**SUMMARY QUESTIONS**

**ESSAY QUESTIONS**

1. ‘Through the last one hundred years, legislative and common law initiatives have failed to establish a single definitive test to establish the employment status of individuals.’

Critically assess the above statement and identify reforms in the law that you deem expedient.

**Indicative content outline answer:**

* Employees are provided with greater access to employment rights than independent contractors – such as unfair dismissal, redundancy, various maternity rights and so on. They are also subject to implied terms that independent contractors are not and the employer has obligations (including vicarious liability and compulsory insurance) that are not imposed (in most circumstances) when independent contractors are employed.
* Being the highest form of law, the most obvious place to search in establishing how to identify a worker’s employment status is statute.
* The Employment Rights Act 1996 contains many of the laws relating to employment and under s. 230(1) an employee is classed as ‘an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.’ The term ‘a contract of employment’ is defined under s. 230(2), which reads ‘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.’
* Ultimately, the legislation is unhelpful and very broad and requires reference to case law to extract the determining factors of employment status. As a consequence, the common law tests have evolved from ‘control’ and ‘integration;’ to the modern ‘mixed’ test.
* It is important to recognise before the tests are discussed that no one test is conclusive and the courts and tribunals make the decision of the employment status based on mixed law and fact – the employment laws established from statute and the courts (through precedent) and the individual facts of the case.

#### *The Control Test*

* This initial test of employment status occurred through the master and servant distinction where the master held control over the servant who was subservient to him/her.
* In *Yewens v Noakes* where Bramwell LJ stated ‘A servant (employee) is a person subject to the command of his master (employer) as to the manner in which he shall do his work.’ This degree of control was easily seen in employment relationships where the employer exercised complete control over the actions of the worker. However, soon after the test had been established the nature of the control in employment relationships began to change.

### *The Right to Control*

* The control test evolved in a later case involving a professional football player, and how the law could deal with a skilled worker whose job involved a high degree of independence in completing the tasks set by the employer (*Walker v Crystal Palace Football Club*).
* Control was a useful test when it was first established. However, with modern working practices this was of limited usefulness when applied in isolation. Workers increasingly are skilled and are employed away from the direct control of the employer.
* Contracts of employment are considered to be contracts of personal service. This means that an employee has to perform the work his/herself and if the worker has the ability to sub-contract the work, or if he/she can provide a substitute, then he/she will be more likely to be considered an independent contractor (*Express and Echo v Tanton* [1999]).
* In *James v Redcats* the Employment Appeal Tribunal remarked on worker status, the essential question is ‘… whether the obligation for personal service is the dominant feature of the contractual relationship or not. If it is, then the contract lies in the employment field…’
* Therefore, with the limitation of the control test, greater detail and consideration of the employment relationship in each case had to be included. This led to the integration / organisation test.

#### *The Integration / Organisation Test*

* In *Stevenson, Jordan and Harrison v Macdonald and Evans* Denning LJ considered that ‘One feature which seems to run through the instances is that, under a contract of service a man is employed as part of the business and his work is done as an integral part of the business; whereas, under a contract for services, his work, although done for the business, is not integrated into it but only accessory to it.’
* This definition uses common sense and its logic will be obvious to all, but it is unfortunate that Denning did not define the word ‘integrated’ to assist in identifying where the demarcation between employee and independent contractor lay.
* Hence the test was sensible but could not be used in future cases.
* This led to the development of the mixed / economic reality test.

#### *The Mixed / Economic Reality Test*

* A very important case in the development of the law in this area was *Ready Mixed Concrete* that established three questions that a tribunal should seek to answer in reaching its conclusion:

(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.

* Further, essential, factors to consider and be addressed in establishing employment status were developed in *Market Investigations Ltd v Minister of Social Security*. A fundamental element in identifying an employee is mutuality of obligations. This question must be added to the three questions developed in *Ready Mixed Concrete*.
* However, it is essential to note that in *Hall v Lorimer* the court stated that the tests developed in the case law should not be proceeded through mechanically. The tribunals should have the discretion to come to their own conclusions, and attach whatever weight they wish to the factors present.
* However, these tests should be used as they provide an effective indication as to the direction the tribunals will take. Also, independent contractors are considered to be in business on their own account. Per Cooke J in *Market Investigations* stated: ‘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 contract is a contract of service.’
* Whether someone is in business on their own account may be evidenced through the questions raised in *Lee Ting Sang v Chung Chi-Keung* such as:

(i) whether the man performing the services provides his own equipment;

(ii) whether he hires his own helpers;

(iii) what degree of financial risk he takes;

(iv) what degree of responsibility for investment and management he has; and

(v) whether and how far he has an opportunity of profiting from sound management in the performance of his task.

