course of dealing:

> there are more means of expressing mutual intentions than putting them in writing. In the field of employment it is not uncommon to find that a contract of employment has come into being through the conduct of the parties without a word being put in writing or even, on occasion, spoken. In particular, conduct which might not have manifested such a mutual intention had it lasted only a brief time may become unequivocal if it is maintained over weeks or months.

As, however, the Council was not a party to the proceedings the decision of the Tribunal stood and Mrs Dacas' claim for unfair dismissal went no further.

Two points emerge from *Dacas*. Firstly, given that there is seldom if ever an express written contract between the Claimant and the end-user it will be necessary, so as to discover whether this is a contract between them, to inquire into the conduct of the Claimant and their end-user as regards their dealings with each other. Secondly, when regard is paid to the practical realities of these dealings the conclusion, as matter of common sense, may be that the Claimant is an employee of the end-user.

Just as they had done in *Dacas* the Court of Appeal in *Cable and Wireless plc v Muscat* [2006] IRLR 354 found that the end-user was the employer. Mr Muscat was a telecommunications specialist. His employers, Exodus Ltd, required him to become a "contractor" and provide his services via a one-man limited company. Exodus were later taken over by Cable & Wireless and they accordingly inherited their liabilities in respect of the staff, including Mr Muscat, who transferred provided they were employees. They paid Mr Muscat's bills, provided him with the equipment he used and he was described, within their departmental structure, as an employee. However, he submitted invoices to a separate company, E-Nuff, which was set up for the purposes of receiving his pay and car allowance. Cable and Wireless later decided that he would have to deal with them via an agency, Abraxas plc. The agency entered into a contact with E-Nuff whereby E-Nuff agreed to provide services to Cable & Wireless via Mr Muscat. Sometime later Cable & Wireless informed Mr Muscat that they no longer required him and he ceased working for them. As regards the issue of whether he was an employee two questions arose. Firstly, as he had been employed by Cable & Wireless for less than a year (a year's employment then being required to claim unfair dismissal) he had to show that, despite having worked as a one-man company, he had been an employee of Exodus. Secondly, that during the period since transferring to Cable & Wireless he was an employee of theirs despite providing his services via an agency. The Tribunal, the EAT and the Court of Appeal all held he was an employee.

Smith LJ held that "the essentials of a contract of employment are the obligation to provide work for remuneration and the obligation to perform it coupled with control." It was submitted on behalf of Cable & Wireless that as it was the agency and not them who paid Mr Muscat directly they could not be employers. Her Ladyship rejected that submission in the following terms: "*It does not, in our view, matter whether the*

arrangements for payment are made directly or indirectly." Cable & Wireless accepted that up until Mr Muscat provided his services via E-Nuff further to their contractual agreement with the agency they had been his employer. They submitted, however, that the test, further to the Court of Appeal's decision in the non-employment case of *The Aramis* [1989] 1 Lloyd's Rep 213, for implying a contract of employment with the end-user was whether it was necessary to give business reality to the relationship and to create enforceable obligations. They further submitted that it was not necessary to do so after the agreement with the agency was reached. This was because, so they said, the contractual relationship between them and the agency covered all aspects of the working relationship between them and Mr Muscat.

Smith LJ accepted that necessity was the test but did not accept that it was not necessary to infer a contract of employment in the present case. It was, she held, "necessary to infer the continuing existence of the employment contract in order to give business reality to the relationships and arrangements between Mr Muscat and C&W." This was because the arrangement with the agency changed nothing except that "C&W arranged for payment of Mr Muscat's invoices through Abraxas." Furthermore, "it was necessary to infer the existence of an employment contract in order to establish the enforceable obligations that one would expect to see in these circumstances." There was no dispute that prior to the arrangement with the agency "there were enforceable obligations between Mr Muscat and C&W. After that it cannot be said that those obligations disappeared. Abraxas had not affected them. If Abraxas had for some reason ceased to function, that would not have brought the relationship between C&W and Mr Muscat to an end. Their mutual obligations to each other would have continued and C&W would either have had to pay Mr Muscat itself or make some other arrangement for payment."

The effect of *Muscat* is to harmonise *Dacas* with traditional principles of the law of contract. Whilst it is true, as indeed Smith LJ noted, that in *Dacas* Mummery LJ did talk of a contract of employment being a "necessary inference" it is clear that considerable weight was attached to "practical reality and common sense." In *Muscat* the Court of Appeal seemed to recognise that the necessity to create enforceable obligations between Claimant and end-user will often derive from the practical reality of their relationship.

However, the seemingly broad approach to inferring a contract of employment, enunciated in *Dacas* and *Muscat*, has been restricted by the decision of the EAT (Elias J Presiding) in *James v London Borough of Greenwich* [2007] IRLR 168. Mrs James had been employed by the local authority as a support worker. She then began working for them via an agency. A couple of years later she left that agency but continued to work for the local authority but via another agency. She had no express contract with the authority. Due to her being absent due to ill-health for a couple of months the authority informed the agency that they no longer required her. She brought a claim for unfair dismissal against the authority. The Tribunal found that she had not been an employee of the authority. The EAT upheld their decision.

The EAT observed that "neither *Dacas* nor *Muscat* seek to indicate to tribunals how they might approach the question of implying a contract with the end-user, save for saying that the possibility must be considered." The EAT then proceeded to make certain observations as to how a contract could be implied. Firstly, "the issue then is whether the way in which the contract is in fact performed is consistent with the agency arrangements or whether it is only consistent with an implied contract between the worker and the end-user and would be inconsistent with there being no such contract." The EAT explained that in adopting this approach the Tribunal is not so much determining whether there are mutual obligations but whether there is a contract. Secondly, as regards wages:

> provided the arrangements are genuine and the actual relationship is consistent with them, it is not then necessary to explain the provision of the worker's services or the fact of payment to the

> worker by some contract between the end-user and the worker, even if such a contract would also not be inconsistent with the relationship.

Thirdly:

> if any such a contract is to be inferred, there must subsequent to the relationship commencing be some words or conduct which entitle the Tribunal to conclude that the agency arrangements no longer dictate or adequately reflect how the work is actually being performed, and that the reality of the relationship is only consistent with the implication of the contract. It will be necessary to show that the worker is working not pursuant to the agency arrangements but because of mutual obligations binding worker and end-user which are incompatible with those arrangements.

Fourthly, the EAT disagreed with Sedley LJ's dictum, in *Dacas*, that the passage of time will often lead to a contract being inferred. This was because:

> it will no doubt frequently be convenient for the agency to send the same worker to the end-user, who in turn would prefer someone who has proved to be able and understands and has experiences of the systems in operation. Many workers would also find it advantageous to work in the same environment regularly, at least if they have found it convivial. So the mere fact that the arrangements carry on for a long time may be wholly explicable by considerations of convenience for all parties; it is not necessary to imply a contract to explain the fact that the relationship has continued perhaps for a very extensive period of time.

Fifthly, the EAT considered the effect of *Muscat*. That was a case where "the agency arrangements were super-imposed on an existing contractual relationship" and in such cases it will "be more readily open to a tribunal to infer a contract." In such cases the agency arrangements may be a "sham and that worker and end-user have simply remained in the same contractual relationship with one another" or the intention may have been "to alter the relationship" but that "has not in fact been achieved. That may be legitimate, for example, where the perceptible change is in who pays the wages. In such a case the only effect of the agency arrangements may be to make the agency an agent of the employer for the purposes of paying wages." In any case, strictly speaking, "in these cases the Tribunal is not strictly implying a contract as such but is rather concluding that the agency arrangements have never brought the original contract to an end."

As for the present case the question of whether Mrs James was an employee of the authority was a pure question of fact. This was because the contractual position was not fixed by documents. Accordingly the appeal could only succeed if the Tribunal's decision was perverse. That could not be said on the facts and thus the Tribunal's decision was upheld.

The Court of Appeal upheld the EAT's decision (*James v London Borough of Greenwich* [2008] IRLR 302). Mummery LJ agreed with the EAT that the "essential point" is not "the presence of the irreducible minimum of mutual obligations." Whilst "the mutuality point is important in deciding whether a contract, which has been concluded between the parties, is a contract of employment or some other kind of contract" the "relevant question in such cases is whether it is necessary, in the tripartite setting, to imply mutual contractual obligations between the end user to provide the worker with work and the worker to perform the work for the end user." As for the observations made by the EAT concerned with the approach to implying a contract his Lordship held: "*ETs would be well advised to follow the guidance given by the EAT, which I would expressly approve.*"

The following principles emerge from *James*. Firstly, before the question of whether the worker is an employee of the end-user is addressed there must be a contract between the worker and the end-user. The question will then arise as to whether it is a contract of employment. Secondly, the test for determining whether there is a contract is necessity. Thirdly, the test is to be applied with the guidance made by the EAT in mind. Fourthly, as it is the conduct of the parties, rather than written documents, which

will almost invariably be the focus of the inquiry the question of whether it is necessary to infer a contract is a question of fact.

It is clear that the approach set out by the EAT is restrictive. Whereas the Court of Appeal in *Dacas* seemed to suggest that ultimately it is a question of practical reality the EAT in its guidance, approved by the Court of Appeal, placed limitations on the extent to which practical reality can create a contract. The guidance expressly limits the scope of two factors which the Court of Appeal in *Dacas* held could as a matter of practical reality lead to the inference of a contract – namely the end user indirectly remunerating the worker and the passage of time. A further restraint is the EAT finding that there must be some words or conduct establishing that the agency arrangements no longer dictate how the work is to be performed.

The EAT (Clark J Presiding) in *Heatherwood and Wexham Park Hospital NHS Trust v Kulubowila and others* [2007] UKEAT/0633/06 considered when a contract can be implied by necessity. The Claimants worked for the Trust via an agency. The Claimants' remuneration was agreed between them and the agency. The Tribunal inferred a contract between the Claimants and the Trust. The EAT reversed their decision and held that "the real test is whether the reality of the relationship was only consistent with the implication of a contract and whether, therefore, it is necessary to imply a contract." The Tribunal had erred in not applying this test.

However, in (1) *Harlow District Council, (2) APS Recruitment Limited v SJ O' Mahoney* [2007] UKEAT/0144/07 the EAT (Clark J Presiding) upheld the decision of the Tribunal that there was, implied by necessity, a contract between the worker and the end-user. On the basis of the following facts the Tribunal implied the contract: (1) HDC asked APS to find them a plasterer – who turned out to be the Claimant; (2) HDC interviewed the Claimant before taking him on. He was then subject to the control of his supervisor, (3) The Claimant had no further contact with APS or its representatives, save that he submitted timesheets countersigned by the supervisor and APS paid his wages, (4) The Claimant negotiated a pay increase directly with the supervisor on behalf of HDC, not with APS; (5) He was provided with HDC clothing, protective equipment and a vehicle to carry out his work; (6) He was subject to discipline by HDC and raised a grievance with HDC about his working conditions;(7) He was asked directly by the supervisor to work overtime when required; (8) He needed HDC permission to take holidays and notified them when he was absent through sickness.

The EAT opined that "cases may arise where the agency acts as agent, not just for the worker but also the end-user." HDC asking APS for a plasterer "was entirely consistent with APS acting as agent for HDC in obtaining personnel". Him submitting timesheets to HDC, signed by them, meant that APS paying his wages did so "as agent for HDC." These factors along with the others listed by the Tribunal meant that the Tribunal "permissibly found that a contract was necessarily to be implied to reflect the reality of the relationship between the Claimant and HDC as it developed, and that that contract was a contract of employment."

