Nutshells

Employment Law

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EMPLOYMENT LAW IN A NUTSHELL

by

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ABBREVIATIONS

ACAS	Advisory, Conciliation and Arbitration Service
CRE	Commission for Racial Equality
DDA	Disability Discrimination Act 1995
EAT	Employment Appeals Tribunal
ECJ	European Court of Justice
EOC	Equal Opportunities Commission
ERA	Employment Rights Act 1996
ERelA	Employment Relations Act 1999
EqPA	Equal Pay Act 1970
ETO	Economic, Technical or Organisational (reason)
GOQ	Genuine Occupational Qualification
HRA	Human Rights Act 1998
HSE	Health and Safety Executive
HSWA	Health and Safety at Work Act 1974
NMWA	National Minimum Wage Act 1998
PIDA	Public Interest Disclosure Act 1998
RRA	Race Relations Act 1976
SDA	Sex Discrimination Act 1975
S.I.	Statutory Instrument
SOSR	Some Other Substantial Reason
TULR (C)A	Trade Union and Labour Relations (Consolidation) Act 1992
TUPE	Transfer Of Undertakings (Protection of Employment) Regulations 1981

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INTRODUCTION

This book is designed as a revision guide, not as a textbook. It covers only individual employment law, that is the relationship between the employer and the individual employee; it does not deal with collective labour law or trade union law.

You should be aware that employment law is dynamic, it does not stand still, and it is constantly being updated and revised. You must ensure that you keep up to date with developments, new statutes, domestic case law and opinions of the European Court of Justice (ECJ), most of which will appear in the specialist journals and newsletters. It is also a good idea to get into the habit of regularly reading a non-sensationalist national daily newspaper; cases are often reported in the body of a newspaper long before they reach the law reports.

It is important that you should view employment law not as a "black letter law" subject, but in its social context. Until 40 or 50 years ago there was relatively little legislation controlling the employment relationship: the government had traditionally adopted a *laissez faire* approach, regarding employment as a matter for the employer and employee to arrange within a very broad or loose legislative framework. The increase in power of the trade unions, a growing social awareness and an increase both in industrial disputes and media coverage of them throughout the 1960s and 1970s, focused the attention of both the public and the government on reform. The reform was aimed at the relationship of the parties in an employment context: no longer just the employer and employee, but now the government, the trade unions, the employer and the employee. Britain's joining of the European Union helped focus attention on the "rights of workers", and the government, particularly Mrs Thatcher's government of the 1980s, used the opportunity to severely reduce the power of the unions, whilst creating or codifying an individual floor of rights, thus moving the emphasis from the collective to the individual. Although the present Labour government has introduced legislation regarding union recognition, it seems unlikely that there will be any appreciable move away from the

emphasis on the individual worker, and any return to the unions of their power and influence of the 1970s looks very doubtful.

Although much employment law is now consolidated into statute, the interpretation of that statute and some other areas of the law rely heavily on case law. During the course of your studies you will be referred to—and hopefully read—hundreds of cases from tribunal decisions to ECJ opinions. It is hardly realistic to expect either that you remember all of these cases, or that all of them can be included in a book such as this.

As you know, to a lawyer the importance of case law is not in the facts of the case as such, but in the legal principle and the use of the case as authority to support (or perhaps argue against) that particular principle. The facts of cases can, however, be important to you as a student—both in order to help you to remember and identify the case, and also as an example or explanation of the principle it follows or proves. You should be familiar with most of the case law used in this book—if you are not you could either substitute a similar case with which you are familiar, or read the facts of the case, either in its original in the law report, or in precis form from one of the case books presently on the market.

In employment law examinations it is often the case that your final answer is of less importance than the way by which you arrived at it: in other words your legal argument supported by statute and case law will almost certainly gain you more marks than your conclusion.

Finally, remember that knowledge and understanding are two very different things; knowledge without the ability to apply it to any given situation will avail you of very little, whilst understanding is not possible without first gaining the knowledge. To be successful you will need both—good luck!

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1. SOURCES OF EMPLOYMENT LAW

All of your authorities to support any proposition in employment law will be either statute or case law, and often a combination of both. It is therefore important that you should understand the sources of these authorities and the relationship between them.

