

Business Law: CIMA Year One
Employment Law

An employment relationship arises when one person provides skilled labour to another party. The relationship is primarily contractual. However, employment is a contract of a specific social nature.

The employment contract is formed of express terms, common law implied terms, collective agreements and statutes. Of these, only collective agreements are special to employment contracts. These are terms agreed between a trade union and the employer or representative of the employer. Courts will incorporate these terms into an individual's employment contract if that individual is a member of the union. This is one example where the contract is not private.

Independent Contractors

Independent contractors may often be considered part of the workforce of a firm. However, there is an important legal difference between an employee and an independent contractor. This difference is vicarious liability:

- If an employee is negligent, the firm itself is liable.
- If an independent contractor is negligent, then that contractor is liable.

The courts, therefore, must define how an employee may be recognised.

The Control Test

This was used in the 19th century until 1940. Under this test, employment law was considered as a law of master and servant. An employer was held to have control over how an employee performed his job. If this control did not exist, then the worker was an independent contractor.

This test ran into problems in the 20th century, as an increased number of specialised skilled workers meant that managers could not always control the methods used by their workers. This was especially true in the medical profession, where hospital managers were unable to control their surgeons to a great extent.

The Organisation (or Integration) Test

From 1940, courts began to look at how a worker was integrated into the company.

Cassidy v Ministry of Health (1951)

C was taken to hospital with a broken wrist. The wrist was incorrectly set in plaster, and did not fully heal. The courts had to decide who was negligent – the nurse, the surgeon, or the plaster setter? Moreover, was the surgeon an employee of the hospital, since the hospital management did not control how he acted in his

job? The courts decided that the surgeon was an integral part of the organisation and so was an employee.

However, this test again ran into problems in the 1980s, as contracting out of services became more popular (for example, canteens in schools). Should rubbish collectors be considered to be employed by the council, or by the firm which is contracted to collect rubbish?

The Economic Reality (or Multiple) Test

Courts now look at all elements of a contract to decide whether a worker is an employee or an independent contractor. In particular, they look for which terms imply that an employment relationship exists, and which imply that the worker is independent.

Terms of Employment

From the point of view of the employer, there are a number of duties which must be fulfilled.

- Wages are covered by two pieces of legislation: the National Minimum Wages Act 1998, and the Wages Act 1986 (now largely replaced by the Employment Rights Act 1996).
- Employers have a duty to provide work to their employees. This is a very rare term to be enforced!
- They have a duty to provide a reasonably safe system of work.
- More generally, employers have a duty to behave reasonably towards their employees.
- Employers do not have a duty to provide a reference, but if they do provide one it must be accurate

Spring v Guardian Royal Exchange (1984)

S was employed at GRE. On leaving, he requested a reference. The reference which was prepared was inaccurate and harmed S's job prospects. S sued and won.

Employees have a number of **rights implied into their contracts**. The most important of these are from discrimination law. Sex discrimination is a good example, but the model also applies to race, disability, sexual orientation, religion or belief, and age.

Direct discrimination

Employers are held to discriminate directly against a woman if he treats her less favourably than he would a man.

The law is very strict. For sex discrimination, there are a number of exceptions:

- a) if the nature of the job requires a particular sex to carry it out because of physiology (for example, needing an actress in a play)

- b) for personal services or a single-sex establishment, such as a rape recovery centre
- c) for reasons of privacy or decency
- d) work in a private home (where there is a lot of personal contact)
- e) for some live-in jobs where accommodation is limited
- f) in favour of married couples where traditional (for example, running a pub)

Note that ordinarily it is illegal to discriminate based on marital status.

Until recently, it was held that minor distinctions may be ignored. For example, in *Peake v Automotive Products Ltd (1977)* women were allowed to leave work five minutes early to avoid the rush of workers. However, EU law now states that any discrimination at all is illegal.

Indirect discrimination

An employer discriminates indirectly if they apply some preference, criterion or practice that men or women are more likely to meet, unless the job requires this special requirement.

For example:

- “Librarians required: applicants must be at least six feet tall” indirectly discriminates against women and orientals, as significantly lower numbers of these groups fit the requirement.
- “Salespersons required: applicants must be under 30” directly discriminates against older people, but also indirectly discriminates against women, since many are unavailable for work due to childbirth at this age.

One special case which only applies to sex discrimination is the Equal pay Act 1970. This implies an equality clause in contracts so that men and women are subject to the same pay terms.

Any other sort of inequality is dealt with by discrimination laws.

Implied duties of employees

Employees are bound by terms implied into their contracts to:

- not delegate their work to others,
- take reasonable care in their work,
- indemnify their boss – that is, they may be sued by their employer,
- obey instructions, and
- give “loyal and faithful service”.

Some duties of employees may continue after employment has ended. The law only implies confidentiality outside the employment period. Any other type of restraint clauses are only legal if they are termed reasonable, since the government wishes for everyone in the market to be able to exploit their skills.

Occupational safety

Common law is not pro-active when looking at safety in the workplace. Regulations therefore exist to prevent accidents happening. There are a number of laws allowing for criminal prosecution, chiefly:

- the Health and Safety at Work, etc Act 1974 and
- the Management of Health and Safety at Work Regulations 1992

In addition to this, there are EU regulations covering use of equipment, personal protective equipment, manual handling operations, display screen equipment, and workplace conditions. These have replaced existing UK statutes such as the Factories Act 1961.

The Health and Safety at Work Act is enforced by the Health and Safety Commission. Inspectors from the commissions have wide-reaching search and entry powers, and issue “improvement notices” when a workplace does not meet regulations.

In addition, civil liability exists and is kept separate. Initially, the employer must pay statutory sick pay to any injured worker. The employer can also face a claim through common law for a breach of an implied term in the employment contract, or for the torts of breach of statutory duty or negligence.

When assessing these claims, courts will differentiate between “strict liability” (that is, where it is no defence that reasonable precautions were taken) or “fault liability”. Where the latter applies, it is possible for the employer to delegate duty to a third party.

In addition to statutory sick pay, a seriously injured worker may claim disablement benefit, which is calculated based on the loss of ability caused by the injury and is an ongoing pension payment. Payments to dependents are also possible.