Also in *National Grid Transmission plc v Wood* [2007] UKEAT/0432/07 the EAT (Elias J Presiding) again held that the Tribunal had been entitled to imply a contract between worker and end-user. Mr Wood's agency introduced him to the National Grid. They, rather than the agency, interviewed him and were clear that he, rather than any other worker on the agency's books, was the one they wanted. Furthermore, they were not prepared to permit either Mr Wood or the agency to provide a substitute to replace him. He was to perform the work personally. Also arrangements in respect of pay and holidays were directly between Mr Wood and the National Grid. The EAT, in upholding the Tribunal's decision, held "we do not see how it can be said that the actual conduct of the parties reflects the express documents. It seems to us that the company has then altered the original arrangements in a significant way. It has chosen to put itself in a direct relationship with the individual, affecting the future conduct between them. The

company was not treating the Claimant as a semi-detached member of staff. They were in practice acting as though he were a wholly integrated member of staff." In other words this was an example of a new contract emerging by virtue of a course of dealing between the end-user and the agency.

The focus of the discussion thus far has been whether the agency or the end-user or neither is the employer. However, can both be the employer? The issue arose before the EAT (Clark J Presiding) in *Cairns v Visteon UK Ltd* [2007] IRLR 175. There was no dispute that Mrs Cairns had a contract of employment with her agency. The end-user, Visteon, refused to take her back due to a dispute that arose. The agency, accordingly, dismissed her. Mrs Cairns brought her claim for unfair dismissal against Visteon. The Tribunal held that ordinarily they would have inferred a contract of employment between her and the end-user. What prevented them from so doing was that the fact that she was an employee of the agency.

The EAT agreed. They held that unlike the position in certain Tort cases of vicarious liability, there was "no good policy reason for extending the protection to a second and parallel employer." Also there was "business necessity for implying a contract of service" with Visteon when the Claimant had one with the agency. Thirdly "the statutory language envisages, we think, one employer." If there could be more than one employer then "must both, or if one which one, make the decision to dismiss the employee?"

An agency worker will have considerable difficulty in satisfying the requirements of s.230. *James* creates significant obstacles to him establishing he was employed by the end-user. Nonetheless these obstacles can be overcome when the reality of the relationship between the end-user and the worker reflects a contract and the agency acts as an agent of the end-user, as in *O'Mahoney*, or a new contract emerges between the end-user and worker by way of a course of dealing, as in *Wood*. The task of determining he was an employee of the agency is all the more challenging. It is true that in *McMeechan* the agency was found to be the employer. However, three matters must here be born in mind. Firstly, the nature of the job assignment was exceptional and clearly indicated that the agency retained control. Secondly, the very brief duration of the assignment perhaps made it unrealistic to find that for such a short period the end user could exercise sufficient control. Thirdly, in any case, the extent to which *McMeechan* is good law is rendered questionable by the relatively limited weight the Court of Appeal attached to the importance of mutuality of obligation. As for *Kalwak* where the EAT also held the Tribunal was entitled to find the agency was the employer, exceptional circumstances applied particularly the agency providing accommodation, which implicitly meant there was personal service, mutuality and control. In most cases the approach in *Bunce* will apply – namely the focus will be on the working realities of the relationship between the parties and hence on the relationship between the worker and the end-user. As has been said *James* makes it clear that that focus will tend not to provide an alternative route to satisfying s.230.

Sessional workers and umbrella contracts

Sessional Employment is a term given to the arrangement whereby the relationship between the worker and the putative employer consists of the latter providing the former with a series of working assignments of a limited duration interspersed with periods where no work is provided. In such cases two questions tend to arise. Firstly, whether there is a global or umbrella contract governing the relationship between the parties as a whole including the periods where there is no work. Secondly whether the contracts for the specific working assignments can be separated from the global contract and amount to contracts of employment.

The Court of Appeal in *O'Kelly and others v Trusthouse Forte plc* [1983] IRLR 369 made it clear that it does not follow that a global contract will be a contract of

employment. The case was discussed in the previous chapter. It will be recalled that the Claimants were casual workers who worked on a regular basis for Trusthouse. The Tribunal found – in a decision that was upheld by the Court of Appeal – that they were not employees, due to the absence of mutuality of obligation. Similarly the Tribunal found that there was no global contract. The Court of Appeal upheld this on the basis that this was a question of fact and hence they were not entitled to interfere. However, Lord Donaldson MR went on to hold *obiter*:

> Although I, like the Employment Appeal Tribunal, am content to accept the Industrial Tribunal's conclusion that there was no overall or umbrella contract, I think that there is a shorter answer. It is that giving the applicants' evidence its fullest weight, all that could emerge was an umbrella or master contract *for,* not *of,* employment.

For a global contract to amount to a contract of employment there must be mutuality of obligation (see *McLeod and others v Hellyer Brothers Ltd, Wilson and another v Boston Deep Sea Fisheries Ltd* [1987] IRLR 232 and *Clark v Oxfordshire Health Authority* [1998] IRLR 125 – discussed in the previous chapter).

The EAT (Elias J Presiding) in *Stephenson v Delphi Diesel Systems Ltd* [2003] ICR 471 considered carefully what is meant by an Umbrella Contract. Mr Stephenson was initially an agency worker and Delphi the end user. He then entered into their employ only to be dismissed several months later. Whether he could establish sufficient continuity of service depended on whether he had in fact been employed for Delphi when he was an agency worker. The Tribunal said not and the EAT agreed. This was because there was no contract between the parties at that time. In so finding the EAT held that in searching for an Umbrella Contract "all that is being done is to say that there must be something from which a contract can properly be inferred."

The Court of Appeal in *Cornwall County Council v Prater* [2006] IRLR 362 considered whether the specific assignment can amount to a contract of employment. Mrs Prater was a teacher. For a period of ten years she was engaged by the Council, under a series of contracts, to teach children who were unable to attend school. An assignment could last from several months to several years. The council was under no contractual obligation to provide her with pupils and she was under no contractual obligation to accept them. However, when she did accept an assignment she was obliged to complete it and the authority was obliged to continue providing that assignment until it had been completed. She applied to an Employment Tribunal for a declaration of her terms and conditions of employment – in effect an application for a declaration that she was an employee.

The Tribunal, the EAT and the Court of Appeal all agreed that she was an employee. There was no dispute that there was no global contract. The issue was whether the separate contracts were contracts of employment. It was submitted on behalf of the council that mutuality of obligation within each separate contract does not create a contract of employment if at the end of the contract the putative employer is under no continuing or further obligation to offer more work or the worker to accept it. Mummery LJ rejected this submission. His Lordship held it did not:

> make any difference to the legal position that, after the end of each engagement, the council was under no obligation to offer her another teaching engagement or that she was under no obligation to accept one. The important point is that, once a contract was entered into and while that contract continued, she was under an obligation to teach the pupil and the council was under an obligation to pay her for teaching the pupil made available to her by the council under that contract.

The EAT (Langstaff J Presiding) in *Cotswold Developments Constructions Ltd v Williams* [2006] IRLR 181 considered the mutuality of obligation required in the overriding contract. Mr Williams was a carpenter. There was no written contract. He was engaged by Cotswold for 21 months and during that time did not work for another. On occasions

he refused to work and on other occasions no work was available. Generally speaking he was not paid if he did not work although sometimes he was paid an amount equivalent to half a shift. He was subject to supervision, required to attend courses and was provided with a company van. The Tribunal found, for the purposes of his unfair dismissal claim, that he was not an employee.

The EAT remitted the case. The EAT held that "an overriding contract cannot exist separately from individual assignments as a contract of employment if there is no minimum obligation under it to work at least some of those assignments." However, "it does not deprive an overriding contract of such mutual obligations that the employee has the right to refuse work. Nor does it do so where the employer may exercise a choice to withhold work. The focus must be upon whether or not there is some obligation upon an individual to work, and some obligation upon the other party to provide or pay for it." This resonates with *Clark v Oxfordshire Health Authority* [1998] IRLR 125, discussed in the previous chapter, where the Court of Appeal held that in the case of an overriding contract it suffices that there is *some* mutuality. In the present case the Tribunal had not adopted this approach to whether there was an overriding contract and thus the matter fell to be remitted.

The EAT (Richardson J Presiding) in *North Wales Probation Area v Edwards* [2007] UKEAT0468/07 followed *Prater*. Mrs Edwards was a relief hostel worker. She entered a contract with the North Wales Probation Service under which they offered her sessional employment. The contract expressly provided that the Service was under no obligation to provide work and they were under no obligation to accept it. Accordingly, the Tribunal found there was no global contract of employment. However, the Tribunal went on to find that when she accepted an assignment the Service took upon itself to provide work and pay for it and the relief workers took upon themselves the obligation to do the work required. Accordingly, found the Tribunal, in respect of each separate assignment there was mutuality of obligation and accordingly each assignment amounted to a contract of employment. The EAT found that the "finding is unassailable and plainly correct."

The EAT (Elias J Presiding) again stressed that *some* mutuality will suffice in *St Ives Plymouth Limited v Haggerty* [2008] UKEAT/0107/08. Mrs Haggerty was a casual worker. At the end of each day the putative employers would ask her if she was available to work the following day. She would normally accept the work. It was accepted that she was free to decline work. However, the evidence was also that it was expected by both sides that she would accept it. Accordingly, the Tribunal found she was an employee. The EAT upheld their decision. They held "that the issue is not whether there may be circumstances when the employer can choose not to offer work, or the employee to refuse it, but rather whether there is an obligation to offer some work and some corresponding obligation to do it." Such a finding was open to the Tribunal on the facts.

A question also arose as to whether she was engaged under an umbrella contract. This question arose from the fact that there had been gaps of several weeks between periods when she worked. The gaps were due to illness. The EAT upheld the Tribunal's finding that an umbrella contract had come into existence by way of a course of dealing. The question, as the EAT put it, was when "a practice, initially based on convenience and mutual cooperation – an alternative if less personal description may be market forces – can take on a legally binding nature." The "test is not whether it is necessary to imply an umbrella contract, or whether business efficacy leads to that conclusion. It is simply whether there is a sufficient factual substratum to support a finding that such a legal obligation has arisen. It is a question of fact, not law."

This passage requires further comment. It would be wrong to conclude that the EAT held that the test for determining whether there is an umbrella contract can only be one of fact and not law. Rather the EAT was concerned with the approach to determining

whether there is an umbrella contract not on the basis of the written contract entered into by the parties at the outset of the relationship but on the basis of their conduct as the relationship developed. This approach is consistent with *Carmichael* – i.e. construing a contract on the basis of written documents is a question of law but on the basis of conduct is a question of fact.

The questions of whether the short term assignment can amount to a contract of employment and the approach to finding an umbrella contract were before the EAT (McMullen J Presiding) in *Quashie v Stringfellows Restaurants Ltd* [2012] IRLR 536. The Court of Appeal's decision had already been discussed. It was noted that the Court, reversing the EAT, held that there was no obligation to pay a wage and hence no contract of employment. Accordingly it was not necessary to address or disturb the EAT's findings as to mutuality in the context of an umbrella contract. It is thus submitted that the EAT's findings in this regard remain good law.

Ms Quashie was a stripper. She had to attend, without pay, meetings on a Thursday and to give compulsory free dances. If the club directed her to a customer she could not refuse. She could be fined for attending late, being off rota and refusing to give a free dance. She had to notify the club when she went on holiday. She had to dance the day she returned and if the period extended more than four weeks she was required to audition again. She was not paid when she did not work and when she did not work for the club she could, and did, work elsewhere. The Tribunal held she was not an employee.

