

Practice questions for chapter 25 – The contract of employment

Essay question

'The law has failed to articulate a clear and coherent approach in determining whether a person is an employee or an independent contractor.'

Discuss the validity of this statement.

Introduction

- This essay will discuss the law's approach in distinguishing between employees and independent contractors.
- You will want to point out the importance of the distinction. A number of reasons exist why it is necessary to distinguish between employees and independent contractors. First, determining whether a person is an employee or an independent contractor is vital in cases where vicarious liability could be imposed. The law will impose vicarious liability on an employer for the acts of his employees, but will not impose liability for the acts of his independent contractors. Second, many statutory employment rights are reserved solely for employees and so would not extend to independent contractors. Third, in some cases (e.g. health and safety cases), the law imposes upon employers more stringent duties in relation to employees than in relation to independent contractors. Fourth, many of the implied duties owed by employers are only owed to their employees, and not to their independent contractors.
- You may wish to briefly mention the fact that, although the parties are free to classify the nature of their relationship, the Court of Appeal in *Ferguson v John Dawson & Partners Ltd*¹ emphatically stated that such self-classification is not conclusive and the courts are clearly of the opinion that it is their responsibility to determine conclusively the nature of the employment relationship. Accordingly, one would assume that the courts would go to great lengths to ensure that the distinction between employees and independent contractors is clear. However, as we shall see, this is often not the case.

Statute

- Your starting point should be to discuss any statutory definitions that exist. Unfortunately, statute offers little aid. The Employment Rights Act 1996, s 230(1) defines an 'employee' as an 'individual who has entered into or works under ... a contract of employment.' Section 230(2) goes on to define a 'contract of employment' as 'a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.'

Clearly, these definitions provide very little, if any, help and it has therefore been left to the courts to determine how best to determine the difference between employees and independent contractors.

The courts

- As noted, how the law should distinguish between employees and independent contractors has been left almost entirely to the courts. Unfortunately, the courts have not been able to articulate a single, coherent test and what tests the courts have devised have been somewhat vague and difficult to apply in certain cases. The three tests devised by the courts should then be discussed.

¹ [1976] 1 WLR 1213 (CA).

The 'control' test

- The first test adopted by the courts was devised in the nineteenth century and was known as the 'control' test. Under this test, an employee is defined as 'a person subject to the command of his master as to the manner in which he shall do his work.'² In other words, the more control the employer exercised over a person, the more likely it was that he was an employee.
- When the control test was first devised, much of the country was engaged in unskilled or agrarian work, and so the control test functioned well. However, as time progressed, the number of skilled workers (e.g. surgeons) whose actions were not under the direct control of their employer grew. In such cases, the control test shown itself to be inappropriate and so a new test had to be created. This led to the development of the 'integration' test.

The 'integration' test

- The integration test was first developed by Denning LJ (as he then was), who defined an employee as someone who is 'employed as part of the business and his work is done as an integral part of the business.'³ He went on to say that a person would not be an employee if 'his work, although done for the business, is not integrated into it but only accessory to it.'
- The integration test was better suited to skilled workers than the control test, but it was ultimately little used as the terms used are extremely vague. For example, Denning LJ offered little guidance as to what would amount to an 'integral part of the business.' The judiciary themselves are aware of the weaknesses of the integration test with MacKenna J stating that the integration test 'raises more questions than I know how to answer.'⁴

The 'multiple' test

- Following the relative ineffectiveness of the control and integration tests, the courts realized that the adoption of a single test would be too limiting and it was highly unlikely that a single test could ever effectively apply in all cases.
Accordingly, the courts will now look at all the facts of the case (including the level of control and the extent to which the employee is integrated into the business) in determining whether or not an individual is an employee or independent contractor.
- There is no doubt that the current approach of the courts provides considerable flexibility. However, the classic trade off between certainty and flexibility is evident in that the current approach is undeniably vague and this has been evidenced in judicial decisions. For example, in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance*,⁵ the court stated that three factors were relevant in determining the case. However, in *O'Kelly v Trust House Forte plc*,⁶ the Court provided seventeen factors that could be relevant. Clearly, different judges will view different factors differently. This introduces a considerable level of subjectivity into judicial deliberations and could result in inconsistent decisions.
- In recent years, the courts have attempted to provide more certainty by providing 'irreducible minimums' that must exist in order for an employment relationship to be present, but the law is still far from certain.

² *Yewens v Noakes* (1880-81) LR 6 QB 530 (CA) 532,533 (Bramwell LJ).