* The cases identified in the mixed test section provide a list of questions that can be used in assessing employment status. A last case must be addressed as the leading authority in this area. *Montgomery v Johnson Underwoood* established two clear factors which the courts / tribunals will take into consideration – control and mutuality of obligations. There must be an element of control, and mutuality of obligations for the case establishing a worker as an employee to proceed. If these two questions are answered in the affirmative, then the tribunal should continue to the *Ready Mixed Concrete* questions, if not, the claim fails at this stage!
* Parliament has left the statutory definition deliberately broad to allow the tribunals to alter the tests in light of changes in working. The evolution of the common law tests have demonstrated the need for flexibility in defining employment status, and if Parliament had been overly prescriptive in defining who would be held an employee, it would have given scope to the employers to ensure they could avoid the employment protections that are afforded employees.
* Employment status is based on mixed fact and law – hence statute law may not be the best way in defining the status.
* Parliament may also find defining employment status that could be applied to all forms of employment very difficult. Some workers are heavily regulated and controlled in their work, whilst others are provided with a great deal of autonomy despite still being employees.

1. Lord Slynn, in Spring v Guardian Assurance plc [1994] 3 All ER 129, observed ‘…the changes which have taken place in the employer / employee relationship… (have seen)… far greater duties imposed on the employer than in the past, whether by statute or by judicial decision, to care for the physical, financial or even psychological welfare of the employees.’

Discuss the above statement in relation to the development of implied terms in contracts of employment.

**Indicative content outline answer:**

* Implied terms are present in employment law, and can have a fundamental effect on the obligations to both the employer and employee. As implied terms, they are part of the contract between the parties, and of course by being implied, they are by necessity never written in the employment contract or spoken in the negotiations.
* Such implied terms are just one reason why the document provided to employees under s.1 of the Employment Rights Act 1996, is not the contract of employment, although many of the provisions will overlap.
* Some derive from statutes (such as a pay equality clause in employment through the Equal Pay Act 1970), and custom in a particular employment may provide terms. For example, terms may be implied by the courts where the practice is notorious and reasonable, as demonstrated in *Sagar v Ridehalgh*. Works handbooks are also a common source for implied terms as the employer can establish terms that are to affect a large number of workers, and instead of incorporating these terms into each employee’s contract, they are maintained in the document and can be accessed by the employees at their convenience.

### *Implied Terms on the Employee*

* Implied terms include mutual trust and confidence (*Donovan v Invicta Airways Ltd* [1970]) whereby the employee may not breach the duty to maintain the respect between themself and the employer. This embodies respect between the parties, but that does not prevent criticism of either.
* It has been recently held by the High Court that a Board of Directors may talk in negative terms about an employee, but extending this to a campaign of vilification of an employee will breach the mutual trust and confidence between the parties. If the breach is sufficiently serious, it may amount to a repudiatory breach, that the employee is entitled to accept, resign, and claim damages.
* There is an obligation of fidelity (faithful service - *Hivac Ltd v Park Royal Scientific Instruments Co* [1946]) where the employee must not work in competition with the employer and they must give their faithfulness to the employer.
* Fidelity has caused problems in the employment relationship when employees have followed the exact terms of their contract, yet their actions were held to be breaching the duty of faithful service (*Secretary of State for Employment v ASLEF* (No. 2) [1972]). In *Boston Deep Sea Fishing and Ice Co. v Ansell* the managing director of a company received secret commissions when placing orders for new boats and provided business to corporations in which he held shares. The Court of Appeal held such actions to be against the implied duties on the director to give faithful service to his employer. Where a potential conflict of interest is evident, the employee should inform their employer of this fact and thus enable the employer to take the most appropriate action.
* Employees have the duty to disclose the misdeeds of others (*Sybrom Corporation v Rochem Ltd* [1983]). This places an obligation on the employee to inform the employer if they are aware or has knowledge of wrongful actions by colleagues.
* Employees are under a duty of cooperation (*Secretary of State for Employment v ASLEF* (No. 2) [1972]) and must work with their employer in the best interests of the business. Even if the employee dogmatically adhere to the textual reading of the contract of employment, if this is used to cause harm to the employer, the employee will breach their obligation to cooperate.
* Employees must exercisereasonable skill and judgement in their employment so as not to endanger colleagues and clients. This extends beyond the issue of health and safety to the employer’s property (*Janata Bank v Ahmed*).
* Employees have a duty to obey lawful ordersfrom the employer, even if this extends beyond their job description (*Pepper v Webb* [1969]).
* There exists the duty to adapt to new working conditions and enables the employer to introduce new working systems and the use of technology (*Cresswell v Board of Inland Revenue* [1984]).

