**Chapter 3: The employment relationship and the contract of employment**

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1. In light of the earlier discussion, what are the advantages and disadvantages of constructing employment law around the central concept of the contract of employment?

**Author's answer:** We turn first to the main advantages. If the contractual paradigm was dispensed with, in order to gain access to employment rights, it would no longer be relevant whether an individual providing services to a third party was doing so on the basis of a contractual relationship. As such, the key issue would be whether an individual is providing a personal service to a third party in exchange for remuneration. This would be sufficient to cover casual workers, zero-hours contract workers, and other semi-dependent workers. On the merit side of the equation, the adoption of a non-contractual framework would also act as a counterweight to the recent emergence of a two-tier labour force in the UK, i.e. the divide between employees and atypical workers. As such, the argument runs that the position would be more socially just, as well as generate a greater degree of certainty in the law as to who is covered by employment laws and protection. However, on the 'cons' side, the abandonment of a contractual model would reduce the flexibility inherent in the UK labour market, thus diminishing the amount of flexibility in working arrangements for both employees and employers. This could drive up the employer's costs of production, leading to higher unemployment. Moreover, employment law would be unmoored from the safety of the berth of contract law, which could lead to unintended consequences, in terms of doctrinal and theoretical incoherence, as well as practical challenges. Moreover, the difficulty with the non-contractual model is that employment law could inadvertently take in many individuals who are self-employed and in business, who are not desirous of the common law and statutory protections, e.g. plumbers, barristers, solicitors, dentists, etc. The end result would be that the subject of employment law could lose its legitimacy and be undermined, since it would be illogical to expect the clients of plumbers, dentists, etc. to be subject to legal duties as employers. Needless to say, such clients would be surprised to find that they were 'employers'. Of course, the downside of persisting with the contract of employment as the key institution upon which employment law is rooted, is that many semi-dependent workers such as casual workers, agency workers, zero-hours contract workers are excluded from its coverage: this is mainly attributable to the requirement to establish mutuality of obligation.

2. The distinction between the contract of service and the contract for services can result in over-inclusivity as well as under-inclusivity when a finding is made that an individual is engaged under the former contract. Consider the implications of this statement.

**Author's answer:** The under-inclusivity associated with the binary divide between the contract of service and the contract for services is a reference to the inability of casual workers to satisfy the tests for the establishment of the former contract. For example, despite the fact that many casual workers are in a subordinate position to their purported employers and also dependent on receiving work from them in order to make a living, they struggle to meet the mutuality of obligation test, which demands that they demonstrate that the purported employer is subject to

an ongoing series of obligations to offer them a minimum or reasonable amount of work and pay for it, with a corresponding set of commitments on their part to perform the minimum or reasonable amount of work when it is offered to them. Likewise, casual workers often find it difficult to show that they are providing a personal service, e.g. where their contractual terms stipulate that they have the power to send along a substitute individual to perform the work where they are unable or unwilling to do so themselves. As for the over-inclusivity problem, this arises where certain individuals who are self-employed independent contractors but not in a subordinate position vis-à-vis their clients or dependent on their clients for a living, nonetheless qualify as employees. In such a case, the client is classified as an employer who is bound by employment law obligations to the individuals concerned. For example, it is possible that an individual essentially running his/her own business is nevertheless held to be entitled to employment rights and protection, e.g. where he/she is engaged by a client on a long-term contract and can satisfy the requirements of control, mutuality of obligation and personal service. Although this kind of case is rare, it does happen on occasion and serves to underline the problems associated with the existing contract of service/contract for services dichotomy that is struck by employment law.

3. What do you think are the principal reasons why the law permits individuals and employing enterprises to adopt a variety of contractual structures in order to capture their relationship? Give reasons for your answer.

**Author's answer:** If a legal system clings to a political philosophy that accepts the classical liberal tradition developed in the late eighteenth, nineteenth and twentieth centuries by philosophers such as Bentham, Mill, Berlin and others, then it will prize the liberty of the individual and expect the law to do so too. The totemic liberties recognised by the common law are freedom of contract, the freedom to (or not to) contract with whom he/she chooses and the freedom to quit a contract. Under a liberal society, interference with these freedoms is only acceptable in limited circumstances. That is, where the harm caused to others by non-interference outweighs the harm to the individual by the deprivation of their liberty. As such, if we are to remove the employer's prerogative to freely agree terms and conditions of employment with a prospective employee, its prerogative to agree to contract with a particular individual as an employee, or the employer's prerogative to terminate the contract of employment that it has concluded with an employee, extremely powerful justifications are required. What this means is that placing legal controls on the ability of employing enterprises to adopt a variety of contractual structures would interfere with freedom of contract and potentially the employer's freedom to choose with whom it contracts. For this reason, it is a radical move for a legal system to make: a convincing case must be made that non-interference with these freedoms would give rise to public, social, economic or other forms of harms that would dwarf the harm caused to the employer by the interference with its liberty. This is a difficult case to make, and so far, only the 'sham' doctrine crafted by the UK Supreme Court in *Autoclenz Ltd v Belcher* [2011] ICR 1157 by using the common law, places fetters on the employer's freedoms of contract and to contract.