The EAT found otherwise. The first question was whether she was party to a contract of employment when she attended work. There was mutuality of obligation. She "had to turn up pursuant to her contractual commitment to the rota." As for the employers they were "obliged to exchange the vouchers she earned into sterling, deducting only that which had been agreed between them and to pay the rest to her." There was control in the form of the fines the employers could impose. As the EAT explained:

> The fact that the Claimant might incur a fine for non-attendance does not mean that she was not obliged to give personal service; she was, and would suffer a deduction, or pay a fine, if she did not. She could not send a friend to work for her

That left the question of whether there was an umbrella contract. If, the EAT held, "the engagement on the night is itself a contract of employment, it includes also the period from the date of acceptance. That happened when the rota was published and agreed by the Claimant." During the gaps she was subject to various contractual obligations. The requirement she attend meetings on Thursdays was "sufficient." The fact that she could not take extended holidays, had to dance when she returned and audition if the period was more than four weeks meant she "was under an employment status during holidays." Such on-going obligations meant there were no gaps between the assignments. However, the EAT went on, if this was not right then an umbrella contract of employment had come into being by virtue of a course of dealing:

> But if there are [i.e. gaps], applying *Nethermere,* by the regular performance of work and/or by the judge's findings on the Claimant's expectation of work, in my view the relationship had evolved into an employment relationship under the one umbrella contract.

It is clear that the separate contract for the specific assignment can amount to a contract of employment. In determining whether it does normal s.230 principles will apply. If they do and the Claimant is an employee for the duration of the assignments that *per se* will not mean the Tribunal has jurisdiction. As such assignments are typically of a very brief duration the question will then arise as to whether the Claimant had sufficient continuity of employment .The question will be answered by determining whether there was an umbrella contract which also amounted to a contract of employment. The search for an umbrella contract is simply the search for some proper basis for inferring the

existence of a contract. If there are on-going contractual obligations between the assignments then it will not be necessary to consider whether there was an umbrella contract. The on-going obligations *per se* will link the gaps. Otherwise an umbrella contract may be found via a course of dealing arising from regular performance of work and expectation of work.

However, whilst the question has not arisen directly it is arguable that when the assignment is of a very brief duration or for a single, specific task it will not amount to a contract of employment. This is because an opportunity for mutuality of obligations will often not bite or arise. However, here the decision of the Court of Appeal in *McMeechan* should be born in mind where the Court held, albeit in the context of an agency arrangement, that in such cases mutuality is not crucial although, as has already been said, it is perhaps questionable to what extent this is good law.

What also emerges from consideration of the cases concerning the approach to s.230 in the context of sessional employment is a dilution of what mutuality of obligation requires. It is clear that there must be mutuality of obligation. However, mutuality can be found when the employer and the employee are not so much contractually obliged, respectfully, to offer and accept work but when there is some, more limited degree of mutual obligation. Hence in *Prater* it sufficed that Mrs Prater was obliged to conclude teaching work once she commenced even though the council was not obliged to offer pupils and she was not obliged to accept them. Similarly in *Williams* and *St Ives* it sufficed that there was some obligation to provide work and some to accept it.

Directors and controlling shareholders

Can a Company Director or a company's Controlling Shareholder be also, for s.230 purposes, an employee? The difficulty lies in the fact that a limited company is a distinct legal entity and the fact that the director/controlling shareholder will have notably more power and freedom both within and over the company than ordinary employees. On one hand as the limited company is a legal entity it can be said it employs the director/controlling shareholder just as it employs the rest of its workforce. On the other hand, however, when the corporate veil is pierced it is clear that, in most cases at least, the director/controlling shareholder is in effect in business on his own account and would thus fail to satisfy the general approach to s.230.

Most of the leading authorities are cases where the company concerned stopped trading and the Claimants, directors or controlling shareholders in each case, applied, under the relevant provisions of the ERA, for redundancy payments either from the Secretary of State or directly to the Tribunal. As they were only entitled to redundancy payments if they engaged s.230 these cases are relevant in the context of consideration of the term "employee" under the law of unfair dismissal.

The first case is the decision of the EAT (Kilner-Brown J Presiding) in *Eaton v Robert Eaton Ltd and Secretary of State for Employment* [1988] IRLR 83. Mr Eaton was the Managing Director of Robert Eaton Ltd. There was nothing in writing, not even a board minute or memorandum, that indicated he was an employee. Also the company had not paid him for seven years as he himself had decided that the company could not afford to do so. When the company ceased trading he applied to the Tribunal for a redundancy payment. The Tribunal refused his application on the grounds that he was not an employee. The basis of the Tribunal's decision was the absence of anything in writing signifying he was an employee and the fact that he had not been paid for so long.

The EAT upheld their decision. They said that "generally speaking, a director of a company is the holder of an office and is not in employment." The EAT then went on to address in what circumstances this general rule is displaced. Six points seem to emerge from their decision. Firstly, in the case of a "properly appointed managing director or the so-called working director who draws a weekly wage" he is "more likely to present

an arguable case for a contract of employment." Secondly, "in this context the most pertinent question is whether or not there was an agreement to employ a person as managing director which should either be an express contract or minuted at a board meeting or noted by a memorandum in writing." Thirdly, "it may then have to be ascertained whether remuneration is by way of salary or by way of director's fees. If the latter, it points away from employment." Fourthly, "then it might be appropriate to consider whether there was remuneration fixed in advance or merely on an *ad hoc* basis. If the latter, this too points away from employment." Fifthly, "there is the important consideration of the functions actually performed by the director. Was he merely acting in a directorial capacity or was he under the control of the directors?" Sixthly, "an Industrial Tribunal may not find it necessary to pose all questions and they may identify other factors as relevant. It is entirely a matter for the Tribunal to approach the problem as it thinks appropriate."

The issue arose again before the EAT (Mummery J Presiding) in the consolidated cases of *Buchan v Secretary of State for Employment, Ivey v Secretary of State for Employment* [1997] IRLR 80. Mr Buchan was a director of a company in which he had a 50% shareholding. He had no express contract of employment. He was not subject to the control of any person including the other directors. However, he was paid a salary on a PAYE basis. Mr Ivey was Managing Director and 99% shareholder of the company where he worked. Like Mr Buchan he was paid a salary on a PAYE basis but unlike Mr Buchan he had a written contract in the same form as that of the employees of the company. Both companies went into receivership and both Mr Buchan and Mr Ivey applied to the secretary of state for redundancy payments. Both applications failed, on the grounds that neither man was an employee, and both decisions were upheld by the Tribunal.

They were also upheld by the EAT. The EAT accepted that in principle both a director or managing director or a shareholder "may enter into and work under a contract of service with the company." Whether, the EAT went on, this implies the director or shareholder concerned is an employee will often depend on whether he "has a controlling shareholding in the company." When the "Claimant is able, by reason of a beneficial interest in the shares of the company, to prevent his dismissal from his position in the company, he is outside the class of persons intended to be protected by the provisions of the [1996] Act and is not an employee within the meaning of that Act." This was because "a controlling shareholder can prevent the company from dismissing him from his position. It would be inconsistent with the purposes of the [1996] Act to extend protection to a person who cannot be dismissed from his position in a company without his agreement." The EAT also held that there is a distinction between "an individual running his own business through the medium of a limited company and an individual employee of a limited company who is subject to the control of the board of directors of that company." Also whether the director has a written contract that purports to be a contract of employment is "only one factor to be considered" as "the label which the parties put on their relationships in the context of work is no more conclusive of the legal relationship than the label which the parties put on a relationship in the context of the occupation of property (e.g. licensee or tenant)." As in the present case both Mr Buchan and Mr Ivey were not only directors but also controlling shareholders and did not work under the control of others they were not employees.

The Court of Session in *Fleming v Secretary of State for Trade and Industry* [1997] IRLR 682 considered to what extent the Claimant/Director is a controlling shareholder is the determinative factor. Mr Fleming was both Managing Director and 65% shareholder of a company. He did the same hours of work as the other employees, was paid under the PAYE system and when the company was faced with financial difficulties he opted not to take his salary. This, however, proved to be of no avail as the company went into liquidation. His application for a redundancy payment was turned down by

the Secretary of State, the Tribunal and the EAT on the grounds that he was not an employee. The Court of Session agreed.

It was submitted on behalf of Mr Fleming that it could not be right that a majority shareholder cannot ever be an employee as, if this were so, a majority shareholder can render himself an employee by divesting himself of shares to the extent that he becomes a minority shareholder. Lord Coulsfied, however, held that "we do not see how it could, in common sense, be doubted that the fact that a person is a shareholder is a relevant factor." However, his Lordship went on, "the significance of that factor will depend on the circumstances, and the weight to be given to it may vary with the size of the shareholding." Ultimately "the decision as to whether a person is or is not an employee must, however, be taken on all the relevant factors at the material time." Therefore, whereas the EAT in *Buchan* had suggested that the determinative consideration is whether the director is a controlling shareholder the Court of Session in *Fleming* held that this is merely a factor to take into account.

Thus further guidance was required and that was provided by the Court of Appeal in *Secretary of State for Trade and Industry v Bottrill* [1999] IRLR 326. Magnatech UK Limited had one share only and that was owned by Mr Bottrill. It was intended that this would be a temporary arrangement as the Magnatech group in the USA would invest in the UK company acquiring 80% of the equity. Mr Bottrill had a contract which described itself as a contract of employment. He worked fixed hours, he was entitled to holidays and sick pay and was paid under the PAYE system. As it turned out the group in the USA were not able to invest in the UK company as it went insolvent. The Secretary of State found Mr Bottril was not an employee and hence not entitled to a redundancy payment. Neither the Tribunal nor the EAT agreed. Both held he was an employee.

The Court of Appeal upheld their decision. Lord Woolf MR disapproved *Buchan* in the following terms:

> It would appear from the facts of Mr Buchan's case that a 50% shareholding would be sufficient to constitute what otherwise would be a contract of employment a contract of some other character. Why this should be so is not immediately apparent. Shareholders in general do not have the right to interfere with management decisions save pursuant to resolutions passed in general meeting. But by then the dismissal may have occurred. If Mr Buchan's fellow director had been the chairman at a board meeting with a casting vote, he could have dismissed Mr Buchan, and even if Mr Buchan sought at a general meeting to procure his reinstatement, his 50% shareholding would not give him the ability to achieve that result.

This observation applied to the present case as "even Mr Bottrill with the only issued share could in certain circumstances have been dismissed by Magnatech acting by its other director." Furthermore, his Lordship went on, there are "logical problems" in "taking a controlling shareholding as the test. During the life of a contract, such control of a company can change and it would indeed be extraordinary if this should affect the employment status of an individual during the same contract for the purposes of making claims against the Secretary of State under the ERA. Finally, there is the irony that if control were to be the decisive test, it would probably only 'bite' for the purposes of claims against the Secretary of State when the individual was no longer in control because of the insolvency of the company." In other words the focus is on the contract and this is a consideration separate from control.

What, then, is the correct test? His Lordship held:

> We do not find any justification for departing from the well-established position in the law of employment generally. That is, whether or not an employer or employee relationship exists can only be decided by having regard to all the relevant facts. If an individual has a controlling shareholding, that is certainly a fact which is likely to be significant in all situations, and in some cases it may prove to be decisive. However, it is only one of the factors which are relevant and certainly is not to be taken as determinative without considering all the relevant circumstances.

His Lordship then issued guidelines. Firstly, "whether there is or has been a genuine contract between the company and the shareholder. In this context, how and for what reasons the contract came into existence (for example, whether the contract was made at a time when insolvency loomed) and what each party actually did pursuant to the contract are likely to be relevant considerations." Secondly, "if the tribunal concludes that the contract is not sham, it is likely to wish to consider next whether the contract, which may well have been labelled a contract of employment, actually gave rise to an employer/employee relationship." Here the Tribunal must address "the degree of control exercised by the company over the shareholder employee." In this regard "the Tribunal many think it appropriate to consider whether there are directors other than or in addition to the shareholder employee and whether the constitution of the company gives that shareholder rights such that he is in reality answerable only to himself and incapable of being dismissed. If he is a director, it may be relevant to consider whether he is able under the Articles of Association to vote on matters in which he is personally interested, such as the termination of his contract of employment. Again, the actual conduct of the parties pursuant to the terms of the contract is likely to be relevant." In other words a fundamental consideration is to what extent the shareholder is free to determine his working practices and the extent to which any decision to dismiss him is outside of his own control.

