European Working Group of Labour Law:

Persons without a contract of employment performing work personally

UK Report

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Question 1: What is the definition of a contract of employment in the United Kingdom? What are thus the main criteria for assuming a contract of employment in your country? How are these criteria currently interpreted in regulations and in case law? What is the main source of uncertainty in this area?

In the United Kingdom, reference to a contract of employment in the establishment of employment status can be found in the Employment Right Act 1996 and the Trade Union and Labour Relations (Consolidation) Act 1992:

> *"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."*[1]
>
> *"contract of employment means a contract of service or of apprenticeship"*[2]

The importance of having a contract of employment is largely related to the status of the employment, for example, an explicit written contract of employment will afford an employee the rights contained therein, whereas where no contract of employment exists the possibility of one being assumed is of paramount importance in granting full employment right to an individual. In short, if an individual without a written contract of employment can have one inferred, they will be afforded all rights and protection available to 'employees' under the relevant legislation. Therefore, although these statutory definitions do not give a complete picture of what constitutes a contract of employment in the UK, they do give some guidance as to the nature of the contract of employment, for example, the contract of employment need not be express, it can be assumed by implication and it also does not have to be in writing. Therefore, it has been the role of the courts and tribunals to take this definition beyond its most basic form seen in statute. The courts have implemented a number of different tests to determine whether a contract of employment exists, in that it constitutes a contract for service. For example, historically, the main factor considered was that of 'control'; whereby if an employer could not only control the work to be completed by an individual but the manner in which it is should be completed, a contract of employment could be inferred[3]. However, due to the varied nature of the workforce, 'control' as a sole test for the inference of a contract of employment is no longer sufficient and is now to be included as a mere factor in a more pragmatic approach. The case of *Ready Mixed*

[1] Employment Right Act 1996 s.230(2)
[2] Trade Union and Labour Relations (Consolidation) Act 1992 s.295(1)
[3] *Performing Right Society Ltd v Mitchell and Booker (Palais de Danse) Ltd* [1924] 1 KB 762

Concrete (South East) Ltd v Minister of Pensions and National Insurance[4], signalled a move to a more pragmatic approach to the inference of a contract of employment, whereby, a number of different factors will be taken into account in the form of a balancing exercise, these factors include; control, mutuality of obligations and the economic reality of the situation, summed up by MacKenna J:

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

Regarding the economic reality of the situation, the question to be asked is whether or not the individual is in 'business on his own account'[5] (self-employed) or if in reality the individual is economically reliant on another who holds the burden of profit and/or loss and could therefore be classed as an employee. Therefore, an individual working casually, for example, on a construction site, could have a contract of employment inferred if the reality of the situation is that he is working for a singular business and is not ultimately in charge of the economic situation of that business. On the other hand, where an individual is providing services to a number of different companies, for example in *Hall v Lorimer*[6] a skilled television technician worked for 20 different companies on a short-term basis and therefore was held to be in business on his own account; the economic reality of the situation was not that of an employee-employer relationship and therefore a contract of employment could not be inferred.

Particular focus has been placed on mutuality of obligations in finding a contract of employment, whereby in finding a contract of employment it is necessary for there to be an obligation on the employer to provide work and an obligation on the employee to carry out this work. For example, in the case of *Carmichael v National Power plc*[7] tour guides working on a casual as required basis were held not to be employees; the individuals were under no obligation to accept work and the business was under no obligation to provide work. The importance of the mutuality of obligations as a factor in establishing a contract of employment was highlighted in

[4] [1968] 2 QB 497
[5] *Lee Ting Sang v Chung Chi-Keung* [1990] ICR 409
[6] [1994] IRLR 171
[7] [2000] IRLR 43

Nethermere (St Neots) Ltd v Taverna and Gardiner[8] where it was held that mutuality of obligations is an 'irreducible minimum' in inferring any contract of employment.
Although this adds a degree of uncertainty to the situation regarding the assumption of a contract of employment in the United Kingdom, in the consideration of individual cases by the courts and tribunals a more 'instinctive' approach is satisfactory in a number of ways. Firstly, it allows lay members[9] of the tribunal to apply their experience of the business world and secondly, it refrains from having an overly restrictive approach based on a singular definition or test that although adding certainty would make it difficult to infer a contract in certain situations where it would by instinct be assumed. Lord Justice Somerville sums up the UK's approach to finding a contract of employment as: "One perhaps cannot get too beyond this, 'Was the contract a contract of [employment] within the meaning which an ordinary person would give under the words?'"[10]

The main source of uncertainty in establishing a contract of employment is whereby an atypical situation arises, for example, where there is a triangular relationship as is seen in the case of temporary agency workers. In a situation such as this, uncertainty arises as to whether a contract of employment can ever be assumed and if so between which parties. Primarily, as this situation involves three parties; the worker, the agency and the end-user, in looking at the factors to establish a contract of employment becomes difficult, for example, control exists between the worker and end-user however, it is the agency that offers the work and remunerates the worker for it. Further to this, as far as mutuality of obligations is concerned, there is no obligation on either the agency or end-user to provide work to the agency worker and similarly no obligation for the worker to accept.

Traditionally, the main route that an agency worker would follow would be to have a contract of employment inferred between themselves and the end-user. However, there have been attempts to try and establish a contract of employment between the agency worker and the agency itself, but due to explicit contractual terms excluding any mutuality of obligations and the lack of control over the day to day performance of the agency worker this route has rarely and would now doubtfully ever lead to any successes[11]. In pursuing the establishment of an

[8] [1984] IRLR 240
[9] Lay members are non-legally qualified members of the tribunal usually with some experience of business.
[10] *Cassidy v Ministry of Health* [1951] 2 KB 343
[11] *Bunce v Postworth* [2005] IRLR 557

employer-employee relationship with the end-user there has been more success, for example, in *Cable & Wireless Plc v Muscat*[12] a tribunal decision based on *obiter* in *Brook Street Bureua Ltd (UK) v Dacas*[13] that once a situation similar to that of any other 'employee' of the end-user had continued for one year a contract of employment could be implied; was upheld by the Court of Appeal.

The decision in *James v Greenwich BC*[14] significantly narrowed the possibility of implying a contract of employment between the agency worker and the end-user, stipulating that neither *Dacas*[15] nor *Cable & Wireless*[16] laid down a general legal principle. Following *James* it was no longer the case that a contract could be inferred if it looked like a contract of employment (after one year) but only when it was a necessity to imply one; without the implication no sense would be made on the business situation[17] or where the arrangement is a sham[18], this clearly indicates a fall-back to the basic principle of freedom of contract, whereby the implication of a contract as seen prior to *James* seemed to largely ignore the principle. Therefore, the inference of a contract of employment between an agency worker and the end-user is likely to rarely occur.

[12] [2006] ICR 975
[13] [2004] IRLR 358
[14] [2007] IRLR 168
[15] *Brook Street Bureau Ltd (UK) v Dacas* [2004] IRLR 358
[16] *Cable & Wireless Plc v Muscat* [2006] ICR 975
[17] *National Grid Electricity Transmission v Wood* UKEAT/0432/07/DM
[18] *Consistent Group v Kalwak* [2007] IRLR 560

Question 2: What are the main different forms of employment contract in your country? Present these in a table showing the main distinctive characteristics

Individual's status	Form of employment contract	Characteristics	Figures
Employees	Contract of Employment	As discussed above, it has been determined by the common law as the statute is silent on any criteria. • s.230(2) Employment Rights Act 1996 - 'contract of employment' – "a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing" • In *O'Kelly v Trusthouse Forte Plc* [1983] ICR 728, Court of Appeal said by majority that the application for indentifying a contract of employment was a 'question of mixed law and fact' • Greater tax burdens on employees and employers compared to self-employed • Employee's rights include: - unfair dismissal protection - redundancy compensation - minimum notice upon termination - right to maternity, paternity and parental leave - right to return to work after taking such leave	Figures released Oct 2010: 24.92 million in total
Self-employed /independent contractors	Contract for services	Genuinely self-employed/independent contractors • Often have business of their own • Excluded from legislative protection • Tax benefits • Independent contractors takes on the liability if a passer-by is injured by their actions • Often have a general power to delegate the work to someone else –	Figures released Oct 2010: 3.97 million in total

		sometimes 'sham' clauses deliberately put into contracts by employers so that individual is not protected by legislation even though, after scrutiny, it is clear they are in fact an employee or worker. • This power of delegation shows the lack of mutuality of obligations since the independent contractor is not required to perform the work himself. Case law examples: →*O'Kelly v Trusthouse Forte plc* [1983] ICR 728, 'regular casuals' in catering business were considered independent contractors	
Worker	Contract of employment OR contract for services	1. 2. S.230(3) ERA 1996 – 'worker' – "an individual who has entered into or works under...(a) a contract of employment, or (b) any other contract, whether express or implied and...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 undertaking carried on by the individual;" 3. Protection with regards to minimum wage, working time, health and safety, certain collective rights 4. There is an obligation to perform work personally and not delegate the work to others 5. Often those who do not quite meet the common law tests laid down for employees will be deemed workers instead. • Under s23 Employment Relations Act 1999 – power to the Secretary of State to extend employment rights to workers – yet unexercised.	
Agency workers	Contract of employment OR contract for services	• Employment relationship often known as 'triangular' – worker has a relationship with both the agency and the end user • Difficulties in this area surround whether the worker has a contract of employment/contract for services with the agency (who pays the worker) or the end user (who supplies the work). • On occasions, tribunals have been willing to look at all the separate engagements of the individual as an 'umbrella contract' forming a contract of employment. Therefore the individual becomes an employee.	Figures from 2008: 1.1-1.5 million in total