It may be said that there are three main sources of employment law in this country:

STATUTE

The law directly enacted by the U.K. Parliament. It may take two forms: an Act of Parliament, *e.g.* Employment Rights Act 1996, Employment Relations Act 1999; or a statutory instrument, brought into effect by an individual minister under the authority of an enabling Act, *e.g.* Working Time Regulations (Statutory Instrument 1998/1833), The Transfer of Undertakings (Protection of Employment) Regulations 1981 (Statutory Instrument 1981/1794).

Both of these forms of legislation are, of course, directly enforceable in the U.K. courts, and may be equally relied upon.

CASE LAW

Although over the past 30 years employment law has become dominated by statute, case law is still very important. Not only does case law both interpret the statute and "fill in the gaps" between statutes, but certain areas of employment law are still heavily dependent upon the common law, *e.g.* claims for wrongful dismissal.

A hypothetical example of case law interpreting legislation would be:

> The Race Relations Act 1976 refers to "ethnic origin", the case of *Mandla v. Dowell Lee* [1983] I.C.R. 385, HL, laid down a test to interpret this term and determine the conditions to be met by a group wishing to bring itself within the protection of the Race Relations Act.

Consequently, if you were asked in an examination to consider whether discrimination in an employment context against (say) an inhabitant of the Isle of Wight was unlawful, you would need to consider first the statute itself and then the subsequent case law in arriving at your answer.

EUROPEAN LAW

It is outside the scope of this book to consider the detail of the legislative process of the E.U., but there are several issues you will need to remember:

1. E.U. law is supreme over national law. In any conflict between the two, European law will take precedence.
2. Many Treaty Articles have been shown to be directly effective, both vertically (may be relied upon in a national court by an individual against the state) and horizontally (may be relied upon in a national court by an individual against another individual). Of particular importance in employment law is Art. 141, which states that men and women should receive equal pay for equal work. Article 141 was held to be directly effective by the ECJ in the case of *Defrenne v. Sabena* (Case 43/75).
3. A directive is an instruction to a Member State to adapt its law to conform with E.U. requirements. A directive may have direct effect if it is sufficiently clear and precise, but may only be relied upon by an individual in a national court against the state or an emanation of the state; in other words a directive may have vertical direct effect only.
4. The European Court of Justice (ECJ) plays a very important part in the U.K. judicial system, in particular in the field of employment law. Questions on points of E.U. law may be referred to the ECJ under Article 234 by any national court. The decision or opinion of the ECJ will in practice be binding on the national court, both in the instant case and also as precedent for future cases (although you should remember that the ECJ itself is not bound by its own previous decisions). Consequently, decisions of the ECJ referring to cases within other Member States of the E.U. will also form precedents for U.K. national courts.

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2. THE TRIBUNAL AND COURT SYSTEM

Employment tribunals (previously known as industrial tribunals) have jurisdiction to hear almost all individual disputes based on statutory employment law claims and, in addition, common law contract claims arising from or outstanding at the termination of employment up to a maximum of £25,000.

An employment tribunal is normally comprised of three mem-

bers: a chairperson, being a barrister or solicitor of at least seven years' standing, and two lay members, drawn from either side of industry—one having had experience as perhaps a trade union official, the other having had management or trade association experience. Although it is uncommon, it is possible for the lay members to outvote the legally qualified chair.

The tribunal system was set up with the aims that it should be quicker, cheaper, more efficient and more accessible than the normal court system. In much of this it has been successful, although delays are not now uncommon partly due to the increased number of claims being made, and also partly due to the increased use of legal representation, particularly by employers, which tends to slow the system down.

There are a number of advantages and disadvantages to the tribunal system, and these include:

- Informality, lack of ceremony, regalia etc. Hearings are normally conducted in a room, which although perhaps purpose built, is very similar to any meeting or small function room.
- Representation may be by the party themselves, a lawyer, a trade union representative, a friend etc.—although it should be noted that most companies tend to be legally represented.
- Legal Aid is not available for first instance tribunal hearings, but may be available for appeal hearings before the Employment Appeals Tribunal (EAT).
- Costs are rarely awarded, thus there is no financial threat to an applicant wishing to bring a claim.
- The members of the tribunal are specialist and experienced in employment disputes. Unlike magistrates or judges, members of an employment tribunal hear only cases within one area of law.
- Certain rules of evidence, *e.g.* hearsay, do not apply.

