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Section 230(3) of the Employment Rights Act 1996 (ERA 1996) defines a worker as ‘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 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 carried on by the individual’. A contract of employment is in turn defined as ‘a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.’ It is interesting that any definition of a contract of employment was supplied given that ‘contract of service’ provides little or no more guidance than ‘contract of employment.’ The first half of the definition of worker refers exclusively to employees (of whom an identical definition is provided in s230(1) ERA 1996). Employees are afforded the highest levels of protection in employment law and many cases turn on whether or not a claimant can fit themselves into this hallowed category. The protection offered to worker is much less wide-ranging, but is recognition by the legislature that protection is required for the many workers who do not meet the common law tests for employees but are nevertheless sufficiently dependent to necessitate protection. There are several common law tests used to determine whether or not an individual is an employee. The problem is not that the common law tests cannot cope with the variety of modern labour relationships. The problem is instead that Parliament is yet to find a legislative model that strikes an adequate balance between labour market flexibility and employee protection.

PART I – The Common Law Tests of Employee Status

The oldest test of employee status is that of control. The question asked under this test is whether or not the servant is subject to the command of the master in relation to the manner of carrying out the work.¹ There are, however, many problems with the control test. The first is that it came into being in the 19th century where the test was used to separate manual employees from professional ones. Thus, a rigid modern-day application could result in the denial of employee status to professionals. Moreover, the control test implies a level of personal supervision that is no longer present in modern-day labour relationships. It remains, nevertheless, a regular feature in the determination of employment status.² However, the right of control is often as consistent with the relationship between employer and employee as it is with that between client and independent contractor. A housewife arguably exercises the same amount of control over her gardener as does a law firm over its lawyers.

A second test is the test of integration. This was largely developed within the case law of vicarious liability in the law of tort. The aim here is once again to determine whether or not the worker is an employee or an independent contractor. An individual is an independent contractor if his work ‘is not integrated into it [the company] but is only accessory to it’³ This test is hardly used today and understandably so. It fails immediately when it encounters the large, diffuse organisations that are

¹ *Yewen v Noakes* (1880-81) L.R. 6 Q.B.D. 530

² See e.g. *Lane v Shire Roofing* [1995] I.R.L.R. 493

³ *Stevenson Jordan & Harrison v McDonnell & Evans* [1952] 1 T.L.R. 101

prolific in modern economy. It would almost suggest that a cleaner employed by a library would not be an employee simply because their work was merely ‘accessory’ to the company’s main activities.

Another test which has failed to be articulated with any clarity in the case law is the economic reality test. This test requires the courts to examine the risks borne by the employer and by the employee. The more risk borne by an individual, the less likely it is that they are an employee as the employer traditionally bears any risks of failure. This test will not be discussed further because it does not play a significant role in the present-day tests of employment status.

The test of mutuality of obligation is now the definitive test of employment status. Without this, the employment relationship cannot be said to exist. There are two important elements to this test: the first is the need for a relationship in which labour is supplied in return for a wage; the second is that there be a continuing obligation on the employer to provide work and a corresponding one on the employee’s behalf to undertake work.

The control and mutuality of obligation tests are the two prevailing tests of employment status. They are relatively uncontroversial in simple cases. They are also of assistance in cases where a contract expresses itself to be a contract *for* services, but is in fact a contract *of* service. However, there is an increasing number of relationships that they cannot adequately classify. These will be discussed in the next part.

Part II: Workers in the Grey Zone

There is an increasing category of individuals who find themselves in regular, sometimes demanding work, but yet fail to classify as employees. The two most significant categories – that of the casual and agency worker – will be considered below.

The first category is that of the casual worker. In *O’Kelly v Trusthouse Forte plc*⁴, the claimants worked as catering staff supplied to individuals for functions. They were on a list of ‘regulars,’ that is workers who could be counted on to accept any work sent their way. They often ended up working more hours than those who were actually employed by the company. Their argument that they were employees came before the Court of Appeal. It was concluded that they could claim no more than a firm expectation of work. Without a mutual obligation to provide and undertake work, this could not be said to be a contract of employment. It was irrelevant that refusing work would result in removal from the list of ‘regulars’ as there was no corresponding requirement to provide it.

