简明法学案例丛书(影印版)

briefcase on EMPLOYMENT LAW

劳动法简明案例

(第二版)

(Second Edition)

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本书导读

劳动法是诞生较晚但发展较快的法律部门。早期的劳动关系多为一般民事关系的一部分，随着近代机器大工业的兴起和扩张，劳工问题日益突出，劳资关系日渐紧张，劳动者相对于资本的弱势地位也暴露无遗。为了平衡劳资双方的紧张关系，公共力量（国家）和社会力量（工会）不断介入并在平衡劳资双方力量上起到了重要作用。

本书选取了英国劳动法领域具有代表性的案例，并依据劳动法的内容将其归入不同门类，增强了逻辑性与可读性。其内容涉及雇员身份、雇用合同、职工健康与安全、合同终止、解雇、裁员、工作的连续性和企业转让、同工同酬、雇用歧视、劳工组织和劳工行为（如罢工）等方面。该书聚焦雇员利益的保护，职工的健康与安全、法定最低工资、工时限制、对女职工特殊保护等内容无不以此为主线连接而成。同时这也是该书的重点之所在。

英国劳动法建立在判例的基础上，内容广博，法源庞杂，常令初学者有见木不见林之感。本书突出的特点是准确、简明、全面和及时。所谓“准确”，是指该书尽量阐述实务界的观点，反映具体问题上的主流观点。所谓“简明”，是指为了追求对劳动法的整体把握，作者舍弃了次要的或重复性的案例。所谓“全面”，是指它不仅提供了某个问题的一贯立场，而且也描述其当代的发展；不仅展示英国法的判例的态度，也提供成文法、衡平法的观点；不仅勾勒英国法的基本框架，也为我们开启了欧盟劳动立法之门。所谓“及时”，是指它紧跟英国成文法与欧盟立法的变化，并依据法院最新判例更新了第一版中的某些内容。如第一版中的所指的“工作中的公正”（fairness at work）白皮书，在本书中已用“雇用关系法”（1999 年）代之。此外，作者还在不同的地方设置了相应的问题，以激发读者的思考与讨论。

该书是对配套教科书的一个有益的补充，不但适合英国及欧盟劳动法的初学者快速入门之用，还可以帮助对英国及欧盟劳动法深有研究的学者掌握劳动法的概况与动态，对广大法律工作者也具有重要的参考价值。

该书目录、法规一览表、索引、术语等相关内容的中文翻译由武汉大学博士生廖焕国完成，不当之处敬请读者及专家批评指正。

译　者

2004 年 4 月

Preface

The success of the Briefcase Series has shown that there is a need for books which give greater detail about cases than are found in textbooks, yet, at the same time, are more succinct than casebooks. We hope that we have achieved this aim with this particular addition to the Briefcase Series.

Employment law is very largely a creation of both statute and, increasingly, EC legislation; accordingly, it has been necessary to give greater extracts from legislative provisions than are found in some other books in this series. A collection of cases on employment law with nothing more would give a very misleading picture. We have also included some questions at various points, which are designed to stimulate thought and discussion.

Every preface to a book on employment law points out how quickly the subject is changing and we must do so here, both to protect ourselves against any charge of being dated and also to stimulate students into keeping up to date with new developments. For example, the preface to the first edition referred to the imminent publication of the White Paper, *Fairness at Work*, which has now resulted in the Employment Relations Act 1999. In addition, since the publication of the first edition in 1998, employment case law has developed considerably in virtually all of the areas covered by this book.

The great joy when writing a preface is the opportunity it gives to thank those without whose help a book would never have been written. John Duddington would like to thank his two children, Mary and Christopher, who have provided constant stimulation and necessary distraction and, above all, his wife, Anne, for her help and encouragement in this as well as in so many other projects over many years. Charles Barrow would like to thank Alan Robertshaw for his assistance in compiling Chapter 5.

It is finally necessary to add that, as is the case with all books written by co-authors, although we have each been responsible for separate chapters, we accept liability for the whole.

Charles Barrow
John Duddington
1 March 2000

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1 Employee Status

1.1 Statutory definitions

1.1.1 Employment Rights Act 1996

Section 230(1)

In this Act, 'employee' means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

Section 230(2)

In this Act, 'contract of employment' means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

Section 230(3)

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

(a) a contract of employment; or

(b) any other contract, whether express, or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.