		• Common law cases have established that a contract can be implied between the worker and end user through the conduct of the parties – not straightforward though – could possibly be implied where the agency merely acts as a 'go-between'. • End user has a duty to protect temporary workers under the Health and Safety at Work Act 1974 Case law examples: → *Dacas v Brook Street Bureau (UK) Ltd* [2004] IRLR 358 – C had worked for end user for several years before an allegation of misconduct – C of A found there was no contract of employment between C and the agency HOWEVER considered there may have been an implied contract between C and the end user. → *James v Greenwich London Borough Council* [2008] IRLR 302 – reasserted view that contract of employment will only be implied between the worker and end user where it is necessary to do so as to give legal effect to their relationship.	
Part-time workers	Contract of employment OR contract for services	• UK authorities count those working 30 hours or less as employed part-time • Mostly women and young people are employed part-time • Most contentious issue in this area centres upon equal treatment between full-time and part-time workers. • Part-Time Workers (Prevention of Less Favourable Treatment) Regs 2000 – covers workers under contract of employment or in employment relationship as defined by relevant law. • Regs state that part-time workers shall not be treated less favourably than comparable full-time workers unless different treatment is justified on objective grounds.	Figures released Oct 2010: 7.96 million in total Part-time self-employed – 1.03m Part-time employees – 6.74m
Fixed Term contract	Contract of employment	• Entitled to same health and safety protection as workers • Fixed-Term Employees (Prevention of Less Favourable Treatment)	

		Regulations 2002 – restricted to 'employees' – focus of legislation is on equal treatment • Under Regs 'comparable permanent employee' is narrowly specified – two employees must have same employer, engage in broadly similar work and normally be based at same establishment – right to be treated no less favourably than the comparable permanent employee. • Other focus of Regs is to prevent the abuse of keeping individuals on successive fixed-term contracts for unreasonable periods – Regs state that a worker kept on successive fixed-term contracts of four years or more is deemed in law to be a permanent employee unless an employer can objectively justify keeping person on fixed-term basis.	
Apprentices	Contract of employment/apprentice-ship	• Expressly mentioned in s.230(2) Employment Rights Act 1996 . • Contract is often for a fixed term – once term has ended, often no obligation on employer to continue this employment relationship. • If apprentice is 'let go' on expiration of contract – then no rights to a redundancy payment • It was ruled in the case of *Daley v Allied Suppliers Ltd* [1983] IRLR 14 that 'trainees' do not come under a contract of employment or apprenticeship but are still partially protected by health and safety, working time and equal treatment legislation. • Apprentices below 19 and below 26 during their first year of training are excluding from minimum wage protection.	
Homeworkers	Contract of employment OR contract for services	• Defined in s.35(2) Minimum Wage Act 1998 – "In this section 'home worker' means an individual who contracts with a person, for the purposes of that person's business, for the execution of work to be done in a place not under the control or management of that person." • No clear employment status – often mutuality of obligation is the most contentious issue in cases involving Homeworkers • Therefore the rights of homeworkers are dependent upon whether they can establish themselves as employees. • Has been attempts to extend beyond categories of 'employee' and 'worker' – s.35 National Minimum Wage Act 1998 – specific definition of	Figures from 2005: 3.1 million in total

		'homeworker' – "contracts with a person, for the purposes of that person's business, for the execution of work to be done in a place not under the control or management of that person." Case law examples: →*Airfix Footwear Ltd v Cope* [1978] ICR 1210 and *Nethermere (St Noets) Ltd v Taverna and Gardiner* [1984] IRLR 240 – Homeworkers were considered employees as their long-standing arrangement for regular work showed sufficient mutuality of obligations	

Question 3: Which categories can be distinguished of persons who perform work personally, but who do not have a contract of employment in your country? Which legal criteria are used to distinguish these groups? Which numbers on the respective groups are currently available?

The two main groups of individuals who perform work personally but who do not have a contract of employment are independent contractors (or self-employed) and the very wide category of workers.

An individual is likely to be classed as an independent contractor if they fail to meet the criteria set down by the various tests from the common law for establishing whether an individual is an 'employee' and would therefore be working under a contract for services. Although the individual is likely to be in a better monetary position compared to a worker or employee due to the tax advantages attached to this type of work, an independent contractor is at a severe disadvantage with regards to any statutory protection; only minimal health and safety legislation and social security rights apply to the self-employed.

One of the main distinguishing features noted by the tribunals and courts in making distinctions between employees, workers and independent contractors has been the inclusion of a substitution clause within the agreement between the contractor and individual. A classic example can be seen in the case of *Express & Echo Publications Ltd v Tanton* where as driver had an unrestricted right under his contract to appoint a substitute if he were "unable or unwilling to perform the services personally"[19]. In this case, unsurprisingly, the individual was ruled to be an independent contractor due to the wide right that he need not perform the work personally. In contrast, in the case of *MacFarlane v Glasgow City Centre*[20] two gymnastics coaches were entitled to have their classes taken by a substitute if they were unable to take the class. Here, the tribunal found that the fact the individual had on occasions found a replacement for when they were ill or on holiday was not inconsistent with their personal obligation as workers.

[19] [1999] ICR 693 at 696
[20] [2001] IRLR 7

Whether the individual can be said to be 'in business on his own account' is also crucial in deciphering whether the individual is self-employed. In the case of *Market Investigations Ltd v Minister of Social Security* where Cooke J suggested "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?' If the answer to that question is 'yes', then the contract is a contract for services. If the answer is 'no', then the answer is a contract of service."[21] This distinction is of great significance since if the individual is in business on his own account then he would be expected to take the risk of loss and chance of profit upon himself demonstrating the potential financial advantages of being self-employed and partly justifies the lack of protection afforded to these individuals. This also illustrates the lack of economic dependency on the employer and the ability to take on work whenever and from whomever the independent contractor wishes unlike the position of employees and some workers who become solely dependent on the income from their employer.

Therefore, the common law tests of control, integration, economic reality and mutuality of obligations discussed earlier essentially enable to courts to assess whether an individual falls into the 'employee' category. It follows that if they fail to satisfy these factors set out then it is likely they will be deemed to be an independent contractor and are, therefore, only entitled to very minimal rights in terms of their employment. If, however, it would cause much hardship for the individual to be considered 'self-employed' the courts have the ability, in certain situations, to try and construe the individual's contract so they may be deemed a 'worker' and so receive some statutory protection (although not as extensive as an employee's rights).

'Worker' is defined in similar terms in a number of statutes with the most commonly cited definition coming from s.230(3) Employment Rights Act 1996 which states:

"(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

[21] [1969] 2 Q.B. 173 at 184

that of a client or customer of any profession or business undertaking carried on by the individual;

and any reference to a worker's contract shall be construed accordingly."

As with the lack of legal criteria for interpreting the term 'employee', this definition does little to aid drawing a distinction between employees, workers and independent contractors. Further confusion has had to be overcome through the years with much of the discrimination legislation using the term 'employment' to describe who is protected by the statutes. A recent example can be seen in s.83 Equality Act 2010:

" (2) "Employment" means –

(a) Employment under a contract of employment, a contract of apprenticeship or a contract to perform work personally"

With some interpreting this as possibly including independent contractors, Elias J took the opportunity in the case of *James v Redcats (Brands) Ltd*[22] to explain the 'dominant purpose' test which is used to decipher which individuals fall within the definition and are therefore afforded protection. He noted that "the courts are seeking to discover whether the obligation for personal service is the dominant feature of the contractual arrangement or not. If it is, then the contract lies in the employment field; if it is not-if, for example, the dominant feature of the contract is a particular outcome or objective-and the obligation to provide personal service is an incidental or secondary consideration, it will lie in the business field."[23] This essentially means that only workers fall within this definition leaving independent contractors more vulnerable in terms of protection.