Thus far the cases considered have been claims for redundancy payments. The Court of Appeal in *Sellars Arenascene Ltd v Connolly* [2001] IRLR 222 considered the question of whether a director and majority shareholder was an employee in the context of a claim for unfair dismissal. Mr Connolly was the majority shareholder of EGP Limited. EGP owned 99% of the shares of Arenascene Ltd. Mr Connolly owned the other 1%. He entered into a service agreement with EGP by which he was to be Managing Director and Chairman of both EGP and Arenascene. He subsequently sold his shares in both companies to a company called IRH plc. IRH employed him as director and chief executive of EGP and Seller. About three months later IRH went into receivership and Arenascene was acquired by Sellars Arenascene Limited. Mr Connolly was dismissed as a consequence of IRK going into receivership. He brought a claim for unfair dismissal against Seller. There was no dispute that when he sold his shares, some three months before IRH went into receivership, he was an employee. The issue was whether he had been an employee beforehand which was necessary to determine in order to establish whether he had sufficient continuity of employment so as to be entitled to claim unfair dismissal. The Tribunal held he had not been an employee as, by virtue of him being a controlling shareholder, he had an interest in the company over and above that of an employee. The EAT and the Court of Appeal reversed their decision.

Pill LJ acknowledged "that the fact that the respondent has a controlling shareholding is a significant factor in deciding whether he is an employee but, in considering whether the agreement gave rise to an employer/employee relationship, the tribunal have attached to that factor a significance which excludes a proper consideration of other relevant factors" as "there are many situations in which people who are undoubtedly employees of a company stand to gain if the company prospers." In the circumstances "the only legitimate conclusion was that the respondent was an employee."

The importance of the control that shareholder/directors exercise over the company is graphically illustrated by the decision of the EAT (Wall J Presiding) in (1) *Hauxwell, (2) Hauxwell v (1) Secretary of State for Trade and Industry, (2) Industrial Working Services (in liquidation)* [2002] UKEAT/386/01. Mr and Mrs Hauxwell each owned a 50% shareholding in Industrial Working Services Ltd. They worked fixed hours, had the same entitlement to holidays as the employees and were paid on a PAYE basis. However, they decided how much their wage was and they made all the decisions regarding the operation of the company including decisions in respect of recruitment and dismissal.

When the company went into liquidation they were dismissed by reason of redundancy. The Secretary of State held they were not entitled to redundancy payments as they were not employees. The Tribunal recognised the factors that were consistent with them being employees – such as having fixed hours and being paid PAYE – but held that these factors were outweighed by those that demonstrated they operated the company. The EAT, mindful that the question was a question of fact, could not "not find in the overall facts of the case any material factor which the Tribunal has failed to take into account" and could not "detect any error of law in their conclusion."

However, the decision of the EAT (McMullen J Presiding) in *Interlink Express Parcels Ltd v Wild & Others* [2003] UKEAT/0242/03 shows, in contrast, that a controlling shareholder and director, who exercises considerable control as regards the running of the company can be an employee. The Claimant, Miss Wild, was a director of the company. Her father had wielded the controlling interest in the company. When he died she and her brother each became 50% shareholders. The following was arguably consistent with her not being an employee of the company: She had control over how she was paid and could alter those payments, the Articles of Association allowed her to vote on any matter even if she had a direct or indirect interest, there was no one in the company who had the power to discipline or dismiss her and, when her brother cease involvement in the company, she had full control as regards the running of the company even though he retained his shareholding. Furthermore she and she alone took the decision to liquidate the company. The factors arguably consistent with her being an employee were that she was treated as an employee by the Inland Revenue, she was paid a salary, was not paid dividends and strategic decision-making played a small part in her day to day activities. The company went into liquidation and the question arose as to whether Miss Wild was an employee.

The Tribunal held that she was. The EAT observing that the question was a question of fact upheld the decision as "this Tribunal did not make a perverse decision" and it "properly weighed the factors, some going one way, others going another." Thus even though she was not only a controlling shareholder but effectively exercised the sole running of the company Miss Wild was held to be an employee.

On one reading of *Bottrill* it is arguable that the decision is wrong. It is true, as the EAT observed, that the Court of Appeal in *Bottrill* held the question is one of fact and that this inevitably means that different Tribunals can come to different conclusions, all of which are sound in law, on the same facts. However, the Court of Appeal, in its guidance, went on to find that in considering whether the contract is a contract of employment particular weight should be attached to the extent to which the shareholder/director is in control of the company and his working practices and the extent to which others are able to take the decision to discipline or dismiss him. It is arguable that the EAT erred in that in approaching the issue as one of fact it neglected to apply the guidance enunciated in *Bottrill*. The decisions of the EAT in *Hauxwell* and *Interlink* show the potential for lack of clarity in the law and conflicting decision-making when the factual question is answered in the absence of application of the guidance. However, the true meaning of the guidance is a question that will be re-visited shortly.

There is no logical inconsistency in an individual being both employer and employee. So said the EAT (Elias J Presiding) in *Gladwell v Secretary of State for Trade and Industry* [2006] UKEAT/0337/060. Mr Gladwell was both a director and 50% shareholder of the company where he worked. He worked full time, he was paid PAYE and had set holidays. He had a written contract purporting to be a contract of employment. He described himself, in his evidence before the Tribunal, as both employer and employee. When the company became insolvent the Secretary of State refused his application for a redundancy payment on the grounds that he was not an employee. The Tribunal agreed. Whilst recognising that certain factors were consistent with him being an employee – such as him being PAYE and working full-time – it held that the fact that, along with the

other shareholders, he was a joint controller of the company meant he was not an employee. Furthermore, the Tribunal held, he could not be both employer and employee.

The EAT held that this approach disclosed an error of law. They held that "a majority shareholder will in practice act as the employer, making decisions on behalf of the company in which he has shares, but that does not prevent him being an employee, as *Bottrill* and subsequent cases show." The EAT remitted the matter so that the Tribunal could consider what weight was appropriate to attach to the fact that Mr Gladwell as a controlling shareholder and weigh this alongside the other relevant factors.

The EAT (Underhill J Presiding) in *Nesbit and another v Secretary of State for Trade and Industry* [2007] IRLR 847 addressed a question that was eluded to above in the discussion of *Hauxwell* and *Wild* – i.e. whether the question, ultimately, is what control the company has over the director/shareholder and, in particular, the extent to which it is able to dismiss or discipline him. Here it is important to note that in this context the word "control" does not refer to being a controlling shareholder but control as regards the running of the business. Mr and Mrs Nesbitt were both majority shareholders and directors. They had written contracts, described as contracts of employment, with the company. They did not receive directors' fees or dividends. They managed the day to day running of the business. The company became insolvent. The Secretary of State held they were not employees and hence declined their applications for redundancy payments. The Tribunal upheld his decision. The EAT did not.

The EAT considered the true effect of *Bottrill*. They noted that the EAT in that case had held that "the shareholder of a person in the company by which he alleges he was employed is a factor to be taken into account because it might tend to establish either that the company was a mere simulacrum or that the contract under scrutiny was a sham." The EAT in *Nesbitt* noted that the Oxford English Dictionary defines "simulacrum" as "something having merely the form or appearance of a certain thing, without possessing its substance or other qualities." A "simulacrum" case should, the EAT went on, be "confined to those [cases] where it appears that there is no real intention to vest the business in the company in question or, therefore, to distinguish between the two roles of director and employee." The EAT noted that the Court of Appeal in *Bottrill* had expressly approved the EAT's reasoning. Therefore one reading of *Bottrill* was that a shareholder/director is not an employee where the fact that he holds shares establishes that the company is a simulacrum.

In this vein the EAT also held that the *Bottrill* guidance is not helpful in cases "where typically all the ordinary indicia of a contract of service, including the right of the company to control the activities of the putative employee, will be present: the question, rather, is whether it makes a difference that the company in whom that control is vested is itself controlled (in a different sense) by the employee." The Court of Appeal were not, the EAT opined, "intending tribunals to carry out a conventional 'service or services?' analysis." In other words the question is whether the fact that putative employee controls the company makes any difference to the irreducible minimum requirements of a contract of employment – discussed in the previous chapter. Provided there is no simulacrum it should make no difference.

However, there was another reading of *Bottrill*. A literal reading of the guidance issued by Lord Woolf MR suggested, as has already been submitted, that the question is whether the putative employee is answerable only to himself and that the "plain implication" of the guidance is "that where an employee/shareholder has 'real' as well as theoretical control over whether he can be dismissed that is, at least, a strong pointer against him being an employee." If this was the correct reading then, held the EAT, "the retreat from *Buchan* and *Ivey* is quite limited: the Court of Appeal meant only to disapprove the proposition that the mere fact of a majority shareholding was by itself

incompatible with employee status. Provided that the shareholding gives 'real' control, it remains a crucial, if not decisive, factor."

The EAT considered the two different approaches and held: "*the law is that the fact that a Claimant under the employment protection legislation is a shareholder and a director of the company which employs him does not affect his status as employee unless the Tribunal finds that the company is a 'mere simulacrum'*." This approach was preferable because "it reflects the reality that in the event of an insolvency (or indeed a share sale) control of the company would pass out of his hands and leave him to be treated like all other employees". Also this approach is "more workable in practice" as "it should not in most cases be difficult to decide whether the business in which the Claimant is apparently employed is genuinely being run through the company." In contrast "the same cannot be said of the alternative approach, where it is far from clear what the indicia of 'real' control are and Tribunals will have to make subjective judgements of a kind which will only conduce to uncertainty and dissatisfaction." In the present case there was no question of the company being a simulacrum and hence Mr and Mrs Nesbitt were employees.

The difficulty with *Nesbitt* is that in effect it seemed to disapply the guidance issued by the Court of Appeal in *Bottrill*. It therefore fell to the EAT (Elias J Presiding) to issue further guidance in *Clark v Clark Construction Initiatives Ltd and another* [2008] IRLR 364. Mr Clark was the Managing Director and 100% shareholder of Clark Initiatives Ltd. His salary was small. He drew loans from the company which were substantially greater than his salary. He intended to repay the loan by the dividends he would earn when the company became profitable. Subsequently he sold his shares to two associates. He remained the Managing Director. Subsequently he fell out his with associates and they dismissed him. There was no dispute that he was an employee when he sold his shares. The issue was whether he had been an employee beforehand; a matter that needed to be determined for the purposes of the computation of his continuity of employment. The Tribunal held that he had not been an employee, did not have the necessary continuity of service and hence his claim for unfair dismissal failed.

The EAT upheld their decision. The EAT noted that the key principles were that the question is a question of fact and the question is answered by taking all the relevant information into account. Then, however, the EAT asked "what material is relevant?" The EAT noted that in most cases there will be a written document which the Claimants says is a contract of employment and the Respondent says otherwise. Accordingly, held the EAT, "the issue becomes this: on what grounds can the court refuse to give effect to the contract entered into between the company and the majority shareholder? Until that question is answered, it is impossible to state what material is relevant and what is not." The EAT also recognised that in determining whether the director/shareholder is an employee the task is different from most s.230 cases: "*In practice the individual will almost always be fully integrated into the business, frequently as the managing director or some other executive director. It is not the lack of control of the company over the individual but rather the extent of the control of the individual over the company which sometimes creates doubts as to whether the contract of employment truly reflects the nature of the relationship*." The EAT also recognised that "there is an air of unreality in describing the controlling shareholder as under the control of the company when he can, by the exercise of his votes as majority shareholder, ultimately control what the company does."