### *Implied Terms on the Employer*

* There is a duty to pay wages (*Devonald v Rosser & Sons* [1906]). This is often where the amount in wages or the frequency of the payments has not been agreed between the employee and employer. If no express agreement is made the employee should be paid a reasonable wage and within a reasonable time.
* The employer also has the duty to pay a fair proportion of wages if industrial action is accepted (*Miles v Wakefield MDC*).
* There is generally no obligation on the employer to provide work for the employee (*Collier v Sunday Referee Publishing Ltd.* [1940]). As long as they provide the wages agreed then the employer may ask the employee to stay away from the place of employment. The exception to this is where the nature of the job requires work then the employer must provide it. In *Clayton & Waller v Oliver* an actor who had been given the lead role in a musical production, and was then removed from the role and offered a substantially inferior one, was entitled to seek damages due to the employer’s actions which had damaged his reputation.
* The employer has an obligation to maintain the health and safety of their workers and this means the appropriate training of all staff, and safe systems of work to be put in place (*MacWilliams v Sir William Arrol & Co Ltd* [1962]).
* As its name suggests, employers, like employees, also have the obligation to maintain mutual trust and confidence. As stated in *Malik v Bank of Credit and Commerce International* the employer must not ‘without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee.’This may include, for example, unfair criticism of the employee in front of their colleagues, or demeaning them in the workplace, and a breach of this term enables the victim to treat the action as a repudiatory breach.
* Mutual trust imposes obligations on the employer to prevent actions including bullying (*Waters v Commissioner of Police for the Metropolis* [2000]) and stress faced by an employee (for example through an unreasonable workload - *Barber v Somerset County Council* [2004]), and if not attended to, may lead to successful claims for constructive dismissal and also possible tort actions against the employer for damages.

**PROBLEM QUESTIONS**

1. Jennifer has been employed by All Bright Consumables (ABC) Ltd for the past two years. ABC retails electronic home entertainment equipment. Her tasks include offering sales advice, stock-taking duties, restocking the shelves and accepting deliveries from suppliers. Jennifer works 40 hours per week and is entitled to six weeks paid holidays each year, however these must be agreed in advance with her manager and she cannot take her holiday if another member of staff is on holiday at the same time.

She is occasionally required to work in other regional branches when necessary, although Jennifer may claim expenses for the travel involved. Jennifer’s contract identifies her as an independent contractor, and it also contains a restraint of trade clause. She is responsible for paying her own income tax and national insurance.

Following a disagreement with her employer regarding stock irregularities, Jennifer has been dismissed from work. She would like to know her employment status in order to identify if she may pursue a claim of unfair dismissal.

With reference to appropriate case law, identify how a tribunal may decide the employment status of Jennifer.

**Indicative content outline answer:**

* Using the points outlined in greater detail in the previous answers, the major areas to include are:
* The statutory definition under s. 230 ERA 1996 would be identified.
* The next stage would be to identify the limitations of the statutory definition and hence the common law must be considered.
* The various tests should be outlined before *Montgomery* and *Ready Mixed Concrete* are identified and applied to the facts.
* The third element of *Ready Mixed Concrete* should be focused on – and it often helped in problem questions to physically draw a list of consistencies and inconsistencies.

***Consistent with Employee Status***

1. Jennifer works 40 hours per week.
2. She may have six weeks paid holidays each year, however these must be agreed in advance with her manager.
3. She cannot take her holiday if another member of staff is on holiday at the same time.
4. She receives expenses for travel away from her base.

***Inconsistent with Employee Status***

1. Jennifer’s contract identifies her as an independent contractor.
2. Her contract contains a restraint of trade clause.
3. Jennifer is responsible for paying her own income tax and national insurance.

* It is not possible to second-guess what a tribunal would decide as the weight attached to the factors of the case are for the tribunal to decide having heard all the evidence (*Hall v Lorimer*).
* Awareness and explanation of how a restraint of trade clause is incorporated into a contract and its implications on the problem – that typically independent contractors can work for several employers and this clause requires greater control by the employer. Hence this would be a factor indicating employee status.
* Reasons for the distinction – tax; national insurance; vicarious liability; maternity pay; health and safety etc. There is no point in identifying employment status unless the question is required as part of the claim. In this case it is required as Jennifer will be able to claim unfair dismissal if she is an employee, whilst she will have to bring an action for wrongful dismissal if not.