Since statutory law cannot be used alone to distinguish who a worker is, the common law has developed its own legal criteria. The case of *Byrne Brothers (Formwork) Ltd v Baird*[24] is very useful in this respect as the EAT attempted to lay down some distinctions between independent contractors and workers. The claimants in the case were 4 builders who "On starting work for the contractors the applicants were required to sign standard-form "subcontractor's agreements"[25] of which one of the terms stated that the 'subcontractors' were not entitled to holiday or sick pay. When the builders discovered they had not been paid for the Christmas

[22] [2007] ICR 1006
[23] Ibid at 1020
[24] [2002] I.C.R 667
[25] Ibid at 668

holidays, they bought claims under the Working Time Regulations 1998 for the holiday pay they believed they were entitled to. Regulation 2(1) effectively reproduced the definition of 'worker' found in s.230(3) Employment Rights Act 1996 (reproduced above). Therefore the case essentially centred on whether the 'subcontractors' were in fact workers and so could rely on the Regulations.

The first issue the EAT grappled with concerned the builder's obligation to perform work personally and whether the 'substitution' clause was inconsistent with the obligation for the personal performance of that work. Mr Recorder Underhill QC cited MacKenna J with approval that "Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, *though a limited or occasional power of delegation may not be...(Emphasis added)"*[26] *It was concluded that since the substitution clause was only a limited delegation, this issue did not cause the case for a contract of service to fail.*

*The second issue considered by the EAT was whether there was the work carried out by the builders amounted to a "business undertaking" as defined in limb (b) of Regulation 2(1). The EAT agreed with the Employment Tribunal on this point citing paragraph 27 of the ET's judgement with approval; "*Although it is clear that each of the applicants submitted accounts to the Inland Revenue, and took advantage of their entitlement to set off business expenses, this did not of itself mean that they were in a 'business undertaking' as distinct from being labour-only subcontractors. Whilst their pattern of work was of going from site to site, each of them none the less worked for one principal contractor, to the exclusion of any other, for significant periods of time. We are not satisfied that they are excluded from the definition of 'worker' on that basis."[27]

The third issue addressed by the EAT concerned the mutuality of obligations in the agreement and the effect of the clauses stating that the contractor had no obligation to provide work and the subcontractors were equally not obliged to take it. It was concluded that, since neither party exercised these rights and the subcontractors worked continuously through the "assignments", there was a contract in force at the time of the Christmas holiday break. The EAT dismissed the appeal of the contractor approving the Employment Tribunal's decision that the builders fell into

[26] Ibid at 674
[27] Ibid at 679

the category of 'workers' and were thus entitled under the Working Time Regulations 1998 to receive holiday pay.

The case clearly demonstrates the various factors which tribunals consider when assessing whether an individual is a 'worker' or 'independent contractor' and that the court looks at the situation as a whole and does not confine it's judgement to the words within the agreement between the contractor and the individual. This leaves the law on an unpredictable footing since many of the cases which have come to the tribunals are very fact specific and so it is difficult to conclusively set out the legal criteria necessary for establishing 'worker' status.

Despite this uncertainty, the courts have all taken similar approaches to that seen in *Byrne Brothers (Formwork) Ltd v Baird*[28]; a clear example of this can be seen from the Court of Appeal case of *Wright v Redrow Homes (Yorkshire) Ltd*[29] where the facts of Byrne Brothers were effectively repeated. The case similarly concerned sub-contracting builder's entitlement to holiday pay and, again, the court looked at the parties' intentions rather than the technical limitations present in the contract to find that the bricklayers were required to perform personally the work and so were entitled to the holiday pay. In the case of *Cotswold Developments Construction Ltd v Williams*[30] the EAT set out further guidance to assist in distinguishing workers. Langstaff J suggested that tribunals should first consider whether there was the required minimum level of mutuality of obligations for there to be a contract at all, secondly (if there was) whether the level of mutuality and control was enough to produce a contract of employment, thirdly (if not) whether there was sufficient obligation of personal service on the part of the individual to qualify him/her as a 'worker' and fourthly (if so) whether the work was done in the course of the individual's business or profession looking at the facts[31].

As can be seen from the case law, the fundamental question of whether an individual is a worker depends on a combination of the mutuality of obligations between the employer and the individual, whether there was a personal obligation to carry out the services called upon and whether the individual can be said to be carrying out the services in the course of their business.

[28] [2002] I.C.R 667
[29] [2004] ICR 1126
[30] [2006] IRLR 181
[31] I.T Smith and A Baker, *Smith and Wood's Employment Law*, (10th edn, OUP, 2010)

It is worth noting that under s.23 of the Employment Relations Act 1999, the Secretary of State has been granted the power to further extend the protection to workers more in line with employees. However, this power is yet to be exercised and looks extremely unlikely to be used anytime soon with the current Government who are already taking action to lessen the rights currently afforded to employees.

Question 4: Do labour law Acts and/or courts assist workers who have difficulties in proving that they (actually) have a contract of employment in asserting their claim? For instance, does the Act provide for legal presumptions that there is a contract of employment? In which situations? Do courts reclassify a civil law contract into a contract of employment? Under what conditions and by using which criteria?

English Law divides the working population into four general groups:

1. Employees
2. Workers
3. Informal Workers eg agency workers
4. Self-employed

The rights of these different categories against their employers decreases as you move down the list above. This explains why claimants wish to be classed as employees when their action involves a working relationship.

The Employment Rights Act (ERA) 1996 determines the employment status of claimants. An 'employee' is defined as 'an individual who has entered into or works under... a contract of employment.'[32] This should be contrasted to the definition of a worker, stated as being 'an individual who has entered into or works under... (a) a contract of employment,[33] or (b) any other contract... whereby the individual undertakes to do or perform personally any work or services for another party... whose status is not... that of a client or customer...'[34] This preliminary glance at the statutory distinction makes it difficult to consider what the difference is between these categories, as all employees could fit the worker category. Furthermore, it is clear that there is no legal presumption for contracts of employment within the Act.

Therefore, the common law was developed to aid in determining the practical significance of this distinction between employers and workers. However, a degree of deference to the decisions of the lower-level, albeit specialised, tribunals have led to inconsistency in the common law.[35]

[32] s.230(1) ERA 1996.
[33] A 'contract of employment' is also defined in the ERA under s.230(2) as: '…a contract of service or apprenticeship…'
[34] S.230(3) ERA 1996.
[35] S. Deakin & G.S. Morris, Labour Law (5th edn, Hart Publishing, 2009) 125.

The Court of Appeal in the case of *O'Kelly*[36] decided that the application of the legal criteria for identifying a contract of employment was 'a question of mixed law and fact' in which several answers are possible. This does not help in the determination of the rights of particular claimants, as the case law at that point became even more confused. Despite this the House of Lords reaffirmed *O'Kelly* in *Carmichael v National Power plc.*[37] The majority opinion of Lord Irvine of Lairg LC states that the construction of an employment contract could only be a question of pure law if the parties intended the written document to be the exclusive source of their agreement. The question of whether the parties intended the document to be conclusive was said to be a matter of fact. Deakin and Morris argue that 'it is far from clear that the decision in *Carmichael* has done anything to reduce the volume of cases on employment status'.[38]

The behaviour of the parties after entering into the relationship of employment will be taken into account by the tribunal. It is also clear that a 'statement that... [a worker] supplies [services] as a self-employed worker is not conclusive of his status, since it has been said many times that whether someone is an employee is a matter of analysing all the rights and obligations created by the contract'.[39] This provides for a flexible approach towards the substance of the contracts of employment to ensure they reflect reality, thus assisting workers who have difficulties in proving that they have a contract of employment. This was emphasised in the case of *Ferguson v John Dawson & Partners (Contractors) Ltd*,[40] where Megaw LJ said that 'a declaration by the parties, even if it were incorporated in the contract, that the workman was to be, or was to be deemed, self-employed, an independent contractor, ought to be wholly disregarded – not merely treated as not being conclusive – if the remainder of the contractual terms, governing the realities of the relationship, showed the relationship of employer and employee'. This should be contrasted with *Carmichael* where Lord Hoffman said it would be difficult to reject the contract if it reflected both parties' intentions.[41]

The case of *Muscat v Cable & Wireless Plc*[42] is a good example of the courts reclassifying a civil contract as a contract of employment. In this case Muscat had worked as a telecommunications specialist by an internet company that dismissed him and then immediately

[36] *O'Kelly v Trusthouse Forte plc* [1983] IRLR 369.
[37] [1999] 1 W.L.R. 2042.
[38] Deakin & Morris (note 35) 126.
[39] *McMeechan v Secretary of State for Employment* [1995] IRLR 461 (CA) per Mummery LJ at 463
[40] [1976] 1 WLR 1213 (CA).
[41] [1999] 1 W.L.R. 2042 per Lord Hoffman at 2050.
[42] [2006] I.R.L.R. 354.

re-engaged him as a contractor providing his services through a limited company. Muscat continued to work as before although under the direction of the new management. Within the departmental structure he was described as an employee. C did not deal with contractors directly and had entered into an agreement with an agency to provide contract personnel. The new management dismissed Muscat and argued that he was not an employee. The Court of Appeal held that Muscat was indeed an employee of the company and the requirement for mutuality of obligation could be satisfied where the obligation to remunerate did not lie on the person having control of the worker's work so long as the remuneration was being provided by the employer albeit indirectly.