The EAT then set out the circumstances where what is ostensibly a contract of employment, held by the director/shareholder, will not be enforced. Firstly, as held in *Nesbitt*, when "the company itself is a sham." Secondly, "where the contract is entered into for some ulterior purpose, such as to secure some statutory payment from the Secretary of State. Hence the reason why in both *Fleming* and *Bottrill* the courts recognised the one potentially relevant factor would be the circumstances in which the

contract was created." Thirdly, "where the parties do not in fact conduct their relationship in accordance with the contract. This may be either because they never really intended that it should be so conducted, or because the relationship has ceased to reflect the contractual terms."

The EAT then issued the following guidelines that Tribunals should follow in seeking to determine whether any of these circumstances apply and the contract of employment should be displaced:

(1) Where there is a contract ostensibly in place, the onus is on the party seeking to deny its effect to satisfy the court that it is not what it appears to be. This is particularly so where the individual has paid tax and national insurance as an employee; he has on the face of it earned the right to take advantage of the benefits which employees may derive from such payments.
(2) The mere fact that the individual has a controlling shareholding does not of itself prevent a contract of employment arising. Nor does the fact that he in practice is able to exercise real or sole control over what the company does.
(3) Similarly, the fact that he is an entrepreneur, or has built the company up, or will profit from its success, will not be factors militating against a finding that there is a contract in place. Indeed, any controlling shareholder will inevitably benefit from the company's success, as will many employees with share option schemes.
(4) If the conduct of the parties is in accordance with the contract, that would be a strong pointer towards the contract being valid and binding. For example, this would be so if the individual works the hours stipulated or does not take more than the stipulated holidays.
(5) Conversely, if the conduct of the parties is either inconsistent with the contract or in certain key areas where one might expect it to be governed by the contract is in fact not so governed, that would be a factor, and potentially a very important one, militating against a finding that the controlling shareholder is in reality an employee.
(6) In that context, the assertion that there is a genuine contract will be undermined if the terms have not been identified or reduced into writing. This will be powerful evidence that the contract was not really intended to regulate the relationship in any way.
(7) The fact that the individual takes loans from the company or guarantees its debts could exceptionally have some relevance in analysing the true nature of the relationship, but in most cases such factors are unlikely to carry any weight. There is nothing intrinsically inconsistent in a person who is an employee doing these things. Indeed, in many small companies it will be necessary for the controlling shareholder personally to have to give bank guarantees precisely because the company assets are small and no funding will be forthcoming without them. It would wholly undermine the Lee approach if this were to be sufficient to deny the controlling shareholder the right to enter into a contract of employment.
(8) Although the courts have said that the fact of there being a controlling shareholding is always relevant and may be decisive, that does not mean that the fact alone will ever justify a tribunal in finding that there was no contract in place. That would be to apply the *Buchan* test which has been decisively rejected. The fact that there is a controlling shareholding is what may raise doubts as to whether that individual is truly an employee, but of itself that fact alone does not resolve those doubts one way or another.

The guidance can be summarised as follows: In most cases the fact that the contract is ostensibly a contract of employment will mean that it is indeed a contract of employment. The fact that the Claimant is a controlling shareholder, is an entrepreneur, takes loans from the company or guarantees its debits will be of little if any relevance. What will displace the assumption that the contract is a contract of employment will be conduct by the parties either inconsistent with the contract of employment or which is not governed by the contract. In the present case the Tribunal had found that Mr Clark's remuneration was not regulated by the contract at all. This was a finding open to them and could not be disturbed.

The Court of Appeal in *Secretary of State for Business, Enterprise and Regulatory Reform v (1) Neufield, (2) Howe* [2009] EWCA Civ 280 considered the *Clark* guidelines. Mr Neufield was Managing Director and 90% shareholder. He had what was ostensibly a

contract of employment. He gave personal guarantees for the company and lent it money. When the company went insolvent, he applied for a redundancy payment but the Secretary of State refused his application stating that he was not an employee. The Tribunal upheld this decision attaching particular weight to the guarantees and loans. The facts in Mr Howe's case were materially identical. Nonetheless the Tribunal found that the effect of *Nesibitt* was that he was an employee. The EAT reversed *Neufield* and upheld *Howe*.

The Court of Appeal upheld both decisions of the EAT. As regards what relevance, if any, to attach to the putative employee being a controlling shareholder Rimer LJ held "the answer to it must ultimately depend on what he agreed with the company he would do, whether he did it and whether what he so agreed and did shows that he did have such a contract, his status as director/controlling shareholder will not ordinarily require any different conclusion. Nor can we see the relevance of the fact that he gave guarantees to creditors of the company or that he did not draw his salary during the last month of the company's existence." In other words the focus is on the contract – his shareholding, personal guarantees and not drawing his salary are, ordinarily, ancillary to and separate from the contract.

His Lordship then addressed a question which has already been raised in this discussion - namely the impact of the guidance in *Bottrill*. His Lordship observed that "difficulties have arisen because the ensuing comments embrace two different things: (a) the extent of the power of the shareholder/director to control the company's decision making (for example, in relation to whether to enter into or to terminate the contract) and (b) the content of the contract." Whilst, his Lordship held, "(b) is critical" when the contract is in "writing and sufficiently explicit to establish its content, we cannot see the relevance of factor (a)." When the contract is not in writing or is short "it is necessary to examine the conduct of the parties in order to deduce the content of the contract" and then "the position of the individual and the manner in which the company's affairs were conducted provide the factual setting for the inquiry." In other words the power of the director/shareholder over decision making is only, at best, part of the factual setting – it does not *per se* determine the outcome of the inquiry.

As for *Nesbitt* his Lordship agreed "if the outcome is a finding of no sham, the next question is whether the contract that has been provided amounts to one of employment." His Lordship then turned to *Clark* and agreed with the EAT's "summary of the types of case in which the court or tribunal may find on the facts that a purported contract is not a genuine contract." His Lordship rejecting a submission that the first of the *Clark* guidelines reverses the burden of proof upon production of a written contract but did criticise guideline 6 as here the EAT "may perhaps have put a little too high the potentially negative effect of the terms of the contract not having been reduced into writing" as in some cases "the parties' conduct under the claimed contract points convincingly to the conclusion that there was a true contract of employment."

His Lordship then issued further guidance on the approach to s.230 in such cases. Firstly, in many cases the position will be "ostensibly clear on the documents" which may include a service agreement, a memorandum or minute of a board meeting. In the absence of such documents "the putative employee will have to prove more than his appointment as a director. It will be relevant to consider how he has been paid. Has he been paid a salary, which points towards employment? Or merely by way of director's fees, which points away from it? In considering what the putative employee was actually doing, it will also be relevant to consider whether he was acting merely as a director of the company; or whether he was acting as an employee." As for the present case, the Tribunal in *Neufield* had erred by taking into account the "irrelevant consideration that he had given personal guarantees, for the company lent money to it and had a controlling shareholding." No such error was evident in *Howe*. Accordingly the employee status of both Claimants was affirmed.

The approach to s.230 in director/shareholder cases does not differ markedly from the general approach to the section. In so far as they suggest otherwise it is now clear that *Buchan* and *Eaton* are bad law. The focus is on the contract. This *per se* renders whether the putative employee has a controlling shareholding, makes personal guarantees and lends money to the company, in most cases, irrelevant as such matters fall outside the contract. The exception to this proposition is if such arrangements indicate a sham or that the company is a simulacrum. Similarly the extent to which the putative employee controls the company's decision-making is also irrelevant. The starting position is always the relevant documents such as any service agreement. In the absence of such documents the focus will fall on matters such as the way the putative employee was paid and whether the conduct of the parties was consistent with a contract of employment.

Partners

The fundamental difference between a limited company and a firm is that whereas the former is a legal entity the latter is not. Rather a firm is a partnership consisting of individuals, or partners, who are themselves legal entities. In other words a company is legal entity and a firm is a group of legal entities. This fundamental difference determines the differences in approaches in considering whether the company director/shareholder and partner are employees. Whereas the director/shareholder can, despite the control and autonomy that he enjoys, say he is employed by the company the partner will have greater difficulty in saying that he is employed by the firm. The law relating to partnerships or firms is set out in the PARTA of 1890. S.1(1) of the Act defines a partnership as being "the relation which subsists between persons carrying on a business in common with a view to profit."

Whether the partner is an employee will often depend on whether he is an "equity" or "salaried" partner. The position of "equity" partners was addressed by the Court of Appeal in *Cowell v Quilter Goodison and QC Management Services Ltd* [1989] IRLR 392. Mr Cowell was an equity partner in Quilter Goodison. The firm transferred its business to Quilter Goodison & Co limited which had a service company, G Management Services Limited. Mr Cowell became an employee of both companies. He was subsequently dismissed. The issue, for the purposes of establishing whether he had the relevant continuity of service, was whether he had been an employee prior to the transfer – i.e. when he was an equity partner. The Tribunal, the EAT and the Court of Appeal all agreed that he was not.

Lord Donaldson MR held:

> it is quite impossible to say, in my judgment, that Mr Cowell was the servant of anybody when he was an equity partner, or that he was the employee of anyone, or that he had any employment relationship with any of the other partners, or perhaps with all the partners, including himself. The firm was not a corporate entity. It had no separate identity. His relationship with the other partners was governed by the concept to which the Partnership Act applies, namely of people who are carrying on business in common with a view to profit, a very well known and well understood relationship in law, and one which is wholly different from the employment relationship.

What, however, is the approach to determining whether an individual is a partner? S.3(2) of the PARTA 1890 provides:

> (3) The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but receipt of such a share, or of a payment contingent on or varying with the profits of a business, does not of itself make him a partner in the business; and in particular—

(a) The receipt by a person of a debt or other liquidated amount by instalments or otherwise out of the accruing profits of a business does not of itself make him a partner in the business or liable as such:
(b) A contract for the remuneration of a servant or agent of a person engaged in a business by a share of the profits of the business does not of itself make the servant or agent a partner in the business or liable as such:
(c) A person being the widow, widower, surviving civil partner or child of a deceased partner, and receiving by way of annuity a portion of the profits made in the business in which the deceased person was a partner, is not by reason only of such receipt a partner in the business or liable as such:
(d) The advance of money by way of loan to a person engaged or about to engage in any business on a contract with that person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on the business, does not of itself make the lender a partner with the person or persons carrying on the business or liable as such. Provided that the contract is in writing, and signed by or on behalf of all the parties thereto:
(e) A person receiving by way of annuity or otherwise a portion of the profits of a business in consideration of the sale by him of the goodwill of the business is not by reason only of such receipt a partner in the business or liable as such.

Put briefly if the putative employee is remunerated by way of a share of the profits then, on the face of it, he is a partner. However, this will not be the case if any of subs.3(a) to (e) apply. Of these (b) is perhaps the most relevant in determining whether the individual is a partner or an employee. The subsection provides, in essence, that remuneration by way of profits for a servant or agent engaged in the business does not in itself establish he is a partner. It seems implicit, therefore, that he may not be partner if he is remunerated by way of a mixture of profit share and fixed salary. To what extent this determines his status for s.230 is likely to depend on the circumstances of the case.

The position of so called "salaried" partners was addressed by the High Court in *Stekel v Ellice* [1973] 1 ALL ER 465 – although it must be noted that this was not a case of unfair dismissal. Mr Ellice was one of two partners in a firm of chartered accountants. His partner died. He entered into an agreement with Mr Stekel whereby the latter would after several months become an equity partner but, in the meantime, he would be paid a salary, but without deduction of tax, and be described and held out as a salaried partner and act as a partner within the firm. The agreement also provided that the firm's capital was to belong solely to Mr Ellice, that if either party died the other was entitled to his clients and that if Mr Ellice died Mr Stekel would inherit the practice. In contravention of the agreement Mr Ellice did not make him an equity partner when the moment arrived when, in accordance with the agreement, he was to be made an equity partner. Subsequently Mr Stekel left the firm. He claimed that he was a partner, not an employee, and, as such, entitled to a share of the profits of the firm which, by virtue of his leaving, had been dissolved.