A similar result was reached in the more recent case of *Carmichael v National Power*⁵ which had similar facts. Thus, it seems settled that casual workers, who work on a ‘casual as required’ basis, cannot satisfy the all-important test of mutuality of obligation. The court, however, stressed that it was possible, where the signed document did not constitute the exclusive record of the agreement, to analyse the behaviour of the parties in order to establish whether or not there were implied terms supplying the necessary mutuality of obligation.

It is submitted that it is rare that this will be the case. Such contracts are usually watertight and it will be rare that the employer will be under any obligation to supply work to the worker. If, therefore, the protection of the worker is the ultimate goal, as suggested by the question, the preferred test of the common law is currently failing workers in the casual industry.

⁴ [1983] I.R.L.R. 369

⁵ [2000] I.R.L.R. 43

The question of agency workers is an even more vexed area of the law. This is because of the tripartite nature of the relationship. Agency relationships essentially take advantage of the law, splitting the functions of employer between the end-user (who usually is in control of the worker) and the agency (who pays the worker's wages) so that neither can be said to be the employer. Early common law attempts to protect such workers tried to create an employment relationship between the worker and the agency, but in *Bunce v Postworth*⁶, it was recognised that the lack of control and obligation to provide work was fatal to such an effort.

*Dacas v Brook Street Bureau*⁷ saw the Court of Appeal attempt, though this was not admitted, to rectify what has become a recurring problem in employment law. The majority placed the onus on tribunals to ask in the future, whether there was an employment relationship between the end-user and the worker. Sedley LJ went as far as to suggest that after a year or more, there was an 'inexorable inference' that the worker had become an employee. Mummery LJ's suggestion, that both the agency and the end-user taken together could be the employer, has not been pursued further.

The recent decision of *James v Greenwich LBC*⁸ has seen the Court of Appeal row back from what was clearly an instance of judicial activism. Arguably, the behaviour of the claimant in this case demonstrated a clear preference for flexibility, such that it was unrealistic to subsequently claim subordination. Yet the general principles put forward demonstrate that *Dacas* is now little more than a judicial experiment in social reform. In such scenarios, there will typically be no contract between the worker and the end-user. The usual approach of 'necessity' is to be implied and only where the inference of an employment contract is required to give business reality to the relationship will such an inference be made. As much of the relationship can be complained by the contracts between the worker and the agency and the agency and the user, implied contracts of employment will be rare.

Part III: The Search for 'Flexicurity'

The discussion above clearly demonstrates that the common law has excluded large numbers of workers from the protective ambit of social legislation. However, to presume that this is a bad thing would be to beg the question.

Mummery LJ in *James v Greenwich LBC* chided the government for its failure to make changes in this area of law. However, he did recognise that there are certain advantages to a flexible labour market. The wholesale acquisition of employee rights would lead to wide scale job losses and even more pressure on existing employees. Employers would lose flexibility in important areas such as hiring seasonal workers and some would probably move their companies abroad. The need to balance these two aims is at the core of the problems discussed above.

A flexible labour market, however, will not, without more, provide the safeguards necessary in the world of employment. In the case of *Consistent Group v Kalwak*⁹, an agency brought workers in from Poland to work in meat-processing factories. The contracts bore the hallmarks of the usual agency-worker relationship, but the workers were foreigners who were paid below the minimum wage for demanding work, with little option to refuse. Cases such as these arguably require legal intervention in order to halt the exploitation and maltreatment of the vulnerable. If such cases are left to the

⁶ 2005] I.R.L.R. 557

⁷ [2004] I.R.L.R. 358

⁸ [2008] I.R.L.R. 302

⁹ [2008] I.R.L.R. 505

market, not only will foreign labour become infinitely more attractive than it already is, but also human rights will be lost in the quest for wealth.

The balancing act discussed above is suffused with policy decisions. The courts cannot, therefore be expected to deal with them and any failings must be placed squarely at the door of the legislature.

Conclusion

At present, two Private Members' Bills have failed in Parliament in their attempts to enhance legislative protection of workers in the grey zone. The Secretary of State's powers under s23 of the Employment Relations Act 1999 to extend protection remain largely unused. Parliament is aware of the case law and its lack of intervention is best read as approval of the *status quo*. The control and mutuality of obligation tests leave much to be desired and push important questions to the forefront of labour law. However, any criticism of these tests should be tempered by a) recognition that the courts are not competent to make such wide-ranging and expensive social reform and b) clear thinking as to what the correct balance is between labour market flexibility and employee rights.

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