One area of increasing relevance within employment law is that of 'sham' employment contracts where the dominant party seeks to conceal the true nature of the employer-employee relationship to prevent its employees claiming their rights. The court has recently moved away from the definition of sham contracts in *Snook v London and West Riding Investments Ltd*[43] that required the two contracting parties to be working together to deceive a third party. Davies has criticised this definition as unhelpful 'in the employment context because the employee is usually either ignorant of the deceit or a victim of it.'[44]

The Court of Appeal departed from *Snook* and tailored the sham contract principle for the context of employment within the now leading case of *Protectacoat Firthglow Ltd v Szilagyi.*[45] In this case Mr Szilagyi had a contract with Protectacoat Firthglow which stated that there was no obligation on the latter to provide work. After Mr Szilagyi refused to perform a job due to health and safety issues, Protectacout Firthglow terminated the contract. Mr Szilagyi claimed for unfair dismissal.

The Court of Appeal held that Mr Szilagyi was an employee on the basis that the contractual arrangements were a sham to conceal the true nature of the relationship between the parties. Despite a recent decision approving the Snook definition of sham contracts in *Consistent Group v Kalwak*,[46] the decision was differentiated in favour of a new approach. The leading judgment in this case was that of Smith LJ who stated that the *Snook* definition is irrelevant to areas where there is inequality in bargaining power and summarised the new test as:

[43] [1967] 2 QB 786, CA.
[44] A.C.L. Davies, 'Sensible thinking about sham transactions' 38 (2009) ILJ 318
[45] [2009] EWCA Civ 98; [2009] I.C.R. 835 (CA (Civ Div)).
[46] (2008) IRLR 365.

> "*The question is always what the true legal relationship is between the parties. If there is a contractual document, that is ordinarily where the answer is to be found. But, if it is asserted by either party, or in some cases by a third party, that the document does not represent or describe the true relationship, the court or tribunal has to decide what the true relationship is.*" [47]

Therefore, more protection is granted by the courts taking a more dynamic approach towards the reading of the contracts of employment. This new test protects employees from sham contracts, enabling 'the court to conclude that certain terms in the written agreement were not reflective of the reality of the relationship'.[48]

[47] [2009] EWCA Civ 98 per Smith LJ at para.55.
[48] Davies (note 44) 327.

Question 5: Are aspects of labour law extended to categories of workers who do not have a contract of employment? If so, which parts and under which conditions? Is such protection also available for self-employed persons without staff (you need to give brief information on the position of the self-employed only)?

Atypical workers and the self employed are also afforded some protection, albeit less than the rights of employees and workers. Mummery LJ noted in *Franks v Reuters*[49] that:

> *'Drawing a line between those who are employees (and so have statutory employment rights) and those who are not entitled to statutory employment protection has become more, rather than less, difficult as work relations in and away from the workplace have become more complex and diverse.'*

Atypical workers are those that do not fall within the categories of employee or worker, but also are not self-employed. Atypical workers are clearly dependent upon their employer for work, but do not have a contract of employment or other contract of performing services. Around 152,000 workers are engaged in working arrangements of this type and have been 'excluded from the protection of labour law by the techniques used by the courts to distinguish employees and independent contractors'.[50] This distinction has been made through the use of a 'balancing test' by the courts which looks at the 'various elements of a working relationship, deciding which indicate employment and which independence, and concluding whether on balance, the worker is an employee'. [51]

Those involved with casual work that do not have fixed hours and only required to work by the employer on an irregular basis are a type of atypical worker. These workers may also refuse work when they are unavailable. In *O'Kelly*, the case determined the status of a group of waiters that were categorised by the employer as 'regular casuals'. The Court held that there must be twin obligations, on the hirer to provide work and on the worker to do that work, known as the 'mutuality of obligation' test. The Court came to the conclusion that there was no contract of employment because the waiters were formally entitled to refuse work.

[49] [2003] IRLR 423.
[50] D. McCann, *Regulating Flexible Work*, (OUP, 2008), 34.
[51] Ibid, p.34-35.

Those classed as 'workers' under s.230(3) Employment Rights Act 1996 enjoy a number of rights, these being:

- National minimum wage
- Working time regulations
- Right to be accompanied in relation to disciplinary or grievance hearings at the workplace.
- Protection from less favourable treatment under part-time worker regulations
- Protection from detriment due to trade union activities (found under s.146 Trade Union and Labour Relations (Consolidation) Act 1992).
- Protection from unlawful deductions from wages (s.13 ERA)

The self-employed have protection in two areas of employment law, namely that concerning equality and health and safety. s.83(2)(a) of the Equality Act 2010 states that 'employment' includes 'a contract to personally do work', referring to employees and workers. Section 41 of the Equality Act also includes subcontracted workers into its scope. Some categories of the self-employed are also incorporated into the Act, such as barristers[52] and business partners[53].

The Health and Safety at Work Act (HSWA) 1974 states in s.1 that employers have a duty to ensure the health, safety and welfare of persons at work. Under s.3 of this Act the duty of the employer extends to those that are not his employees and specific duties apply to the self-employed. Self employed people are more broadly defined in s.53 of the HSWA as 'an individual who works for gain or reward otherwise than under a contract of employment, whether or not he himself employs others'. However, it is clear that agency workers in many cases do not benefit from such rights and benefits.[54]

[52] s.47 Equality Act 2010.
[53] s.44 Equality Act 2010.
[54] *Muschett v HMPS* [2010] EWCA Civ 25.

Question 6: Are aspects of social security law extended to categories of workers who do not have a contract of employment? If so, which parts and under which conditions?

The modern `binary divide' between employees and self-employed (independent contractor) in the UK can be traced to the Beveridge Report 1942[55]. In trying to expand the contribution base to cover the whole labour force, Beveridge envisaged two categories of contributors – "employed earners" a category including those `gainfully employed in employment' being employed under a contract of service and those employed on their own account. This distinction was used to transfer some of the economic and social risks of unemployment to employers under the National Insurance Act 1946[56] so all "employed earners" came within the Class 1 national insurance classification.[57] The same distinction was used in the tax regime for the automatic deduction of income tax from wages.[58] Definitions of "contract of employment" are used inconsistently across tax, social security and employment law. For many issues of tax and social security, the notion of an "employed earner" (as opposed to employee) is used. "Employed earner" includes individuals who would not qualify as "employees" under contract law but who pay class 1 national insurance. Individuals may find themselves classed as self-employed in determining access to employment and social security rights but fail on different tests to gain fiscal benefits of self-employed status under the tax regime.

To illustrate the complexity of definition in the UK system this section highlights major social security provisions which operate in periods of employment, periods of unemployment and in retirement. Most statutory provisions are supplemented by occupational arrangements arising from contract, but often these will only extend to those who pass the "employee" test.

[55] Lord Beveridge *Social Insurance and Allied Services* (Cmd 6404) (HMSO, 1942)
[56] The National Insurance Act 1946 s1(2)
[57] **NI (National Insurance) contributions**: These are payments into an individual's National Insurance "account" which theoretically covers payment for future pension, unemployment benefit, NHS service etc. They are usually held back from pay along with tax deductions (known as PAYE - pay as you earn). Those who do not have tax deducted at source will make other arrangements to pay both their tax and their national insurance payments. Employers also have to pay national insurance contributions for each person they employ who is aged 16 or over and whose earnings are above a certain amount. There are six classes of national insurance contribution but the main categories are Class 1 paid by people who work as "employed earners" and their employers contribute to the account. Class 2 contributions are paid by people who are self-employed; there are no additional payments made to their accounts.
[58] The Income Tax (Employments) Act 1943

The statutory benefits do not operate as a floor of minimum rights. In most cases access is determined by previous national insurance contribution rates. Those who do not contribute do not benefit. The only safety net operating is one determined solely by financial need.