The procedure for bringing a complaint before an employment tribunal is fairly straightforward. The applicant completes a form and sends it to the tribunal office. A copy of the form is then sent to the employer who has 14 days in which to respond. Both the original form and the employer's response are then copied and sent to the Advisory Conciliation and Arbitration Service (ACAS), who may then attempt to obtain a settlement between the parties. If the claim is not settled at this stage, the tribunal

will then make a preliminary examination of the case and may hold a pre-hearing review, often consisting of a tribunal chairperson sitting alone; this is in order to "weed out" particularly weak cases. Once a case goes to a full tribunal hearing the procedure adopted is similar in many ways to a court hearing: normally open to the public, it is basically an adversarial procedure, with each party putting its case; witnesses may be called and examined, other evidence introduced. However, unlike judges in most court hearings, the members of the tribunal take a much more active role in proceedings, questioning the parties and, if appropriate, leading applicants through the hearing procedure.

If the applicant's claim is successful the tribunal may award any of three remedies: reinstatement, re-engagement or compensation. Perhaps not surprisingly, the most often awarded remedy is compensation—although when the tribunal system was first introduced it was thought that reinstatement or re-engagement would be the most commonly sought remedies.

An appeal against a decision of an employment tribunal on a point of law only may be made to the Employment Appeal Tribunal (EAT). The EAT has a similar standing and many of the same powers as the High Court, and an appeal from the EAT goes to the Court of Appeal, and on occasion from there to the House of Lords.

The employment tribunal is bound by the decisions of the EAT and other superior courts; the EAT, whilst its own previous decisions are only persuasive, is bound by decisions of the Court of Appeal and the House of Lords.

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3. WHO IS AN EMPLOYEE?

Employment law governs the relationship between the employer and the employee.

Employers and employees have various rights, duties and liabilities to and for each other in law. An employer may have vicarious liability for the actions of his employees in the course of their employment; an employer has a duty to deduct income tax and National Insurance contributions from an employee's wages; an employer owes a particular standard of care to his employees in

regard to health and safety; and an employer is bound by the terms and conditions of the contract of employment.

Likewise, an employee is also bound by the contract of employment; an employee has the right not to be unfairly dismissed by his employer; and in many circumstances an employee has the right to redundancy payments, statutory notice periods, statutory holidays and statutory time off, etc. It is therefore essential to be able to identify "an employee", and differentiate between employees and self-employed workers, sometimes called "independent contractors", who are generally not covered by the same laws and rules.

STATUTORY DEFINITION

Often it is not difficult to identify an employee. Section 230 (1) Employment Rights Act 1996 states, "In this Act 'employee' means an individual who has entered into or works under . . . a contract of employment." The Act goes on to state in 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."

Problems do sometimes arise though in differentiating between employees and self-employed workers: whereas employees work under a contract of employment or a contract of service, a self-employed worker, or independent contractor, works under a contract for services. It is not always easy to distinguish between the two, as for instance in the following brief examples:

1. a sales representative who works exclusively for a company from their offices, but supplies his own car and is paid gross, without deduction of tax or N.I.
2. an accounts clerk who has worked from home on a part-time basis for a company over a number of years
3. a part-time lecturer who regularly works for two or more universities during each academic year.

Over the years the courts have developed and applied various tests in an effort to formally determine who is an employee.

The Control Test

Formulated in the case of *Yewens v. Noakes* (1880) 6 Q.B. 530 by Bramwell L.J., where he stated, "A servant is a person subject to

the command of his master as to the manner in which he shall do his work." However, as working practices have changed over the years, and as industry has become more technical and required more specialist expertise, it has become obvious that the control test alone will not suffice. As Cooke J. stated in the case of *Market Investigations v. Minister of Social Security* [1969] 2 Q.B. 173, ". . . . control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor."

The Integration Test

Proposed and adopted by Denning L.J. from *Cassidy v. Ministry of Health* [1951] 2 K.B. 353 and applied in *Stevenson Jordan & Harrison v. MacDonald and Evans* [1952] T.L.R. 101 asked whether the worker's work is an integral part of the business. If so, the worker is an employee; if the worker's work is merely accessory to the business, then the worker is an independent contractor. The problem with the test is that it appears to call for a value judgment by the court without explaining the steps necessary in arriving at that judgment. Perhaps not surprisingly the test found little favour generally.

