

## **Chapter 2: Employment Status**

### Question 1

Modern patterns of working, particularly the emergence of the 'gig economy,' have highlighted the inadequacies of the common law when it comes to providing appropriate protection for those in work.

Discuss.

### Commentary

This is a broad question, requiring knowledge of the changing employment landscape. The examiner has focussed the question on the 'common law' so discussion should be centred on the case law. Mention of the 'gig economy' means the rise in more flexible/precarious forms of work with its associated problems of identifying whether the person engaged is an employee, worker, or genuinely self-employed. You will be expected to discuss the case law on determining employment status, to address its limitations/lack of fit in the current labour market context, and to be familiar with the current gig economy litigation such as that brought by *Uber* taxi drivers.

## Question 2

Gemma works as a carer for a private care company (“Westshire Care”) that provides home care services on behalf of a local authority. She is engaged on a ‘zero hours’ basis. Her contract states that there is no obligation on the part of the company to provide Gemma with work and that there is no requirement for her to accept any work offered. When she is providing care services to the service users she must wear a tunic with the company logo on it. This is provided by Westshire Care. As the work requires providing care to a number of service users, she travels between appointments by car. She must use her own car but mileage and parking can be claimed as expenses from Westshire Care. Each week she submits timesheets and is paid her wages net of income tax and national insurance contributions, which Westshire Care deducts.

Although Gemma is able to refuse work that is offered, in practice this never happens and there is an unspoken rule that if carers refuse too many offers of work, they will not be asked again as they will be seen as unreliable. The care service works on the basis that service users will ask for care at a time of their choosing and the company will contact available carers to see who is able to take on a new service user. So long as the service user is happy with the carer, the carer rarely changes unless she is on holiday in which case another carer will cover Gemma’s clients. In Gemma’s case, she has worked for Westshire Care for nine years and has provided care to a number of individuals during that time. Her hours can vary from time to time when, for example, a service user dies or moves into residential care but Gemma’s weekly hours never usually drop below 30 hours per week.

Advise Gemma on her employment status.

## Commentary

This problem question concerns whether Gemma will be regarded as an employee, worker, or genuinely self-employed. It deals with a highly topical and controversial area of zero hours contracts, which are prevalent in a number of sectors such as the care industry. Supporters of zero hours contracts highlight their flexibility and the fact that those engaged under them can (in theory) suit themselves with regards to the time and hours worked. There are, however, serious concerns that these contracts dominate in low-paid sectors, where those engaged will not want to turn down work for fear of not being offered further roles, and that they are an abuse of power.

You will be expected to have detailed knowledge of the tests for whether a contract is one of service or for services, and the case law that has developed to determine whether a contract is one of employment. Cases that will be particularly relevant here include *Ready Mixed Concrete* and *Carmichael*.

Question 3

How true is it to say that the old 'master-servant' model of employment is no longer relevant in the 21<sup>st</sup> century?

Commentary

This question invites you to either agree or disagree with the proposition stated. The first thing you need to do is show the examiner that you understand the proposition. This means that the 'control' test as one of the tests to determine whether a contract is one of employment will be particularly relevant in your discussion and you must have a good understanding of the *Ready Mixed Concrete* case and Mackenna J's judgment. Strong students will be able to discuss the limitations of the control test (perhaps with reference to academic commentary on the subject) and how other tests have been developed to respond to these limitations. Other tests include mutuality of obligation, integration, and economic reality together with relevant cases.

The second limb of this question is whether you agree or disagree that this model is no longer relevant. This is your opportunity to give your opinion, supported by authority to make it convincing. It would be open to you to show that this model is outmoded; equally you might point to the precarious nature of many jobs in the gig economy and the rise of modern slavery to challenge the proposition.

Question 4

Questions of employment status require a radical overhaul but are politically sensitive. For tax purposes, there is every incentive to ensure that individuals are regarded as employees. With regards to employment protection, however, successive Governments have had to be alive to employer concerns to have a flexible workforce with minimal risk.

Discuss.

Commentary

There are a number of layers to this question. It is fundamentally about employment status but a standard answer dealing with the various tests and associated case law would only provide a partial answer. It is important to show that you understand the tests of mutuality, service, integration and economic reality but the proposition invites you to discuss whether this area needs a radical overhaul. Strong students should be able to point to the changing labour market and the recent Taylor Review that has highlighted some of the problems with this area. Excellent students will be able to discuss some of the proposals for reform in this area mooted by Taylor and other relevant bodies such as the Law Society. It is also important that you address the test of employment for tax purposes and the conflicting views in this area.