1. Benefits Accessed In Work

The main statutory benefits `in work', provide support to individuals who are not working through family-related reasons (maternity, adoption and paternity), through annual leave (paid leave) or because they are unfit to work. Different rules apply to each scheme. However, a common framework applies to all family-related benefits and therefore maternity benefits are provided as a detailed example of the general provision in this area.

a) Statutory Maternity Leave can only be taken by "employees" and not by other types of "workers" or self-employed.[59] There is no qualifying service. However, under separate health and safety requirements all employers have obligations to safeguard the health and safety of new and expectant mothers in their workplaces. This obligation extends to workers and self-employed and could include the provision to provide a period of leave. .

b) Statutory Maternity Pay has a slightly wider definition of who is eligible to receive payments.[60] Where a woman is treated as an "employed earner" for national insurance purposes, she will qualify. [61] Special provisions also exist for temporary agency workers,[62] who provide personal service under supervision where the agency pays the worker. In consequence an individual can be eligible for maternity pay but not for maternity leave. She would have to use contractual leave arrangements in order to take advantage of her rights to maternity pay. Home-workers and the self-employed are not eligible.

To qualify for statutory maternity pay, the woman must meet certain service and income provisions.[63] She must have 26 weeks' continuous service up to and including the 15th week before the expected week of childbirth. She must have ceased working for the employer (usually by reason of maternity leave but not always, for example at the end of a fixed term

[59] Employment Rights Act 1996 Part VIII s230; Maternity and Parental Leave Regulations 1999 SI 1999/3312
[60] Social Security Contributions and Benefits Act 1992 (SSCBA) s 171(1)
[61] Social Security (Categorisation of Earners) Regulations 1978 SI1978/1689
[62] Income Tax (Earnings and Pensions) Act 2003 s7
[63] SSCBA ss164(2),(4) and (5) and SMP Regulations Reg 22

contract she would still be entitled to maternity pay so long as she met the other qualifications). Finally she must have normal weekly earnings for the eight weeks up to and including the qualifying week where class 1 national insurance contributions are paid.[64]

Continuity of employment is based on a contract of employment being in place.[65] In consequence those employed on an umbrella contract, even with a zero-hours base, will meet the continuity requirement. Those employed on separate casual employment contracts or on short term consultancy arrangements with breaks are unlikely to benefit because they cannot demonstrate continuity of the contract throughout the qualifying period. Special provisions exist for agency workers, so if they are unable to maintain continuous engagement with the same agency throughout the qualifying period because there was no work available or because they were sick but remain available to work, continuity is preserved. Statutory maternity pay is paid by the employer – even if the individual no longer works for that employer.

c) Maternity Allowance (MA) is a social security benefit payable by the state to women whose service with their employer does not qualify them for statutory maternity pay but who have paid sufficient national insurance contributions either as an employed earner or as self-employed. To qualify she must have been an employed or self-employed earner for at least 26 weeks in the 66 weeks preceding the expected week of childbirth. The 26 weeks do not need to be continuous or with the same employer. In addition, her earnings must be at least £30 per week.[66]

d) Annual Leave is a statutory right for all employees and workers under the Working Time Regulations 1998 (as amended).[67] The maximum allocation of paid leave is 28 days for someone who works at least five days a week. Where someone works six days a week (common practice in retail, for example) they are still only entitled to 28 days. Any paid public holidays may be counted against this allowance. Whilst many in the UK celebrated an

[64] 2010/11 is £97 (approx. 117€) rising to £102 in 2011/12 (approx. 123€) (financial year running from 6 April to 5 April)
[65] *Satchwell Sunvic Ltd v Secretary of State for Employment* [1979] IRLR 455 (EAT)
[66] Approx 36€. This figure was set in 2000 and has remained constant since that time.
[67] SI 1998/1833

additional public holiday announced to accompany the royal wedding in April, for many it will be work as normal or be required to take a day from their annual allocation of paid holiday.[68]

e) Statutory Sick Pay is a payment made by the employer if an employee is too sick to work. Individuals qualify for statutory sick pay if they have been sick for at least four calendar days and in the eight weeks before they were absent their average earnings were higher than the lower earnings limit.[69] Anyone who meets the earnings rule will qualify and this will include workers and agency workers. However, the nature of intermittent casual work means that they are unlikely to meet this requirement. Self-employed who do not pay class 1 national insurance will not qualify. Statutory sick pay is only paid from the fourth actual day of absence. Its current rate is £79.15[70] and it is only paid for a total of 28 weeks. If someone does not qualify for statutory sick pay or they use up all their benefit they will need to apply for Employment and Support Allowance.

2. Benefits Accessed During Unemployment

Social security benefits available to individuals who are not in work are determined in the first instance on whether the person is judged "capable" of working. If they are they will receive Job Seekers Allowance and be required to actively seek work. If they are not capable they can receive Employment and Support Allowance.

i) Job Seekers Allowance (JSA). There are two levels of benefit. Contribution based Job Seekers Allowance[71] is available to those aged 18 or over and who have paid sufficient class 1 national insurance contributions over the last two years before they became unemployed. This benefit is payable for a maximum of six months, regardless of how long an individual has paid national insurance contributions for in the past. Self-employed national insurance payments do not qualify. Income based Job Seekers Allowance[72] is available to those who have not made sufficient contributions in the past or have been unemployed for more than six months. An

[68] UK Press Association NHS row over royal wedding day work 14 February 2011: commenting on the fact that a number of National Health Service Trusts and Local Government Authorities (large public sectors employers) were not granting an additional day of paid leave
[69] Currently this is £97 per week (approx 116€)
[70] Approx 94€
[71] Currently £51.85 (approx 61€) per week for under 25's and £65.45 (approx 77€) for those aged 25-65.
[72] This is calculated based on individual income and perceived need so varies from person to person

individual will only receive income based Job Seekers Allowance if any income and savings they have (plus any income and savings from their partner/spouse) is not sufficient to cover what the government considers the individual's needs to be. This will depend if claimants have children, rent or pay a mortgage, if they have savings, how old they are etc… The amount of Job Seekers Allowance received is the difference between the money an individual has and the money the government thinks they need. If savings are above £16,000[73] they are ineligible for income related benefits.

To qualify for these benefits individuals must demonstrate that they are "looking for a job" by attending appointments with advisors, taking recommended training problems, being able to demonstrate that they have made applications to suitable vacancies. A failure to comply with these conditions will put the benefits at risk. There are proposals to replace the Job Seekers Allowance with an amended system of Universal Credit. This is unlikely to change the access levels that currently apply to Job Seekers Allowance but it is envisaged that the punitive impact of failing to obtain employment, undertake training or voluntary work will be much greater.

ii) Employment and Support Allowance is a benefit paid to individuals who are unable to look for work because of long term illness or disability. Like Job Seekers Allowance there are two elements – one based on past contributions and one based on income. A single person over age 25 receives £65.45[74] per week for the first 13 weeks. In this period they will be medically assessed to see if they are incapable of working. If they are, their benefits increase to up to £93,[75] depending on individual circumstances. If the individual does not qualify they must register for Job Seekers Allowance. If a self-employed person is unable to work through disability, illness or injury and has not paid the appropriate class 1 national insurance contributions in the previous two years they will not qualify for contribution based benefits.

3. Retirement Benefits

Currently, the State Pension age for men is 65. On 6 April 2010, the State Pension age for women started to increase gradually from 60 to 65. Between December 2018 and April 2020,

[73] Approx 18,900€
[74] Approx 78€
[75] Approx 111€

retirement ages for men and women are increasing to 66 and there are further plans to increase retirement to age 68 by 2048.

a) Basic State Pension is a flat rate pension paid to anyone who has made sufficient national insurance contributions. The full rate for a single person from 6 April 2011 is £102.15 per week.[76] The full rate is payable if someone has 30 qualifying years of contributions and this is reduced proportionately in line with lower levels of total contribution, for example, if someone only has 13 years of contribution they will receive 13/30th of the full basic pension.

b) Second State Pension provides a top-up to the Basic State Pension based on actual earnings. This only applies to employees who have made additional contributions and have not contracted-out of this element through contributions to an occupational or personal pension plan.

The state pension represents a substantial fall-off in income. The basic pension is lower than the income support threshold, so if someone has no other income, state pensioners can receive further financial support from the state but this is based on their total income, savings and value of other assets.

A summary of benefits and qualification requirements is provided in appendix 1.

[76] Approx 122€

Question 7: Are there recent developments in your country in view of the protection of persons working without a contract of employment?