Multiple or Economic Reality Test

Proposed in the case of *Ready Mixed Concrete (South East) Ltd v. Minister of Pensions & National Insurance* [1968] 2 Q.B. 497 by McKenna J., this test asked three questions: first, did the servant agree to provide his work in consideration of a wage or other remuneration; second, did he agree, either expressly or impliedly, to be subject to the other's control to a sufficient degree to make the other master; and third, are the other provisions of the contract consistent with it being a contract of service? McKenna J. also pointed out that "a man does not cease to run a business on his own account because he agrees to run it efficiently or to accept another's superintendence."

The Business Test

In many ways, this test is an extension of the Multiple or Economic Reality Test. It was formulated in the case of *Market Investigations v. Minister of Social Security* [1969] 2 Q.B. 173 by Cooke J. and considers such factors as control, whether the

worker provides his own equipment, whether he hires his own helpers, what degree of financial risk he runs, whether the worker has responsibility for investment and management of the work and what, if any, opportunity the worker has to profit from the sound management of the task. In the later case of *Lee v. Chung and Shun Shing Construction & Engineering Co Ltd* [1990] I.R.L.R. 236, the Privy Council stated that whilst there was no single test for determining employment status, the standard to be applied was best stated by the test from *Market Investigations*.

The Mutuality of Obligation Test

This test has been used on a number of occasions, particularly to try to determine the status of part-time, casual or "agency" workers.

It was used in the case of *O'Kelly v. Trusthouse Forte plc* [1983] 3 All E.R. 456 to prove that part-time casual catering workers were not employees, since the court found that the company was under no obligation to provide work, and the worker was under no obligation to accept work if it were offered.

However, be aware of the recent case of *Carmichael v. National Power plc* [1998] I.R.L.R. 30, a Court of Appeal decision, which seeks to mollify this requirement by introducing the concept of reasonableness into the test. In this case, the words "casual as required basis" were interpreted by the court to mean that the obligation was for the worker to accept a *reasonable* amount of work offered, and the obligation on the company was to provide the worker with a *reasonable* amount of the work available. However, as the House of Lords has now (November 18, 1999) allowed an appeal against the Court of Appeal decision, it is doubtful if this reasoning may be relied upon.

In the earlier case of *Nethermere (St Neots) Ltd v. Taverna and Gardiner* [1984] I.R.L.R. 240, a case concerning the employment status of outworkers or home workers, a similar test was applied to show that although mutuality of obligation as such did not exist, the existence of "well founded expectations of continuing home work" could, over the period of a year or more, give rise to the existence of a contract of employment. Thus the home workers were employees.

A recent approach

In recent years the courts have appeared to adopt a somewhat different approach. In the case of *Hall (HM Inspector of Taxes) v.*

Lorimer [1994] I.R.L.R. 171, a case concerning income tax assessment on either schedule D or schedule E basis, the court warned against the application of "mechanical tests", and took the view that each case should be decided on its own facts. In that case, the number of different companies the respondent had worked for and the short duration of each engagement were important factors—although they were not factors specifically considered in previous tests—in enabling the court to find that Mr Lorimer was self-employed.

In *Lane v. Shire Roofing Co (Oxford) Ltd* [1995] I.R.L.R. 493, the facts of which showed similarities with several earlier cases, the Court of Appeal, whilst referring with approval to the line of authority and various tests defining employment status, were at pains to point out that the facts must be viewed and any tests applied with reference to modern working practices. In this case involving personal injury, Mr Lane was found to be an employee.

It would therefore seem that the courts are becoming more willing to hold that workers may be employees, even in those areas where traditionally it has been accepted that they were engaged on a self-employed basis.

OTHER ISSUES

On the topic of employee status, a number of other issues need to be considered.