³ *Stevenson, Jordan & Harrison Ltd v Macdonald and Evans* (1952) 69 RPC 10 (CA) 22.

⁴ *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 (QB) 524.

⁵ [1968] 2 QB 497 (QB).

⁶ [1984] QB 90 (CA).

Conclusion

- There is no doubt that the law has struggled to effectively devise a test that can be used in all cases to determine the employment status of an individual. Whilst the current approach is flexible enough to apply to a wide range of cases with vastly different facts, that breadth and flexibility has in turn resulted in an approach that is vague, unclear and offers little in the way of certainty.

Problem question

Discuss whether a breach of the law or the employment contract has occurred in the following circumstances?

- Charles is employed by Barker & Co Ltd as an auditor. A wealthy client of Barker & Co's is considering investing in BioTech plc and Charles is asked to investigate the affairs of BioTech and prepare a report regarding the effectiveness of its management and the financial status of the company. Charles carries out an investigation and in his report he states that BioTech's management is incompetent and there is evidence of fraud. The management of BioTech hears of this report and commence libel proceedings against Charles. The proceedings are dismissed. Charles' legal fees amount to £5,000 and he believes that Barker & Co should reimburse him this amount. The board of Barker & Co refuses to reimburse Charles. Charles decides to leave the employment of Barker & Co once he has secured a job offer elsewhere. Unfortunately, all of Charles' job applications have been rejected as Barker & Co are refusing to provide Charles with a reference.
- Sophie has worked for Gray Finance Ltd for three months. She wishes to take a holiday, but she has yet to be informed of her holiday entitlements. She has asked for this information on several occasions, but has yet to be supplied with it.
- Steve is employed by Pear Technology plc as a senior computer programmer. He wishes to leave the company, but his contract of employment provides that Steve must give Pear Technology six months' notice. Before Steve hands in his notice, he e-mails, whilst in work, his girlfriend to tell her that he going to hand in his notice later in the week. Later that day, Steve is called into his manager's office and his manager asks why Steve wishes to leave the company. Steve enquires as to how his manager knows this and his manager indicates that it is because he intercepted and read the e-mail that Steve sent to his girlfriend. Upset by this, Steve hands in his notice immediately, whereupon Pear Technology inform Steve that they will not be providing him with any work during the notice period, although he will continue to be paid.

Charles is employed by Barker & Co Ltd as an auditor. A wealthy client of Barker & Co's is considering investing in BioTech plc and Charles is asked to investigate the affairs of BioTech and prepare a report regarding the effectiveness of its management and the financial status of the company. Charles carries out an investigation and in his report he states that BioTech's management is incompetent and there is evidence of fraud. The management of BioTech hears of this report and commence libel proceedings against Charles. The proceedings are dismissed. Charles' legal fees amount to £5,000 and he believes that Barker & Co should reimburse him this amount. The board of Barker & Co refuses to reimburse Charles. Charles decides to leave the employment of Barker & Co once he has secured a job offer elsewhere. Unfortunately, all of Charles' job applications have been rejected as Barker & Co are refusing to provide Charles with a reference.

Duty to indemnify the employee

- A number of terms are implied into the employment contract that impose duties upon the employer. One of these places a duty upon the employer to indemnify his employees for any expenses reasonably incurred during the course of employment. This would include such obvious examples as traveling expenses or the purchase of certain work-related equipment.
- It would also include indemnifying the employee for any costs incurred in defending a legal action. In the case of *Re Famatina Development Corporation Ltd*,⁷ the Court of Appeal ordered the employer to indemnify an employee who had successfully defended a libel action brought against him whilst acting in the course of his employment. Accordingly, it is likely that, in failing to indemnify Charles, Barker & Co has breached the duty to indemnify and has, in turn breached an implied term of the employment contract, thereby allowing Charles to sue for damages.

Duty to provide a reference

- Charles wishes to leave Barker & Co and obtain employment elsewhere, but this has been hindered by Barker & Co's failure to provide Charles with a reference. The question is whether or not Barker & Co is legally obliged to provide Charles with a reference. This is an area of the law that is likely to develop in the future.
- There is no doubt that employers are under a tortious and negligent duty not to produce a negligent reference.⁸ Currently, it is doubtful that employers are under a general legal duty to provide a reference, but specific instances exist where an employer will be legally obliged to provide a reference. In *Spring v Guardian Assurance plc*,⁹ Lords Hadley and Woolf indicated that a duty to provide a reference would exist where the current occupation of the employee is of the type that normally requires a reference. It is likely that an auditor or accountant working for a firm would be expected to provide a reference when seeking, so a strong argument could be made that Barker & Co would be under a duty to provide a reference for Charles.