Much of the impetus in extending employment rights in the UK has come from the EU. However the overall approach of UK governments has been to adopt a minimalist compliance approach to EU Directives. Whilst there was an initial political drive in the late 1990s to extend rights to workers this was short lived and examples covering worker rights and the implementation of the Temporary Agency Work Directive seek to illustrate these tensions. A separate pressure has been exerted on the self-employed through tax changes. In seeking to maximise revenue the tax status of many self-employed individuals has been changed on the basis that individuals in consultancy and service-company arrangements were disguised employees. The removal of the fiscal benefits of being self-employed was not accompanied by an extension of employment rights.

a) Workers

The Labour government (1997-2010) initially emphasised the need for labour market flexibility as a means to secure economic growth: `Britain needs a flexible and efficient labour market in which enterprise can flourish, companies can grow and wealth can be created'.[77] This push for flexibility in the labour market was matched by extending rights to those groups who did not meet the criteria of `contract of service' through the concept of "worker". This implied that employment protection rights should be based on the economic dependence of an individual on a particular work arrangement, rather than the degree of subordination or formal contractual obligations. Unfortunately the promise of extending employment protection for those without a contract of employment has been limited and government enthusiasm for this approach declined.

Both the National Minimum Wage[78] and the Working Time Regulations[79] applied to workers rather than employees. Workers, rather than employees, were given rights to be accompanied

[77] DTI White Paper Fairness at Work (Cm 3968) (HMSO 1998) para 2.10
[78] National Minimum Wage Act 1998 s1(2)(a)
[79] Working Time Regulations 1998 SI 1998/1833 reg 2(1)

at disciplinary and grievance hearings[80] and received statutory protection when making public interest disclosures (whistle-blowing).[81] Agency workers were explicitly included in these new rights and liability was fixed with the agency.

The government also introduced powers to extend a number of statutory protection rights to those who were not currently covered,[82] and in July 2002, launched a major consultation exercise on what rights should be extended. The report on these consultations was not published until 2006[83] and responses were predictably mixed. Employers welcomed flexibility, but felt that any further extension of rights would increase costs and administrative burdens; trade unions wanted an expansion of all employment rights to all people working, unless they were `genuinely` self-employed. All seemed to recognise that the majority of atypical work tends to be at the lower price end of the labour market and has higher proportional representation of women and black minority ethnic groups than full time, permanent positions. In March 2006, the government made its position clear. Based on the apparent lack of consensus and lack of evidence supporting change, the government favoured retaining the current arrangements, ruling out further legislation in this area.[84] The government saw the diversity in the range of employment relationships as a positive means of meeting `the labour market's current needs and there is no need for further regulation in this area'.[85]

Within the course of the administration the initial attention to expanding "rights" was replaced by a more `light touch' approach.[86] Whilst the definition used in the Fixed Term Work Directive[87] is identical to the definition in the Part Time Work Directive[88] – `individuals who work under a contract of employment or employment relationship as defined in law, collective agreement or practice in each member state', in 2000, the government used this definition to incorporate workers into the protective framework governing part time work.[89] By 2002, the impetus for

[80] Employment Relations Act 1999 s13
[81] Employment Rights Act 1996 s230(3)
[82] Employment Relations Act 1999 s.23
[83] DTI *Employer Status Review: Summary of Results* (HMSO 2006)
[84] DTI *Success at Work: Protecting Vulnerable Workers, Supporting Good Employers* (HMSO 2006)
[85] DTI *Success at Work: Protecting Vulnerable Workers, Supporting Good Employers* (HMSO 2006) 17
[86] P Davies and M Freedland *Towards a Flexible Labour Market* (OUP 2007) 57
[87] Council Directive 1999/70/EC of 28 June 1999 concerning the Framework Agreement on Fixed-term Work [1999] OJ L175 clause 2(1)
[88] Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on Part-time Work [1997] OJ L014 clause 2(1)
[89] Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 SI 2000/1551

change was lost and in the case of fixed term work statute retreated from the worker model, restricting the scope to employees excluding semi-dependent workers.[90]

There is little likelihood of this position changing under the new UK government. The Coalition Government, which came to power in 2010, has announced that it wishes to ensure that there is no 'gold plating' of any EU Directive as these are implemented in UK law. The major announcement of this government in terms of future labour law initiatives has been both to restrict the rights of employees to claim unfair dismissal and a further tightening of the laws governing a trade union's right to call for industrial action. Strengthening regulation in favour of workers is not proposed and any such developments in the EU likely to be resisted.

b) Agency Workers

The employment relationship for agency workers is governed currently by specific legislation in relation to operation of employment agencies[91] which specifies that employment agencies must provide a written statement informing individuals of their employment status but it does not specify what that status should be.[92] Agency workers meet the `worker' definition due to their specific statutory inclusion, but attempting to demonstrate they have contracts of employment with either the agency or end-user is problematic. Under the standard form of agency contract it is unlikely that there will be sufficient elements of control or mutuality of obligation to give rise to a contract of employment with the agency or end-user.[93] In the light of clear contractual documentation accurately describing the relationship with the agency, there will be no necessity to imply any contract of employment with the end-user.[94] For many agency workers the reality of the situation is that they are neither self-employed (certainly with respect to tax and social security provisions) nor employed.

The Temporary Agency Work Directive[95] is part of the wider EC strategy for promoting `flexicurity' in the European labour market and is premised on the idea that `agency work meets

[90] Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 SI 2002/2034
[91] The Conduct of Employment Agencies and Employment Businesses Regulations 2003 SI2003/3319 (CEAEB)
[92] CEAEB 2003 reg15
[93] *Montgomery v Johnson Underwood Ltd* [2001] IRLR 269 (CA)
[94] *James v London Borough of Greenwich* [2008] IRLR 302 (CA)
[95] Council Directive 2008/104/EC of 19 November 2008 on Temporary Agency Work [2008] OJ L327/9

not only the undertaking's needs for flexibility but also the need of employees to reconcile their working and private lives'.[96] The default position in the Directive is that the equal treatment principle should apply from day one of an agency worker's assignment. The Directive also allows Member States, in consultation with social partners, a considerable leeway in introducing derogations, exemptions and qualifying periods for the enjoyment of these rights.[97]
Such an agreement was reached by the Confederation of British Industry (CBI) and Trades Union Congress (TUC) (the UK equivalent of social partners) in May 2008. This provides the legal basis for the Agency Worker Regulations[98] which will come into effect on 1 October 2011. The Regulations provide a right to "equal treatment" once an agency worker has undertaken the same role, whether on one or more assignments, with the same hirer for 12 continuous weeks. After 12 weeks in the same assignment (without a break of six weeks) agency workers become entitled to the same pay, annual leave and working time protections such as rest breaks (but not overall hours of work) as the hirer`s employees are entitled to under their contracts of employment. Pay includes basic pay plus other contractual entitlements directly linked to the work undertaken by the agency worker on an assignment, for example, shift allowances, overtime pay and premiums for unsocial hours. Bonuses will only apply if they are directly attributable to the quality or quantity of work done by an agency worker. Specific payments (usually associated with employment status) are excluded, namely, occupational pension contributions, occupational sick pay, maternity, paternity or adoption leave payments, redundancy pay and membership of share schemes. The employment agency will be responsible for breach of the equal treatment principle unless it can show that it took "reasonable steps" to obtain relevant information from the hirer about its basic working and employment conditions.

Agency work is an important source of labour in the UK economy. UK use of agency employment is twice as big as the next EU user: 1,378K in UK compared with 638K in France.[99] According to the government, the 12 week qualifying period removes 55% of British agency workers from coverage of the Regulations.[100] It is hard to envisage how a provision which

[96] Council Directive 2008/104/EC of 19 November 2008 on Temporary Agency Work [2008] OJ L327/9 Recital 11
[97] Council Directive 2008/104/EC of 19 November 2008 on Temporary Agency Work [2008] OJ L327/9 articles 1(3), 5(2)-(4)
[98] SI 2010/93
[99] ILO *Private Employment Agencies, Temporary Agency Workers and their Contribution to the Labour Market* (ILO 2009) 14
[100] BERR *Agency Working in the UK: A Review of Evidence* (HMSO 2008)

excludes over half the affected workers the Directive is intended to protect, could be compatible with the adequate protection requirement of the Directive.[101]

c) Self Employed

Concern has been expressed over the true nature of work relationships delivered under service company arrangements. Individuals operate such arrangements by establishing a company structure under which they trade personal services. Such arrangements may in reality look a lot like a contract of service, rather than a contract for services. Individuals often work set hours, work at the client's site, use the client's equipment, are supervised by the client and substitution is not possible. The difference is that such individuals do not pay tax as an employee and are able to off-set business expenses against tax owed and pay lower levels of national insurance contributions. Such arrangements are common in engaging specialist consultants, for example, in the IT industry, specialist engineering design, training consultants. Such arrangements are vulnerable to being used as a tax avoidance mechanism, disguising employment and thus failing to submit appropriate tax revenue. This is not a position unique to the UK:

> `*In some countries… taxation systems, and perhaps labour market policies as well, might have encouraged the development of "false" self-employment – people whose conditions of employment are similar to those employees, who have no employees themselves, and who declare themselves (or are declared)as self-employed simply to reduce tax liabilities or employer responsibilities*.'[102]

IR35[103] was introduced to prevent tax avoidance. The IR35 legislation seeks to determine what the relationship would be if the service company were removed by creating a hypothetical contract between the contractor and the client. This hypothetical contract is then tested against standard rules of employment status test to establish whether a contract of service or a contract of for services operates. In effect, asking whether the company arrangement is disguising the employment relationship.