Note

The width of the definition of a worker in s 230(3) is greater than that in s 230(1) of an employee. The essence of the definition in s 230(3) is the undertaking to personally perform work or services for another party.

The definition in s 230(1) is applied in the following Parts of the Employment Rights Act 1996 (ERA):

Part I	right to statements of employment particulars and itemised pay statements;
Part III	guarantee payments;
Part IV	protected shop workers and betting workers;
Part V	protection from suffering detriment in employment;
Part VI	rights to time off work;
Part VII	suspension from work;
Part VIII	maternity rights;
Part IX	termination of employment;
Part X	unfair dismissal;
Part XI	redundancy.

Section 230(3) is applied to Pt II of the ERA 1996 (deductions from pay) and it derives from s 8 of the Wages Act 1986. There is a similar definition of a worker in s 296(1) of the Trade Union and Labour Relations (Consolidation) Act 1992.

Section 1(6) of the Equal Pay Act 1970, s 82 of the Sex Discrimination Act 1975, s 78 of the Race Relations Act 1976 and s 68 of the Disability Discrimination Act 1995 all adopt a definition which incorporates the definitions in both s 230(1) and (3) of the ERA 1996.

They refer to employment 'under a contract of service or of apprenticeship or a contract personally to execute any work or labour'.

Section 53 of the Health and Safety at Work Act 1974 in effect uses the narrower definition of employee in s 230(2): 'Contract of employment means a contract of employment or apprenticeship.'

Section 163 of the Social Security Contributions and Benefits Act 1992 deals with the right to receive statutory sick pay, but here the term 'employee' includes officeholders as well. This is because the definition is based on liability to pay income tax under Sched E.

Loughran and Kelly v Northern Ireland Housing Executive (1998) HL

The House of Lords considered the phrase 'employed under a contract ... personally to execute any work or labour' and held that it not only applied to a solicitor who was a sole practitioner, but also to a partner in the firm. This case concerned a claim brought under the Fair Employment (Northern Ireland) Act 1976, where it was claimed that there had been

religious discrimination against a firm of solicitors, but the decision was obviously of wider application.

1.1.2 Recent statutory developments

Statutes have been increasingly using the term 'worker' rather than 'employee', and have also extended protection to groups of workers not previously covered by employment protection legislation.

Section 54 of the National Minimum Wage Act 1998 defines an 'employee' as someone who works under a contract of employment and gives the term 'worker' the same meaning as in s 230(3)(b) of the ERA 1996 (see above). However, the Act also applies to agency workers and homeworkers. Section 34 provides that the Act applies as if there is a worker's contract between the agency worker and whichever of the client or the agency is responsible for paying the worker; if neither of them is responsible, then whichever of them actually does pay the worker. Section 35 provides that a 'homeworker' is a person who contracts to do work for the purposes of another person's business, but the work is to be done in a place not under the control or management of that other person. A homeworker is treated by the Act as a worker. Moreover, s 41 contains power to extend the scope of the Act even further.

The Public Interest Disclosure Act 1998 expressly states that the term 'worker' includes persons who are not covered by this term as defined by s 230(3) of the ERA 1996; it then goes on to specify four groups that are within the definition of the term 'worker' for the purposes of this Act: agency workers; homeworkers; NHS doctors, dentists, ophthalmologists and pharmacists; and trainees on vocational or work experience schemes. The definitions are slightly different than in the National Minimum Wage Act 1998; for instance, an agency worker is defined as someone who works for a person to whom they were introduced by a third person, and their terms of work were determined by the person for whom they work, or the third person, or by both of these persons. On the other hand, the Working Time Regulations 1998 use the same provisions in relation to agency workers as s 34 of the National Minimum Wage Act (see above).

The most significant development is contained in s 23 of the Employment Rights Act 1999, which gives the Secretary of State power to extend the scope of employment legislation to groups not already covered by it. Accordingly, orders can be made, providing that individuals can be treated as parties to workers' contracts or contracts of employment and can make provision as to who are to be regarded as the employers of individuals.

1.1.3 Definitions in European Community law

The Acquired Rights Directive refers to rights and obligations arising from a contract of employment or from an employment relationship. However, the Framework Directive of 1989 on Health and Safety refers to 'workers', who are defined as persons 'employed by the employer'.