Sophie has worked for Gray Finance Ltd for three months. She wishes to take a holiday, but she has yet to be informed of her holiday entitlements. She has asked for this information on several occasions, but has yet to be supplied with it.

- What terms are included in the employment contract is a matter for the parties to discuss. However, there is a danger that the employment contract will not provide the employment with all the information he would wish to know. Accordingly, the Employment Rights Act 1996, s 1 provides that employees have a right to receive a written statement of the particulars of employment no later than two months following the commencement of employment.
- The question therefore is what particulars must be included in this written statement. The amount of information that must be provided is extensive and includes information concerning the employee's holiday entitlements. Accordingly, Gray Finance Ltd has breached the requirement imposed by s 1.
- If the statement is incomplete, or is not even provided (you are not told whether Sophie has received a written statement or whether she has and it simply does not provide details of her holiday entitlements), then the employee can refer the issue to an employment tribunal, which can determine what should be included in the written statement. The tribunal can also award Sophie a minimum of two weeks' pay.

Steve is employed by Pear Technology plc as a senior computer programmer. He wishes to leave the company, but his contract of employment provides that Steve must give Pear Technology six months'

⁷ [1914] 2 Ch 471 (CA).

⁸ *Spring v Guardian Assurance plc* [1994] ICR 596 (HL).

⁹ *Ibid.*

notice. Before Steve hands in his notice, he e-mails, whilst in work, his girlfriend to tell her that he going to hand in his notice later in the week. Later that day, Steve is called into his manager's office and his manager asks why Steve wishes to leave the company. Steve enquires as to how his manager knows this and his manager indicates that it is because he intercepted and read the e-mail that Steve sent to his girlfriend. Upset by this, Steve hands in his notice immediately, whereupon Pear Technology inform Steve that they will not be providing him with any work during the notice period, although he will continue to be paid.

Duty to provide work

- Steve's employment contract provides that, after he has handed in his notice, he cannot work for Pear Technology or any other employer during the lengthy notice period. Steve hands in his notice and Pear Technology refuse to provide him with any work. The issue to discuss is whether or not Pear Technology is under a duty to provide Steve with work.
- Generally, employers are not under a duty to provide their employees with work. In *Collier v Sunday Referee Publishing Co Ltd*,¹⁰ Asquith J stated that 'It is true that a contract of employment does not necessarily, or perhaps normally, oblige the master to provide the servant with work. Provided I pay my cook her wages regularly, she cannot complain if I choose to take any or all of my meals out.'
- There are exceptions to this rule, with one such exception stating that an employer will be under a duty to provide work if the job in question requires regular practice in order to maintain skills. We cannot say for certain whether or not Steve's job would fit this exception. If Steve's job did require regular practice in order to maintain his skills, then Pear Technology might well be under a duty to provide him with work. If Steve's job is not such a job, then there will be no duty to provide Steve with work.

Duty of confidentiality

- Steve has sent an e-mail to his girlfriend, but this e-mail has been intercepted and read by Steve's manager. The issue to discuss is whether or not Steve's manager is permitted to do this. It is well established that an employee owes a duty of confidentiality to his employer, but more recently it has started to be accepted that an employer also owes a duty of confidentiality to his employee.
- The Regulation of Investigatory Powers Act 2000, s 1 provides that it is a criminal offence for a person to intercept lawfully and without lawful authority any communication in the course of its transmission by way of a public or private telecommunication system. E-mail would come within this definition.
- However, the Telecommunications (Lawful Business Practice) (Interception of Communications) Regulations 2000, reg 3 provides a number of exceptions to s 1 of the 2000 Act and, in such cases, the interception will be authorized and so no offence will be committed. One such exception provides that a communication can be intercepted if the purpose of the interception is to investigate or detect whether or not the telecommunication system was being used for unauthorized purposes, or to discover whether or not the telecommunication system is being used for non-business purposes.
- Accordingly, Pear Technology could argue that the e-mail was intercepted as part of a system created to discover whether or not the work e-mail system is being used for business purposes and, given that the intercepted e-mail was a personal e-mail, Steve would have difficulty arguing against this. However, it should be noted that the 2000 Regulations do state that Pear Technology should make reasonable efforts to inform its employees that their e-mails may be intercepted for such reasons.

¹⁰ [1940] 2 KB 647 (KB).