Megarry J held that Mr Stekel was not entitled to the winding up order he sought but was, nonetheless, a partner and not an employee. Only the latter decision is relevant for the purposes of this discussion. His Lordship opined that it is "impossible to say that as a matter of law a salaried partner is or is not necessarily a partner in the true sense. He may or may not be a partner in the true sense. What must be done, I think, is to look at the substance of the relationship between the parties; and there is ample authority for saying that the question whether or not there is a partnership depends on what the true relationship is and not on any mere label attached to that relationship". His Lordship held that if there is a contract of employment "and the only qualification of that relationship is that the servant is being held out as being a partner, the name 'salaried partner' seems perfectly apt for him; and yet he will be no partner in relation to the members of the firm." His Lordship then considered the case where "there may be a full partnership deed under which all the partners save one take a share of the profits, with that one being paid a fixed salary not dependent on profits." It has already been noted

that remuneration by way of profit share is a strong indication of being a true partner rather than an employee. However, his Lordship held that whilst salaried partner "seems to me an apt description" of the individual "yet I do not see why he should not be a true partner, at all events if he is entitled to share in the profits on a winding up." However, his Lordship went on, if the individual is not entitled to share in profits on winding up "by the terms of the partnership agreement or even by subsequent variation" he will be a "true partner" despite being a "salaried partner".

His Lordship then applied those principles to the case before him. He considered the agreement. His Lordship noted that Mr Sekel was not entitled to profit share but held "that the absence of one possible head of prima facie evidence does not negative the other evidence of partnership." The same applied to the fact that Mr Sekel was paid a salary. However, viewed overall, the agreement satisfied "the statutory definition of s. 1(1) of the 1890 Act as being 'the relation which subsists between persons carrying on a business in common with a view of profit'".

Sekel was considered by the Court of Appeal in *M Young Legal Associates Ltd v Zahid (a firm)* [2006] 1 WLR 2562. Zahid was a firm of Solicitors. One of their solicitors, a Mr Lees, was held out as a partner. However, he did not receive a share of profits and did not play a part in the management of the firm. His role was merely supervisory and he was held out as a partner merely to satisfy the requirements of rule 13 of the Solicitors' Rules of Practice – the other partners not having being qualified for the required period of time to be partners in a firm of solicitors. The Claimants alleged that the firm had breached a contract it had entered into with them. Mr Lees claimed that he could not be a defendant as he was not a partner of the firm. Both the High Court and the Court of Appeal held that he was a partner.

Wilson LJ turned to *Sekel* and agreed that "an agreement for a person to be paid a specified sum for work to be done by him on behalf of a firm does not preclude his thereby being a partner of it." Furthermore, the words of s.1(1) of the 1890 Act "are wide enough to render the recipient of payments in a fixed sum a partner provided that there is a business that is carried on with a view to profit and, crucially for different purposes, that he is carrying it on in common with another or others." Similarly, Hughes LJ with reference to s.1(1) held:

> they refer to the making of profits, but studiously abstain from reference to any necessity that it be shared. On principle it seems to me that if there is an essential element of partnership it is the carrying on of business in common, that is to say in such manner as to make each the agent of the other for all acts done in the course of the business. Having thus constituted themselves, the partners are free under the Act to arrange for the remuneration of themselves in any manner they choose, including by arrangement that one or more shall receive specific sums, or that one or more receive nothing, in either case irrespective of profits.

The fact that the arrangement was entered into to satisfy rule 13 meant that it was an arrangement made with a view to profit. It followed that Mr Lees was a partner.

It is submitted that what emerges from *Sekel* and *Zahid* is that the test is whether the contractual relationship between the individual concerned and the partners of the firm is with a view of making profit. If so the individual will, even if he is described as a salaried as opposed to any equity or true partner, be a true partner and not an employee. In answering this question the extent to which he is remunerated by way or profit share or salary is relevant but not decisive.

Members of a Limited Liability Partnership

Limited Liability Partnerships (or LLPs) were established by the Limited Liability Partnerships Act (LLPA) 2000. They are, in broad terms, a hybrid of companies and firms. Like companies they have limited liability but, like firms, their partners, or, as they are known, members, are jointly and severally liable. The worker status of the

members is set out at s.4(4). This provides: "*A member of a limited liability partnership shall not be regarded for any purposes as employed by the limited liability partnership unless, if he and the other members were partners in a partnership, he would be regarded for that purposes as employed by the partnership.*" In other words there is a presumption that a member is not an employee unless he would be regarded as an employee of a firm or traditional partnership.

The EAT (Birtles J Presiding) in *Kovats v (1) TFO Management LLP, (2) The Family Group of Companies* [2009] UKEAT/0357/08 considered the impact of s.4(4) on s.230. Mr Kovats was a member of TFO Management LLP. The business of the LLP was the provision of investment advice. He was entitled to 1/11th of the profits and to a share of the proceeds in the event of the partnership being sold. He signed important documentation as a partner and ran, with considerable autonomy, the LLP's team that dealt with its interests in Bahrain. He was also paid a fixed salary, although not on a PAYE basis, and was entitled to annual leave and sick pay. The other members voted that he leave the partnership due largely to his unwillingness to make frequent visits to Bahrain. He regarded this as a dismissal and, thus, consequently, brought a claim for unfair dismissal. The Tribunal found that his agreement with the other partners satisfied the irreducible minimum of a contract of employment – namely control and mutuality of obligation. Nonetheless, they found he was not an employee as "he was in a very real sense a manager of the business, and the success of the business depended to a large extent on his input."

The EAT, with reference to s.4(4), held: "*Parliament has thus expressly provided that the legal test which determines whether a person is a partner or an employee of a partnership also determines whether a member of an LLP is employed by the LLP."* Furthermore, "the test of determining employment status in an LLP is additional to the standard common law tests. Thus in the context of partnership the Tribunal is required to decide into which of two legal categories a person falls: partnership or employment. If the Tribunal decides that the person is not a partner, it does not follow that he is necessarily an employee: the usual common law tests will still need to be applied, as the person may in fact be self-employed."

In other words the issue is not solely determinative upon the application of the usual test under s.230 – namely, whether control, mutuality and personal service are present in the contract. In addition to these matters the Tribunal must also determine whether the Claimant was a partner. If so, then he will not be an employee even though the irreducible minimum requirements may be satisfied. However, if he is not a partner that is not an end to the inquiry. The Tribunal will have to go on to apply the traditional approach to s.230. In the present case the Tribunal, on the facts, had found and was entitled to find that Mr Kovats "was carrying on business in common with his fellow members with a view to profit."

It must be noted that the EAT held that it was not necessary for them to determine whether an individual can be both a member and an employee of an LLP. Thus the question remains open. However, it is submitted that the answer to this question must be affirmative given that, depending on the circumstances and in particular the relevant agreement, one can be an employee and a partner of a traditional partnership.

It will be recalled that in *Kovats* the EAT held that that the partnership test is applied in addition to the traditional approach to s.230. Does it follow from that that the Tribunal errs in law if it does determine whether the individual is a partner before applying the usual test under s.230? The EAT (Langstaff J Presiding) held not in *Williamson & Soden Solicitors v Briars* [2011] UKEAT/0611/10. It was common ground that during his first few years with the firm Mr Briars was, indeed, an employee. Then a new arrangement was made whereby instead of being paid a fixed salary of £55,000 he would, instead, be paid what was described as a 'guaranteed profit share' of £55,000 together with a small profit share. In respect of his claim for unfair dismissal the firm

contended that the fact that he was paid a profit share meant that he was not an employee. The Tribunal disagreed. In so finding they did not ask whether Mr Briairs was a partner before applying the traditional s.230 approach. The firm submitted that that was an error of law. The EAT disagreed and upheld the Tribunal's decision.

The EAT did not accept "that there is a rule of law" requiring the Tribunal to first apply the test for partnership under the 1890 Act. Rather it "is up to the Tribunal how best logically to address the specific questions that arise for determination in its particular case upon the particular circumstances of that case when it is deciding whether is or is not an employee, which is the overall question it has to resolve."

In any case "there was no other conclusion to which the Tribunal could reasonably have come." This was because "the Claimant took no risk of loss; his share of the profits was not in modern economic times determinative of status as a partner, though it might have persuasive towards it; he was subject to the direct control of the firm, the government of which was….within the hands of the equity partners."

Does the question of whether an individual is carrying on business in common with his fellow members with a view to profit, and is hence a partner or LLP member and not an employee, depend upon him possessing a minimum number or type of rights and a minimum profit share? The Court of Appeal in *Tiffin v Lester Aldridge LLP* [2012] IRLR 391 held otherwise. Mr Tiffin was remunerated by profit share. However, his share was substantially less than that of the full equity partners. He also contributed considerably less than they did to the firm's capital. He did have voting and management rights but these were far more restricted than those of the full equity partners. He claimed unfair dismissal. The Tribunal held that he was not an employee. The EAT and the Court of Appeal both held that this decision was open to the Tribunal on the facts.

Rimer LJ held that the starting point of an inquiry as to whether he was a member of an LLP is the Act of 1890. If, he held, "he *would* have been a partner, then he could not have been an employee and so he will not be, nor have been, an employee of the LLP. If the answer is that he would *not* have been a partner, there must then be a further inquiry as to whether his relationship with the notional partnership would have been that of an employee. If it would have been, then he will be, or would have been, an employee of the LLP." The qualification, his Lordship went on, to this approach "is that, in what are probably likely to be more unusual cases, the relevant issue may perhaps arise in circumstances in which at the material times there were just two members in the LLP, with the issue being whether one of them was an employee of the LLP. The approach that I have suggested does not work in such a case and would need to be adapted for it."

His Lordship considered *Kovats*. Whilst he "respectfully" agreed with "most" of the EAT's reasoning he held that the EAT had been wrong to suggest that the Tribunal had been correct in that case to first ask whether Mr Kovats was a partner and then go on to consider whether he was an employee. This was because if "the finding was that the claimant would have been a partner in the partnership, there was no basis upon which he might also be found to be an employee of it and so no scope for the further inquiry that the ET apparently made in the *Kovats* case."

As for the present case his Lordship considered, in the light of *Zahid,* Mr Tiffen's limited voting and managerial rights:

> Wilson LJ was saying simply that it is not a prerequisite of the status of a partner that he should assume a role in the management of the partnership – whilst of course he rightly recognised that the assumption of such a role may be a strong indication of status as a partner.

In any case he had limited a managerial role and that was sufficient:

It may be that on most votes the fixed share partners would or might find themselves outgunned by the full equity partners. So likewise will any minority of dissenting full equity partners be outgunned by the majority. It cannot, however, be said that the fixed share partners did not have a real voice in material aspects of the LLP's management

As for profit share:

Accepting, as Ms Eady did, that Mr Tiffin 's fixed share was guaranteed, and can therefore perhaps be equated to a salary, he nevertheless also had a true profit share represented by his points allocation. Although that no doubt gave him only a potentially small share in the firm's annual profits - at any rate as compared with the shares that the full equity partners would enjoy - it cannot simply be dismissed: and the inference is that Mr Tiffin agreed to become a fixed share partner rather than a salaried partner precisely because it carried the promise of a better return for him. In addition, he also had a prospect of a share in the surplus assets of the LLP on a winding up

A superficial reading of the authorities on the question of partnership and LLP membership may reveal some confusion and inconsistency in the law. After all Mr Lees (in *Zahid*) was a true partner even though he did not have a profit share whereas Mr Briars was not even though he did have a profit share. Similarly neither Mr Tiffin nor Mr Briars were true partners partly because they had minimal managerial rights but such was also the case with Mr Lees. However, it is submitted that the law is, nonetheless, clear. What is clear is that the question of whether an individual is a true partner or LLP member as opposed to an employee is whether they carry out business with a view to profit with those who undisputedly are the true partners or LLP members. In answering this question a number of factors may be taken into account including whether they are remunerated by profit share and their managerial responsibilities. However, none of these factors will be determinative. Ultimately the question is one of fact and depends entirely on the circumstances of the case.