[101] N Countouris and R Horton `The Temporary Agency Work Directive: Another Broken Promise' (2009) 38 ILJ 329, 333
[102] OECD *Employment Outlook* 2000 156
[103] Finance Act 2000 Sch12, commonly referred to as IR35

It was envisaged that those reclassified would benefit from the employment protection,[104] but arrangements for tax and national insurance are indicators to consider as part of a total assessment of employment status, they are not conclusive evidence either way.[105] There is a lack of consistency in the application of tests under tax, social security and employment law. For the purpose of income tax and liability for social security contributions, the test for the existence of a contract of employment is more easily satisfied than in cases falling under employment protection.[106] The Employment Appeal Tribunal in *Hewlett Packard Ltd v O'Murphy,*[107] went further by inferring that the two sets of tests are fundamentally different. As with other groups of temporary working arrangements, IR35 has created a further category of quasi-employee[108] - employee for fiscal purposes but unclassified or self-employed under employment protection. It appears that any presumption of employment will only apply when tax revenues are under threat,[109] a political aim, rather than legal one.

[104] N Busby `IR35: Resolution of a Taxing Problem? (2002) 31 ILJ 172, 174
[105] *Davis v New England College of Arundel* [1977] ICR 6
[106] B Burchell, S Deakin and S Honey `The Employment Status of Individuals in Non-Standard Employment' *DTI Employment Relations Research Series No 6* (HMSO 1999)
[107] *Hewlett Packard Ltd* v *O'Murphy* [2001] EAT/612/01
[108] Busby (note 104) 176
[109] Countouris and Horton (note 101) 332

Question 8: Do (legal) authors criticise the present protection of workers without a contract of employment? What is their line of arguments and do they provide for any solutions?

There is no shortage of academic (and judicial) criticism of the current system of employment protection that operates in the UK. Access to such protection rests on the establishment of employee status determined using common law principles of contract. Increasing concern has been expressed over the suitability of this conceptual framework to the modern labour market, leading to the claim of a `crisis in fundamental concepts'.[110] Such crisis, if it exists, is founded on a belief that contract law is no longer able to adequately describe the range and complexity of employment relationships that exist in the modern labour market. In this section we explore three different approaches. The first approach is to cease to see employment rights as a matter for consideration under the private law of contract but one for public law consideration. The second approach is to re-think the boundaries of the employment contract to a wider context of employment relationship. Finally we consider those commentators who wish to see further developments in the existing conceptual framework.

a) A New System of Law

Like other contracts, the contract of employment is treated as a private agreement, freely entered into by the parties, characterised by mutual consent. For Collins,[111] the conceptual apparatus of the law of contract is ill-suited to the regulation of the employment relationship. The employment relationship is not an agreement between equal bargaining parties but is characterised by an imbalance of social power and subordination. Contracts of employment are framed by the contracting party who is in a superior position (the employer) and offered to the other party on a `take it or leave it basis' with extremely limited scope for negotiation.[112] What choice does the weaker party have… often the choice might be employment or unemployment. The law of contract in terms of the employment relationship fails to recognise the power the employer has and Collins argues that it should be interpreted and controlled by public rather

[110] M Freedland *The Personal Employment Contract* (OUP 2003) 26
[111] H Collins *Regulating Contracts* (OUP, 1999) 76
[112] H Collins *Employment Law* (OUP, 2003) 6

than private law.[113] Through adapting principles of public law a basic `floor of rights' governing the employment relationship could be developed using concepts of fundamental individual rights and "civil liberties" in the workplace.[114] Statutory employment protection rights would become free-standing rights over-riding ones attached to the employment relationship.

The purpose of the contract of employment is different to that in exercising public powers. Regardless of the inherent inequality within the employment contract bargain it is a matter of individual power rather than a matter concerning the exercise of state power. Recognition of that inequality of bargaining can be recognised within a contractual framework. This is certainly the case in consumer disputes and is a factor in adjudications concerning tenant and landlord rights. Within employment there is precedent which seeks to limit the power of the employer[115] and recognises the dynamic nature of the employment relationship.[116] These developments have occurred under the common law.

b) A New Concept of Employment Relationship

Rather than using a different body of law as a response there has been growing interest in replacing the contract with some statutory notion of "employment status". The Supiot Report[117] sought to propose a wider concept based on the continuity of labour force membership. The status of labour force membership reconciles the need for flexibility and the need for security. It encompasses both periods of paid employment, periods of training and times out of work (whether by personal choice or not). The prime aim is to protect workers during transitions between jobs. This framework of labour force membership is implicit in UK current legislation, for example, modern apprenticeships; a duty to look for work and/or undertake training as a requirement to access unemployment benefits; access to subsidies for employers to take people into the workplace. These initiatives are about providing social protection rather than extending employment protection to those in work. The Supiot Report extends the debate beyond the domain of contract law to consider rights and expectations of those engaged in any

[113] H Collins `Market Power, Bureaucratic Power, and the Contract of Employment' (1986) 15 ILJ 1, 15
[114] ibid
[115] *Hall v Woolston Hall Leisure* [2000] IRLR 578 (CA): illegalities in the contract should not be used to derogate from employment rights associated with equal treatment and anti-discrimination protection.
[116] *Johnson v Unisys Ltd* [2001] IRLR 279 (HL)
[117] A Supiot *Beyond Employment: Changes in Work and the Future of Labour Change in Europe (*OUP 2001) 218

aspect of work in society. Such a change would require significant political support and as such the proposed framework remains `rather abstract and speculative'.[118]

In the UK a similar line of argument has been developed by Mark Freedland, although the focus is on employment rights rather than wider social protection. He argues that employment status, and the rights which result, have been determined by a rigid interpretation of the contract of employment and what is required is a new conceptual category - the `personal work nexus', which recognises the diversity of work arrangements through a corresponding diversity of contractual arrangements.[119] The personal work contract is defined as `contracts for employment or work to be carried out normally in person and not in the conduct of an independent business or professional practice'.[120] The boundary is located at a point where personal service gives way to a contract of sale - a commercial, rather than employment, relationship. This concept is similar to that of `worker' but embraces the wider concept `of employment' contained in anti-discrimination law. This looser legal framework would recognise contractual arrangements where individuals have greater autonomy,[121] where there is less emphasis on control and more emphasis on dependency.

By considering the phases of the employment relationship identified by Freedland - pre-employment, full employment, sub-employment and post-employment – it might be possible to develop a wider understanding of the rights and responsibilities that apply during the wider employment relationship. Contractual obligations exist throughout the relationship. In pre-employment the parties' obligations are to keep the offer open and to be available for work at the agreed start date. In *Sarker*[122] the Employment Appeal Tribunal found a single contract existed from the date of offer and acceptance, not from the date the individual actually started working. A contract existed in advance of the actual exchange of work for remuneration. Post-employment, the parties remain subject to certain contractual obligations including a duty of care.[123] Full employment is marked by the exchange of work and remuneration. Sub-

[118] M Freedland `Application of Labour and Employment Law Beyond the Contract of Employment *Oxford University Comparative Law Forum* (2006) www.ouclf.iuscomp.org (Last accessed 02/05/08)
[119] M Freedland `From the Contract of Employment to the Personal Work Nexus' (2006) 35 ILJ 1, 20
[120] M Freedland *The Personal Employment Contract* (OUP 2003) 28
[121] Freedland (note 119) 20
[122] *Sarker v South Tees Acute Hospitals NHS Trust* [1997] ICR 673 (EAT)
[123] *Spring v Guardian Assurance Plc* [1994] ICR 596 (HL) the duty of care extended to the provision of references post employment

employment is where full employment has ended but there is `some degree of mutual obligation for the future resumption of work'.[124]

This period of sub-employment has potential as a means of maintaining contractual relations between periods of full employment. Such claims have to date been defeated by a failure to find a future promise of providing and accepting work. Freedland[125] suggests that the courts could recognise a limited duty to consider continuation or resumption of work in the future, but, such a minimal requirement may be nothing more than an `agreement to agree';[126] which is not legally binding. Freedland argues that a promise to consider providing future work and a promise to consider accepting it implies that the employer actively reviews workforce requirements to determine how many casual workers are required.[127] However, the use of casual workers is usually reactive rather than planned and, as Davies[128] argued, even if such reviews were undertaken they would arise from organisational planning rather than from any contractual obligation.