1. Enzo is a maintenance engineer for ABC in its electronic gadgets department (servicing burglar alarms). Enzo is engaged to service the products sold by ABC to its customers in the customers’ own premises. Enzo is provided with a list of customers and the priority of those jobs, but he is otherwise left to determine his workload and when he completes the jobs in the day. Following the completion of each job, Enzo obtains a signature from the customer and passes this back to ABC as proof of him completing the job. ABC then invoices the customer directly.

Enzo uses his own vehicle to make the visits to the customers’ premises and he is paid without any deduction of income tax or National Insurance contributions. ABC considers that Enzo will make his own arrangements with HM Revenue and Customs personally.

Yesterday, whilst on a call to one of ABC’s major customer’s, Enzo was involved in an accident at work. The accident occurred as the customer had alarms placed in particularly difficult to reach locations. The ladders provided by ABC to Enzo did not reach these locations. Enzo contacted ABC about this but was told that this was a very important customer, and he must complete the service at that visit. As such, whilst attempting to do so, he fell and sustained a serious injury to his arm and shoulder.

The result of the accident has left Enzo hospitalized for four weeks and he is unlikely to return to work for at least six months. ABC has informed Enzo that as he is an independent contractor he is not eligible to claim from its insurers, nor is he able to claim sick pay.

Advise Enzo as to his employment status and any claim he may make for his losses against ABC.

**Indicative content outline answer:**

* The tests as outlined above, particularly the identification of consistent and inconsistent features are the same as applied in the above questions.
* Importantly here is the reason for the employment status – the employee Enzo requires employee status to be able to claim from the employer’s insurance.
* The employer, in contrast, wishes to hold Enzo as an independent contractor to avoid such claims when he is injured at work. ABC will expect Enzo to carry his own insurance in the event of injury at work.
* The policy decisions of tribunals will be of interest here. There are cases where the reason why the worker wishes to identify themselves as employee may be indicative of the tribunal’s conclusion.
* The case Lane v The Shire Roofing Company [1995] concerned Mr Paul Lane, a builder/roofer/carpenter who had, since 1982, traded as a one-man firm.
* He was registered as self-employed by the Inland Revenue, and advertised his services of providing estimates and carrying out building works.
* This work had dried up and as a result he began working for Shire Roofing, even though his public liability insurance had lapsed.
* Shire Roofing was a newly established company that did not wish to take on too many long-term employees (to cut their costs) and therefore hired people for individual jobs.
* A re-roofing job was sourced for Mr Lane, who decided to take it on as it was more cost-effective for him to complete with his own materials than for Shire Roofing to hire scaffolding.
* In the course of carrying out this job Lane ‘fell’ and sustained brain damage.
* Mr Lane claimed from his employer for the injuries he suffered as he felt he had the status of employee. If Mr Lane was held to be an independent contractor he would have been responsible for his own safety and insurance.
* The Court of Appeal looked at the control test and acknowledged its limitation in the modern world with skilled workers, but further considered whether the worker provided his own tools and could hire helpers. Shire Roofing also accepted that they were responsible for the workers’ safety.
* Henry LJ remarked that ‘When it comes to the question of safety at work, there is a real public interest in recognizing the employer/employee relationship when it exists, because of the responsibilities that the common law and statutes… places on the employer.’
* The Court was concerned with this policy. Shire Roofing was clearly in breach of its health and safety obligations, and had employed people such as Mr Lane, as independent contractors, to circumvent such obligations.
* It would have been unwise for the Court to enable the employers to avoid their obligations, and therefore held Mr Lane to be an employee even though both he and Shire Roofing had accepted him as an independent contractor, and much of the evidence (such as mutuality of obligations) was missing.
* If Mr Lane was held to be an independent contractor with no insurance, the State would have had to pay for his medical bills, pay him income support for his inability to work, and possibly provide funds for his family on the same basis, whilst enabling a business that flouts the law to succeed in this action. Public policy therefore can impact on the decisions made in employment law, and this aspect makes pre-empting a tribunal’s decision particularly difficult, and possibly regrettable.
* If the tribunal follows this line of reasoning, it may be that Enzo would be held an employee to enable him to claim from ABC’s insurance, and to prevent ABC endangering people at work.