It is submitted that what emerges from consideration of the status of directors/controlling shareholders, partners and members is that there is, in addition to control, mutuality of obligation and personal service, a further component of the irreducible minimum of a contract of employment. That is that the putative employee must be employed by a legal entity separate from himself. This requirement, in many if not most cases, is the only factor distinguishing the director/controlling shareholder from the partner or member. The former is clearly employed by a separate legal entity, namely the limited company, whereas the latter will have the difficulty, for s.230 purposes, of establishing that they are employed by as opposed to being part of the firm whether it is a traditional partnership or LLP.

Office-holders

Whereas the duties and remuneration of an employee are set out in a contract those of an office holder are inherent in the office he holds. In many, but not all, cases the office will be conferred by statute. Examples of office holders are Policemen, Judges, Ministers of the Crown and the officers of private clubs. However, an office holder may, in some cases, also be an employee. The authorities deal with two different, but interrelated questions, namely whether the individual concerned is an office holder and, if so, whether he is also an employee.

The EAT (Philips J Presiding) in *102 Social Club and Institute Ltd v Bickerton* [1977] ICR 911 gave guidance as to the difference between an employee and office-holder. The club dismissed Mr Bickerton. There was no dispute that he was an employee. However, as the law stood at that time, the Tribunal would not have had jurisdiction if the club had fewer than four employees. An issue arose as to whether the club's secretary, Mr Wood, was an employee. The club's own constitution provided that the secretary was an

officer, that the officers were to be elected every year and could only be removed from office if two-thirds of members present at a special meeting voted for their removal. Mr Wood was paid a nominal sum of £225 a year. The club described this as an "honorarium" and not a salary. The Tribunal found it was a salary and thus found that Mr Wood was an employee. The EAT remitted the matter as, so they found, the Tribunal's reasoning as to why the payment was a salary was not clear.

The EAT then proceeded to given guidance and noted that "though the question does not arise directly for decision, the principles must have at least some bearing on the position of office-holders generally, including the holders of public offices. The first question was whether the payment was "an honorarium or was it a salary." The EAT referred to the decision of the Court of Appeal in *Rogers v Booth* [1937] 2 ALL ER 751 where Sir Wildrid Greene MR held "an honorarium" is not necessarily "any payment given contractually for services given or for services rendered" but "is a maintenance payment, to enable them to carry on the work that they have undertaken."

The EAT proceed to list matters that ought to be taken into account:

1) The tribunal may wish to consider whether the payment was fixed in advance, possibly on a periodical basis, or whether it was voted at the end of the year in token of the members' work. The former arrangement would favour the view that the payment was a salary, the latter that it was not, though neither would be conclusive.
2) It is material to see whether the arrangements confer upon the secretary a right to payment or whether what is paid is a mere bounty.
3) The size of the payment.
4) Whether he is exercising the functions of an independent office (somewhat in the way that a curate or a police officer does) or is subject to the control and orders of the club.
5) The extent and weight of the duties performed; the smaller they are the less likely he is to be an employee.
6) The description given to the payment in the minute or resolution authorising it, and its treatment in the accounts, and for tax and national insurance purposes.

Upon the hearing of the appeal numerous matters were canvassed as being relevant to the question whether the secretary was or was not an employee. For completeness we should say that we consider the following factors to be of no relevance: that he was a member; that there was no written agreement; that he held an office; that he had another job; that he was elected, and that he was removable by a two-thirds majority.

Thus the focus appears to be on the remuneration and the functions of the putative employee.

The House of Lords in *Miles v Wakefield Metropolitan District Council* [1987] IRLR 193 considered when a payment is "an honorarium". Whilst the case is not a case of unfair dismissal its principles, it is submitted, go towards determining whether an individual is an office-holder and thus entitled not to be unfairly dismissed. Mr Miles was a superintendent registrar of births, deaths and marriages appointed by the council and paid by them under the Registration Service Act. As part of industrial action Mr Miles refused to carry out marriages on Saturday mornings. Accordingly the council refused to pay him on Saturdays. He claimed that as he was an office holder, and not an employee, the council was not entitled to withhold payment due to him not working as that right was confined to the employer-employee relationship.

Their Lordships did not agree. Lord Oliver held that the "salary was intended to be the reward for the work done in carrying out the duties of the office and not simply an honorarium for its mere tenure." This was because "the nature of [Mr Miles'] remuneration and the terms of his tenure of office are so closely analogous to those of a contract of employment that any claim by him to salary pursuant to the statutory provisions and the local scheme made thereunder ought, in my judgment, to be approached in the same way as a claim to salary or wages under such a contract. The relationship between the council and the plaintiff has all the incidents which one would expect from a contract of employment save that the power of dismissal is vested in the

Register General and not in the appointing authority." In other words if the relationship between the parties resembles the relationship between employer and employee then the payment, despite deriving from a statutory rather than a contractual provision, will not be an honorarium.

The EAT (Morrison J Presiding) in *Johnson v (1) Ryan, (2) Royal Borough of Kensington & Chelsea, (3) Secretary of State for Environment* [1999] UKEAT/724/97 had to determine whether a rent officer was an employee. Mrs Johnson was initially employed by the council as a clerical assistant. She was subsequently promoted to the position of rent officer. She was paid by the council but subject to disciplinary and grievance procedures issued by the Secretary of State. Under s.63 of the Rent Act 1977 the Council was obliged to appoint Rent Officers and to remunerate with scales approved by the Secretary of State. The Tribunal rejected her claim for unfair constructive dismissal finding she was not an employee.

The EAT disagreed. The EAT held:

> there are three categories of office holder: an office holder whose duties are defined by the office they hold and not by any contract, such as a police officer; secondly, there are also office holders who retain the title 'office holder' but are in reality employees with a contract of service (those workers would be rightly described as employees); and thirdly, there are also workers who are both office holders and employees, such as company directors.

In determining whether s.230 applies "it is relevant to consider whether there was payment of a salary, and whether it was fixed, and whether the worker's duties were subject to close control by the employer or whether they worked independently." In the present case "the Council was a party to the contractual documents signed by the appellant....The Council's proper officer had the power to dismiss or suspend and performed a supervisory role in relation to rent officers. The council was also responsible for remuneration, and the provision of accommodation and clerical assistance." Accordingly she was an employee despite being also an office holder. This approach accords with the approach in *Miles* – i.e. the fact that the duties and remuneration of the office holder are determined by statute and not a contract does not prevent the office holder being an employee if their relationship with the putative employer resembles, in practice, a contractual relationship.

Thus far remuneration and function have been the focal point of the inquiry. The EAT (Burton J Presiding) in *Prior v Millwall Lioness Football Club* [2000] EAT 341/99 focused both on the requirement for remuneration and on the office holder being elected. Mrs Prior was the club's General Secretary. Like the club's other officers – such as the Chairman and Club Captain –she was elected and subject to re-election every year at the annual general meeting. Furthermore, she had no wage and was not reimbursed for many of the expenses she incurred on behalf of the club. The Tribunal rejected her claim for unfair dismissal on the grounds that she was not an employee.

The EAT agreed. As for the absence of remuneration it was submitted on behalf of Mrs Prior that there was, nonetheless, consideration – namely the benefit that the club got from her service. The EAT rejected this submission in the following terms:

> But plainly the provision of benefit to another party is not enough to create a contract. It would amount to the gratuitous gift of services or goods and not a contract if it arose out of the simple provision of a benefit to another party. There has to be mutuality to any relationship in order to create a contract. Receipt by one of those two parties of a benefit is not sufficient. There must be a promise to return.

Furthermore the position of the officers "depended entirely on being annually elected, the status that they thus obtained was a status gained by that election, and not as a result of any contract of employment." This contrasts markedly with *Bickerton* where the EAT, as noted, focused on remuneration and function and expressly held that being elected was not relevant. It is submitted that the EAT in *Prior* are correct: in so far as the

status of an employee derives from his contract it must follow that if the worker's status derives from a non-contractual source, such as being elected, that he cannot be an employee.

Again it was the ballot box that prevented the worker from being an employee in the decision of the EAT (Birtles J Presiding) in *Billany v Knutsford Conservative Club* [2003] UKEAT/0065/03. Mr Billany was the treasurer of the Club. The rules of the club provided that some of the members, such as the treasurer, would hold their positions by election and be paid an honorarium whilst others, such as the secretary, would hold their positions by virtue of a contract and be paid a fixed salary. Mr Billany brought a claim for unfair constructive dismissal. He prayed in aid on *Bickerton* where the EAT had held that it was irrelevant that the officers were elected. However, the Tribunal distinguished *Bickerton* on the grounds that in the present case, unlike in *Bickerton*, some of the members held their positions by virtue of a ballot but others by virtue of a contract. The EAT held that this was a matter to which the Tribunal "was entitled to have regard" and thus upheld their decision.

However, election *per se* will not necessarily prevent the office holder from being an employee. This emerges from the decision of the EAT (Elias J Presiding) in *(1) GMB Trade Union, (2) Kenny, (3) McCarthy v (1) Hughes, (2) Beaumont* [2006] UKEAT/0288/06. Mr Hughes and Mr Beaumont were branch secretaries. Under the union's rule book they were described as office holders. Their remuneration was determined by a congress and the congress could even award no remuneration at all although in practice this power was not exercised. They held their positions by virtue of election. The rule book described their duties as keeping books and accounts. However, in practice this constituted merely 10% of what they did. The rest consisted of representation, negotiation and consultation roles and their remuneration reflected these additional duties which made up, by far, the bulk of what they did. Accordingly, the Tribunal held that for the most part their remuneration was for duties that, in effect, resembled a contract of employment and was outside their role as office holders. It followed that they were employees.

The EAT agreed the duties were a "strong factor pointing towards there being a contract in existence" and "that any contrary conclusion would face the challenge of perversity." As for the fact that the congress could award no remuneration the EAT held that that rule "does not prevent a contract being in place, at least unless and until that particular power is exercised" and "where somebody is working, the mutuality exists for the duration of the actual working relationship and there is clearly a contract in place for that period."

The crucial question is whether the remuneration and functions of the office holder derive from or can be said to resemble or point to a contract of employment. If so, then irrespective of whether they are appointed under a statute or hold their position by election, they will, for s.230 purposes, be employees. Whether they were elected or appointed by a statute are important but not necessarily determinative considerations.

Clergy

Members of the clergy were traditionally regarded as office holders. Special considerations have emerged in determining whether they can also be employees. The question arose before the Court of Appeal in *The President of the Methodist Conference v Parfitt* [1984] IRLR 141. Mr Parfitt was a minister in the Methodist Church. The terms of the governance of Methodist Ministers were set in 'The Constitutional Practice and Discipline of the Methodist Church" (CPD) and the enabling Act of Parliament which constituted the church. As for remuneration the CPD provided that the ministers were not paid as such but rather the "church undertakes the burden of their support and

provides for each man according to his requirements." The Tribunal and the EAT found he was an employee and hence entitled to proceed with his claim for unfair dismissal.

The Court of Appeal did not. Dillon LJ held that the crucial question was whether, when the minister is ordained, he enters into a contract of employment with the church. His Lordship answered the question in the following terms: *"the spiritual nature of the functions of the minister, the spiritual nature of the act of ordination by the imposition of hands and the doctrinal standards of the Methodist Church which are so fundamental to that Church and to the position of every minister in it make it impossible to conclude that any contract, let alone a contract of service, came into being between the newly ordained minister and the Methodist Church when the minister was received into full connexion."* Whilst there "probably are binding contracts between the Methodist Church and its ministers in relation to some ancillary matters....these however are no part of the contract of service, either on reception into full connexion or on appointment to a circuit."