Q There is an obvious need for a single, clear definition of which persons are entitled to the protection of employment legislation. How should such a definition be framed?

1.2 Tests applied by the courts to determine whether a person is an employee or an independent contractor

1.2.1 Control test

Yewens v Noakes (1880)

> ... a servant is a person subject to the command of his master as to the manner in which he shall do his work [*per* Bramwell LJ].

Walker v Crystal Palace Football Club (1910) CA

The question to decide was whether a professional football player was employed for the purpose of a claim under the Workmen's Compensation Act 1906. It was argued that he was not an employee, because he was not under the control of the employers as to precisely how he should play; it was for the footballer to decide how he would exercise his skill.

Held, by the Court of Appeal, that, as he was bound to observe the general directions of the club and also directions given by the captain during the game, he was an employee, even though he was also exercising his own judgment.

1.2.2 Organisation test

Stevenson Jordan and Harrison Ltd v McDonald and Evans (1952)

> Under the contract of service, a man is employed as part of the business, whereas under a contract for services, his work, although done for the business, is not integrated into it, but only accessory to it [*per* Denning LJ].

Note

Although the organisation test, as with the control test, is no longer applied on its own today in order to determine employee status, it can still be useful, especially in relation to skilled employees. See, for example, *Cassidy v Minister of Health* (1951), where a resident hospital

surgeon was held to be an employee. However, one problem with the organisation test is that it fails to deal with the now common situation where businesses subcontract parts of their operations.

Q Would the surgeon in *Cassidy v Minister of Health* have been an employee under the control test as used in *Walker v Crystal Palace Football Club*?

1.2.3 The 'economic reality' test

Market Investigations v Minister of Social Security (1969) HC

A company, whose business was in market research, employed interviewers in addition to its permanent staff. The interviewers worked as and when required by the company.

Held, by the High Court (QBD), that the interviewers were employees. Cooke J said that the test to be applied was: 'Is the person who has engaged himself to perform those 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 (not employment). If the answer to that question is 'no', then the contract is a contract of service (that is, employment). Cooke J then went on to mention some indicators to help in deciding this issue:

> Factors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task.

Hall (Inspector of Taxes) v Lorimer (1994) CA

A freelancer vision mixer worked for a number of television production companies.

Held, by the Court of Appeal, that he was self-employed. Mummery J disapproved of the idea that one could determine employment status simply by running through a checklist of the kind set out by Cooke J, above. Instead, he emphasised that the object of the exercise was to paint a picture from an accumulation of detail. It was a matter of evaluation of the overall effect of the detail, which was not necessarily the same as the sum of the individual situation.

Note

See, also, *Warner Holidays Ltd v Secretary of State for Social Services* (1983) and *Withers v Flackwell Heath Football Supporters Club* (1981).

1.2.4 The multiple test

Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance (1968) HC

The plaintiff company employed a driver, Latimer, under a contract where he bought the lorry from the plaintiff on hire purchase. He had to wear the plaintiff company's uniform and the lorry had to be painted in the company's colours and with its insignia. He had to drive the lorry only on the business of the company and he agreed to obey all reasonable orders 'as if he was an employee'. However, he was not required to drive the lorry personally; instead, he was allowed to use a substitute driver.

Held, by the High Court (QBD), that he was self-employed, one of the deciding factors being that he was not contracting to necessarily drive the lorry personally.

MacKenna J said:

> ... a contract of employment 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 ...

In this case, MacKenna J said that the 'obligations are more consistent, I think, with a contract of carriage than one of service'.

Note

This case is not authority for the proposition that the presence or absence of the obligation to render personal service decides whether a person is an employee or not. The significance of the case is the emphasis placed by MacKenna J on the three factors outlined in his judgment. In fact, the multiple test is very similar to the economic reality test in seeking to avoid one all-embracing phase, such as a 'control' or 'integration'. *Hall (Inspector of Taxes) v Lorimer* (see 1.2.3, above) is really an example of the multiple test.

Note

The Court of Appeal's decision in *Express & Echo Publications Ltd v Tanton* (1999) that a right to provide a substitute is inherently inconsistent with the existence of a contract of employment.