Self description

Even if the parties themselves agree on the employment status of the worker, this may by no means be conclusive to the courts. In the case of *Ferguson v. John Dawson & Ptns (Contractors) Ltd* [1976] 3 All E.R. 817, even when the worker gave a false name presumably in order to avoid payment of tax, and both parties had agreed that he was employed on a self-employed basis, the court by a majority decision still held that the company was his employer and that he was working under a contract of employment. As Browne L.J. stated, "The parties cannot by a label decide the true nature of their relationship."

Ferguson is often discussed in conjunction with the later case of *Massey v. Crown Life Insurance Co* [1978] I.C.R. 590, in which a manager took professional advice and decided to change his employment status, with agreement from his employer, from

employee to self-employed for tax reasons. Some two years later Mr Massey was dismissed and wished to claim for unfair dismissal—an option which was only open to him if he was held to be an employee. Based on the decision in *Ferguson*, it perhaps appeared that he had a strong case to succeed. However, the court held that he was self-employed, Lord Denning M.R. famously stating, "Having made his bed as being self-employed, he must lie on it."

The two decisions appear to conflict, although the cases on their facts appear somewhat similar. They may however, perhaps be reconciled: *Ferguson* concerned a labourer who, in order to obtain work, joined a company on the basis on which they hired—the "lump"—he himself having little say in the matter; *Massey* concerned a senior employee who took professional advice and chose to change his status for his own financial advantage. The major difference between the cases, however, is the reason that they came before the courts; *Ferguson* concerning liability for personal injury, and *Massey* for a claim for unfair dismissal compensation. The courts often appear more willing to find employee status in favour of the applicant in cases concerning injury, than in those which involve tax or dismissal claims.

Fact or law?

The Court of Appeal in the case of *O'Kelly v. Trusthouse Forte plc* [1983] 3 All E.R. 456 stated that it had for over 70 years been established law that the employment status of an individual was a question of fact, rather than a question of law. This was reiterated by the Privy Council in *Lee v. Chung and Shun Shing Construction & Engineering Co Ltd* [1990] I.R.L.R. 236. The significance of this is that an appellate court should not interfere with a finding of fact, unless, to use the words of Lord Simonds in *Edwards v. Bairstow* [1956] A.C. 14, the trial court took "a view of the facts which could not reasonably be entertained". In other words, it is generally not possible to appeal against a finding of fact.

On occasion, however, the question of employment status may turn solely on the examination and interpretation of a document, as was the case in *The President of the Methodist Conference v. Parfitt* [1984] I.R.L.R. 141. In such a case, the Court of Appeal ruled, the question would become a question of law, and an appellate court would thus have jurisdiction to interfere if necessary.

Agency Workers

The status of "agency workers" or "temps" is still in many cases unresolved. The case of *Wickens v. Champion Employment* [1984] I.C.R. 365 suggested that agency workers were not employees, since the "relationship between the employers and temporaries seems to us wholly to lack the elements of continuity, and care of the employer for the employee, that one associates with a contract of service". However, the Court of Appeal in *McMeechan v. Secretary of State for Employment* [1997] I.R.L.R. 353 held that a temporary worker can have the status of employee of the employment agency in respect of each individual assignment worked, and this is supported by the Court of Appeal in the case of *Clark v. Oxfordshire Health Authority* [1998] I.R.L.R. 125.

COMMENT

It may therefore be seen that the apparently simple question of "who is an employee" has in fact presented the courts with problems over the years. One reason for this, and for the at times seemingly inconsistent decisions of the courts, may be the reasons that the question has been asked. In cases concerning vicarious liability or personal injury—for example *Lane v. Shire Roofing Co. (Oxford) Ltd* [1995] I.R.L.R. 493—it seems that the courts have been very willing to find employee status despite often strong evidence to the contrary. Indeed in the Lane case it may be argued that the application of almost any of the traditional tests would have produced a contrary result.

OTHER LEGISLATION

Certain employment law statutes are designed to have a wider effect than others by including more than only "employees".

Equal Pay Act 1970 (EqPA) has a wider definition of "employed" and section 1 (6) (a) states "'employed' means employed under a contract of service or of apprenticeship or a contract personally to execute any work or labour."

Sex Discrimination Act 1975 (SDA) applies in an employment context to applicants for work, employees and contract workers. Again the wider definition of "employed" is used in the SDA (s. 82).

Race Relations Act 1976 (RRA) follows the SDA very closely