Freedland's work extends the view of employment as a dynamic, relational contract and extends employers' duties and responsibilities to periods before and after employment. However, by seeking to find some means of maintaining the relationship during sub-employment periods the argument is grounded on the rock of mutuality of obligation – the overarching future promise.

c) Working within the Common Law – re-establishing economic dependency

Rather than abandoning the contractual legal framework some commentators seek to embrace the evolutionary aspects of common law. Contract law can provide a suitable apparatus for the development of the law of the employment relationship. The existing economic reality test can provide an interpretative method to determine status based on the reality of the labour market. If dependency is used as the initial gate keeper then employee, worker, and in employment categories become irrelevant – to qualify as an employee the question is whether there is an employment rather than commercial relationship. The proposed common law development

[124] Freedland (note 120) 107
[125] ibid 478
[126] *Carmichael and others v National Power Plc* [2000] IRLR 43 (HL)
[127] Freedland (note 120) 478
[128] A Davies `The Contract for Intermittent Employment' (2007) 36 ILJ 102, 111

would seek to re-establish the dependency test as the primary test of employee status. This provides a more accurate view of the modern labour market providing rights to those who are vulnerable due to their economic dependency on one or more employers. Rather than operating at the extremes of the binary divide it recognises that only those who are truly operating on a commercial basis are excluded from employee status. Issues of mutuality can be addressed within the work/wage bargain.

Davidov's[129] argument is that dependency on any specific employment relationship justifies various regulatory protections. Dependency is determined by how far the individual can spread risk among different relationships, not the degree of independence in controlling time and decisions. This has been supported in the work of Deakin[130] who argues that re-asserting economic dependence as a dominant factor would provide greater protection to those with irregular or intermittent work – often those classed as vulnerable in the labour market. This approach still relies on contractual analysis, but an emphasis on economic dependence produces greater predictability since there is less reliance on establishing a balance between such a wide range of factors used in the multi-factor test. [131] In the spectrum of dependency only those who are genuinely self-employed would be excluded from employment protection. There need not be equality in bargaining power only the existence of a genuine bargaining power which justifies the individual standing outside the scope of employment protection.[132]

Whilst using the concepts of risk and ability to exploit skills that characterise the genuinely self-employed are useful, the requirement for mutuality of obligation remains a significant barrier to determining employee status. The Employment Appeal Tribunal in *Byrne Brother*[133] attempted to test worker status by using an analysis of risk, identifying whether there is economic dependence using the same test as employee/self-employed although pushing the boundary in favour of the worker. The approach was defeated by the requirements for mutuality of obligation. Therefore re-establishing economic dependency as the critical test alone is unlikely to resolve problems. Issues of mutuality also need to be addressed. Certainly there can be no contract without an exchange of promises; but if the nature of those promises is interpreted as

[129] G Davidov `Who is a Worker?' (2005) 34 ILJ 157, 66
[130] S Deakin and G Morris *Labour Law* (4th edn) (Hart 2005) 153
[131] ibid 161
[132] D Brodie `Employees, Workers and Self-Employed' (2005) 34, ILJ 253, 259
[133] *Byrne Brother (Formwork) Ltd v Baird* [2002] IRLR 96 (EAT)

an insistence on a promise to provide and perform future work, it goes too far.[134] Contracting parties are not usually required to undertake particular levels of obligation. Mutuality of obligation is therefore an employment law invention and could be replaced by normal rules on contract formation.[135]

If we accept mutuality of obligation within the work/wage bargain, re-establishing *McMeechan*,[136] then mutuality of obligation in sub-employment or worker positions becomes no more of a barrier to access employment protection than does the existing provisions for continuity of service. The on-going commitment to provide and accept work becomes necessary for those rights that Parliament has determined rest on the length of service. It might be argued that these levels are unfair but it is relatively straightforward to determine which rights are automatic and which rights require service. Issues of mutuality are relevant to establishing continuity of service and not status. This can be addressed through arguments for temporary cessations of service or through establishing some overarching contractual promises under an umbrella contract.

[134] Davies (note 128)105
[135] H Collins `Employment Rights of Casual Workers' (2000) 36, ILJ 72, 76
[136] *McMeechan v Minister of State for Employment* [1997] ICR 549 (CA)

Appendices

Summary Table of Benefits and Qualification Thresholds

		Qualified for benefit:					
Statutory Leave/ Payments	Main Criteria	Employee	Worker	Agency Worker	Casual Worker	Home Worker	Self-Employed
Adoption Leave	*contract of employment*	✓	**X**	**X**	**X**	**X**	**X**
Adoption Pay	*"employed earners"*	✓	✓	✓	**X**	**X**	**X**
Maternity Leave	*contract of employment*	✓	**X**	**X**	**X**	**X**	**X**
Maternity Pay	*"employed earners"*	✓	✓	✓	**X**	**X**	**X**
Maternity Allowance	*contribution based*	Subject to paying the correct level of national insurance contributions					
Paternity Leave	*contract of employment*	✓	**X**	**X**	**X**	**X**	**X**
Paternity Pay	*"employed earners"*	✓	✓	✓	**X**	**X**	**X**
Paid Leave	*employees and workers*	✓	✓	✓	✓	✓	**X**
Sick Pay	*"employed earners"*	Subject to earnings			Subject to earnings but unlikely to qualify		**X**
Job Seekers Allowance	*contribution based*	Subject to paying the correct level of national insurance contributions. Self-employed are unlikely to meet this threshold					
	income based	Subject to earnings					
Employment Support Allowance	*contribution based*	Subject to paying the correct level of national insurance contributions. Self-employed are unlikely to meet this threshold					
	income based	Subject to earnings					
State Pension	*contribution based*	Subject to paying the correct level of national insurance contributions. Self-employed and intermittent casual workers are unlikely to meet this threshold					
Second Pension	*contribution based*	Subject to paying additional payments. All public sector employees and employees for most large company will not qualify due to occupational pension schemes that apply. Self employed individuals are more likely to have personal pension arrangements.					

Statutes

a) Primary Legislation

Income Tax (Employments) Act 1943

National Insurance Act 1946

Health and Safety at Work Act 1974

Social Security Contributions and Benefits Act 1992

Trade Union and Labour (Consolidation) Act 1992

Employment Rights Act 1996

National Minimum Wage Act 1998

Employment Relations Act 1999

Finance Act 2000

Income Tax (Earnings and Pensions) Act 2003

Equality Act 2010

b) Secondary Legislation

SI 1978/1689 Social Security (Categorisation of Earnings) Regulations 1978

S1 1998/1833 Working Time Regulations 1998

SI 1999/3312 Maternity and Paternal Leave Regulations 1999

S1 2000/1551 Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000

SI 2002/2034 Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002

S1 2003/3319 Conduct of Employment Agencies and Employment Businesses Regulations 2003

c) European Legislation

Council Directive 1999/70/EC of 28 June 1999 concerning the Framework Agreement on Fixed-term Work [1999] OJ L175 clause 2(1)
Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on Part-time Work [1997] OJ L014
Council Directive 2008/104/EC of 19 November 2008 on Temporary Agency Work [2008] OJ L327/9

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Cassidy v Ministry of Health [1951] 2 KB 343 (CA)

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James v London Borough of Greenwich [2008] IRLR 302 (CA)

Johnson v Unisys Ltd [2001] IRLR 279 (HL)

Lee Ting Sang v Chung Chi-Keung [1990] ICR 409 (PC)

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McMeechan v Minister of State for Employment [1997] ICR 549 (CA)

Montgomery v Johnson Underwood [2001] IRLR 269 (CA)

Muscat v Cable & Wireless Plc [2006] IRLR 354 (CA)

Muschett v HMPS [2010] EWCA Civ 25 (CA)

National Grid Electricity Transmission v Wood UKEAT/0432/07/DM

Nethermere (St Noets) Ltd v Taverna and Gardiner [1984] IRLR 240 (CA)

O'Kelly v Trusthouse Forte plc [1983] IRLR 369 (CA)

Performing Right Society Ltd v Mitchell and Booker (Palais de Danse) Ltd [1924] 1 KB 762

Protectacoat Firthglow Ltd v Szilagyi [2009] EWCA Civ 98 (CA)

Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497 (QBD)

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Satchwell Sunvic Ltd v Secretary of State for Employment [1979] IRLE 455 (EAT)

Snook v London and West Riding Investments Ltd [1967] 2 QB 786 (CA)

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