The House of Lords took a similar approach in *Davies v Presbyterian Church of Wales* [1986] IRLR 194. Mr Davies was a pastor of the Presbyterian Church. The constitution of the church was set out in its Book of Order and Rules. The Tribunal found he was an employee. The EAT, the Court of Appeal and the House of Lords disagreed. It was submitted on behalf of Mr Davies that upon being appointed a pastor he entered into a contract with the church. Lord Templeman rejected that submission holding that "the book of rules does not contain terms of employment capable of being offered and accepted in the course of a religious ceremony. The duties owed by the pastor are not contractual or enforceable. A pastor is called and he accepts the call." Furthermore, "his duties are defined and his activities are dictated not by contract but by conscience."

The Court of Appeal in *Coker v Diocese of Southwark; Bishop of Southwark and Diocesan Board of Finance* [1998] ICR 140 again found that the Claimant was not an employee. Dr Coker was an assistant curate of the Church of England. The Tribunal found he was an employee and hence entitled to proceed with his claim for unfair dismissal. The EAT and the Court of Appeal took the contrary view. Mummery LJ considered the authorities and held that whilst "not explicitly analysed in these terms in the authorities, the simple reason, in my view, for the absence of a contract between the church and a minister of religion is the lack of an intention to create a contractual relationship." His Lordship proceeded to explain:

> *The legal effect of the ordination of a person admitted to the order of priesthood is that he is called to an office, recognised by law and charged with functions designated by law in the Ordinal, as set out in the Book of Common Prayer. The Ordinal governs the form and manner for ordaining priests according to the Order of the Church of England. Those functions are also contained in the Canons of the Church of England and are discharged by a priest and assistant curate. It is unnecessary for him to enter into a contract for the creation, definition, execution or enforcement of these functions.*

Neither the Diocese or the Board appointed him or controlled the performance of his functions. Such matters rested with the Bishop but "that relationship, cemented by the Oath of Canonical Obedience, is governed by the law of the established church, which is part of the public law of England, and not by a negotiated, contractual arrangement." Mummery LJ's approach perhaps leaves open the question of whether the clergyman, despite his status stemming from his office, can be an employee if it can be shown that there was, nonetheless, between the parties an intention to create legal relations.

The House of Lords, however, departed, markedly, from the approach considered thus far finding, in *Percy v Church of Scotland Board of National Mission* [2006] IRLR 195 that the Claimant, despite being an office holder, was indeed also an employee. Before the facts are set out a note of caution must first be sounded. This was a case for sex discrimination and not unfair dismissal. Therefore the applicable statutory definition of

employee was not s.230 of the 1996 Act but s.82(1) of the Sex Discrimination Act 1975. The definition was wider providing that employment means "employment under a contract of service or of apprenticeship or a contract personally to execute any work or labour." Mrs Percy was an associate minister in a Church of Scotland parish. Upon her appointment she was issued with terms and conditions. The terms covered a minimum stipend. Her appointment was for five years and she was entitled to be paid annual leave and accommodation. She was subsequently dismissed for having an affair with an elder. The Tribunal, the EAT and the Court of Appeal all held that she was not an employee. The House of Lords, as noted, did not.

Lord Nicholls noted the observation made by Mummery LJ in *Coker* that in such cases there will often be no intention to create legal relations. However, his Lordship held, "this principle should not be carried too far. It cannot be carried into arrangements which on their face are to be expected to give rise to legally-binding obligations." Then, with reference to Ms Percy's terms and conditions, his Lordship continued: "*The offer and acceptance of a church post for specific period, with specific provision for the appointee's duties and remuneration and travelling expenses and holidays and accommodation, seems to me to fall firmly within this latter category*".

Furthermore, "in this regard there seems to be no cogent reason today to draw a distinction between a post whose duties are primarily religious and a post within the church where this is not so" and "in my view it is time to recognise that employment arrangements between a church and its ministers should not lightly be taken as intended to have no legal effect." Lady Hale could not accept that there is a "general presumption" of lack of intent to create legal relations. This was because "the nature of many professions' duties these days is such that they must serve higher principles and values than those determined by their employers. But usually there is no conflict between them, because their employers have engaged them in order that they should serve those very principles and values. I find it difficult to discern any difference in principle between the duties of the clergy appointed to our spiritual needs, of the doctors appointed to minister to our bodily needs, and of the judges appointed to administer the law, in this respect."

The Court of Appeal in *The New Testament Church of God v Stewart* [2008] IRLR 314 considered what impact *Percy* had on the approach to s.230. Mr Stewart was a Pastor in the New Testament Church of God. One of his tasks was to forward collections from his church to a central ministers' stipend account. He had no fixed hours but was expected to discharge a number of duties such as addressing spiritual needs of his church, carrying out a number of services and running choir practice and a prayer meeting and visiting hospitals and prisons. The Church was able to regulate and discipline him. He was, however, required to work in accordance with the rules of the Church which were not specifically set out in a written document purporting to be a contract between himself and the church. Nonetheless the Tribunal found he worked under a contract of employment in that there was intent to create legal relations. In reaching this finding the Tribunal relied on the wide nature of his duties (an approach perhaps reminiscent of *GMB Trade Union*) and the right of the church to discipline its members.

The EAT and the Court of Appeal upheld their decision. Pill LJ held that whilst *Percy* had not overruled the earlier cases it nonetheless could apply to s.230 cases. The effect of *Percy* is to establish "that the fact finding Tribunal is no longer required to approach its consideration of the nature of the relationship between a minister and its church with pre that there was no intention to create legal relations...It is recognised that a spiritual motivation in working for a church does not necessarily preclude an intention to create legal relations." Both Pill LJ and Arden LJ held that in certain circumstances Art.9 of the European Convention of Human Rights (ECHR) could be infringed by a finding of an intention to create legal relations. Arden LJ, however, did not accept that it must be an express tenet of the religious body concerned that no contract can be formed

between it and the minister. Rather "it is sufficient that the beliefs are found to be inconsistent with the implication of any contract or alternatively any contract of employment."

However, the fact the relationship may appear contractual will not lead to a presumption that the parties intended to enter into a legally binding agreement. This seems to be the effect of the Supreme Court's decision in *The President of the Methodist Conference v Preston* [2013] IRLR 646. Mrs Preston was a minister of the Methodist Church. Methodist Minsiters had no written contract of employment. By virtue of the Church's constitution – founded in the Deed of Union and specific arrangements made with particular ministers – she was entitled to a stipend, accommodation and was required to perform certain duties. The ministers obtained their position by ordination and thereafter their duties were not consensual but depended on the Unilateral decisions of the Methodist Conference. Their benefits, including the stipend, were due to them even in the event of sickness or injury. They had no right to resign – their position was only terminable by the Conference. In these circumstances the Tribunal found Mrs Preston was not an employee and hence not entitled to claim unfair dismissal. The EAT and the Court of Appeal disagreed holding that *Percy* had fundamentally undermined *Parfitt*. The Supreme Court, however, restored the Tribunal's decision.

However, the Supreme Court's decision must not be seen as authority for the proposition that a minister of religion can never be an employee in the sec.230 sense. Lord Sumption, who gave the leading judgment, held that the "vice of the earlier authorities was that many of them proceeded by way of abstract categorisation of ministers of religion generally". Rather "the correct approach is to examine the rules and practices of the particular church and any special arrangements with the particular minister". Ultimately, the "question whether an arrangement is a legally binding contract depends on the intentions of the parties". The mere fact that the arrangements contained some features which appeared contractual – such as a stipend, accommodation and duties to be performed – did not "without more resolve the issue". The Minister's duties depending on the Conference, the benefits the Minister enjoyed continuing in the event of sickness and injury and the absence of a unilateral right to resign meant, cumulatively, that the Ministry was a "vocation, by which candidates submit themselves to the discipline of the church for life" rather than a contract.

Hence there is no presumption either way as to whether a clergyman is an employee. The mere fact that some of the features of his relationship with his church appear contractual is not decisive. What matters ultimately is intention to create legal relations. When, as in *Percy,* there are written terms and conditions this is more likely to be so. In other cases the question will turn on whether such intent can be implied from the rules and practices of the church and any specific arrangments made with the clergyman concerned.

Parliamentary staff

House of Commons and House of Lords staff have often been regarded as officeholders. However, s.194 and s.195 of the 1996 Act expressly provide that the right not to be unfairly dismissed applies to them.

Members of a workers' co-operative

Difficulties arise in determining whether a member of a workers' co-operative is an employee due to the fact that in many cases the regulation and management of the working affairs of the members are determined by themselves rather that any supervising managers or directors. The question arose before the EAT (Bristow J Presiding) in *Winfield v London Philharmonic Orchestra Ltd* [1979] ICR 726. Mr Winfield

was a musician with the orchestra. The orchestra was a limited company. Mr Winfield, just like the other regular musicians, held one share of the company. The remaining eight were held by the Managing Director. He, like the directors of the board, were elected by the regular musicians and carried out the company's general administration. The regular musicians, including Mr Winfield, worked on a free-lance basis and were responsible for their own tax and national insurance. He was dismissed. The question arose as to whether, despite his free-lance status, he was an employee give that he was a shareholder and full member of the orchestra. The Tribunal and the EAT held that this made no difference. The EAT held:

> *In deciding whether you are in the presence of a contract of service or not you look at the whole of the picture. The picture looks to us, as it looked to the industrial tribunal, like a co-operative of distinguished musicians running themselves with self and mutual discipline, and in no sense like a boss and his musician employees.*

What, however, would the position have been in the case of an irregular musician who did not have a shareholding? The EAT (Waterhouse J Presiding) in *Addison and others v London Philharmonic Orchestra Ltd* [1981] ICR 261 addressed the question. The Claimants – all part-timers, non-shareholders and engaged on a sessional basis with no obligation to accept work – applied to the Tribunal, under what is now s.1 of the 1996 Act, for a declaration as to their terms and conditions. The Tribunal dismissed the applications. The EAT upheld their decision. The Tribunal found that the Claimants ran, in effect, their own businesses and the EAT could "see no basis, therefore, for finding that they erred in law or misinterpreted the evidence."

However, in *Drym Fabricators Ltd v Johnson* [1981] ICR 274 the EAT (Kilner-Brown J Presiding) the EAT did find that a member of a co-operative was an employee. A number of men, engaged in the fabrication of various aluminium articles, formed themselves into a co-operative – namely Drym Fabricators Ltd. One of them, Mr Johnson, was dismissed. The Tribunal and the EAT agreed he was an employee. The EAT articulated the difficulty in the following terms: "*At first, one might wonder whether in effect a person can dismiss himself, or whether he can make a contract of employment with himself. Is a workers' co-operative a collection of self-employed persons?*"

In the present case, however, there was no such problem as Drym were a registered company and "it has been the law for well over a hundred years that a limited company is a body in itself capable of taking all necessary decisions and functioning quite separately from those who may be directors or servants of the company." Interestingly the EAT also opined, *obiter*, that "if it was necessary to decide this case upon the basis of an unregistered co-operative, it would still be open to a co-operative to have, as it were, a body and a mind, in other words a legal personality and also to have different members of that body who could give and be given instructions by the body as a whole. Equally, the body as a whole could employ and could dismiss."

It is submitted that two questions emerge from the authorities. Firstly, whether the co-operation has legal personality. This will not be an issue when it is a registered company. Secondly, whether the Claimant is an employee and this question is answered in accordance with the usual approach to s.230.

Conclusion

In the special cases considered in this chapter the general approach to s.230, set out in the previous chapter, applies. What makes these cases special is that before the general approach falls for consideration preliminary matters need to be established. These include, for example in cases of Agency Workers, office-holders and clergymen, whether there is in fact a contract (only then will the question arise of whether it is a contract of employment) and whether, in the case of directors/controlling shareholders, partners,

members of an LLP and members of a co-operative, the putative employee has entered into a contract with a separate legal entity.