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1. In your opinion, should the contractual model be abandoned in favour of a more relational rather than contractual construct? What are the potential disadvantages of adopting a more inclusive relational construct as the central organizing concept for the purposes of employment law?

**Author's answer:** If the central organising concept of the 'contract of employment' was replaced with a more relational idea such as 'the employment relationship' which operated independently from contract law, it is undoubtedly the case that a much greater number of individuals providing services to third parties would be caught by employment law. As such, many more individuals would be entitled to statutory and common law employment rights. As a matter of policy, this may be a good thing or a bad thing, depending on your political views and your approach to economic theory, e.g. whether you adhere to classical economic approaches or the new institutionalist school of economics. However, there are potentially two problems, one of a doctrinal nature and the other more conceptual. First, unhinging employment law from its traditional contract law moorings is a bit of a gamble. For over the past 100 years or more, the employment relationship has been treated as one that is grounded in contract, and as such is treated as a branch, albeit a separate one, of contract law. It is unclear how the existing contractual rules on the formation, classification, content, preservation, variation, suspension and termination of the employment relationship would, or could, be adapted along non-contractual lines. Relational theories of contract may take us some way down the road of answering that question, but despite the avid work of scholars such as Brodie, Collins et al, the detailed doctrinal and policy implications of relational theory for a non-contractual framework have not yet been fully worked out. The second difficulty is that a non-contractual model based on 'the employment relationship' could easily create a system that is over-inclusive, i.e. that many individuals who are self-employed would end up falling within the coverage of employment protection laws, such as plumbers and electricians working for own account. If the criteria for the establishment of 'the employment relationship' were drawn too widely, this could easily materialise as a problem, resulting in employment law losing its normative claim to legitimacy as a separate area of the law.

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1. If the three irreducible minimum criteria of control, mutuality of obligation, and personal service are present in a working relationship, is the tribunal or court *obliged* to make a finding that a contract of employment exists?

**Author's answer:** No, these are minimum criteria only, and as such their establishment is sufficient, but not conclusive in order for an employment tribunal or court to find that a contract of employment exists. An employment tribunal or court will also look to identify whether any of the following factors are present:

- Has the individual made no investment of capital in his/her work and does the individual suffer no risk of loss in his/her work?
- Is the individual integrated into the operations of the purported employer?

- Does the individual pay income tax and national insurance contributions as an employee instead of VAT on the provision of his/her services?
- Does the enterprise supply tools, uniforms, stationery, equipment, or materials to the individual?
- Is the individual paid a wage or salary instead of a fee, commission, or royalties?
- Have the parties labelled their relationship as one of employment in their written contract?
- Is the individual subject to the enterprise's disciplinary or grievance procedures?

The more of the above criteria that are satisfied, then the more likely that a contract of employment will be held to have been established.

2. In your opinion, is the sham doctrine expounded in *Autoclenz Ltd. v Belcher* [2011] ICR 1157 a viable and logical basis for characterizing what appears to be a written contract for services as a contract of employment?

**Author's answer:** The incarnation of the sham doctrine that was set out in *Autoclenz* provides that the relative bargaining power of the employer and employee must be taken into account in deciding whether the terms of their written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which that written agreement is only a part. As such, if the bargaining power is skewed in favour of the employer, the courts will then go on to consider whether the terms of the written contract fail to reflect the reality of the situation and the true agreement of the parties having assessed all of the relevant evidence on an objective basis. In this way, there are two controlling mechanisms in position if an employee is attempting to show that his/her contract is a sham and should be recategorised as a contract of employment instead of a contract for services, namely (1) the existence of inequality of bargaining power as a matter of fact, and (2) the true agreement and reality of the situation in fact. Since these two requirements have to be proven by the employee with evidence and proof, it is arguable that the sham doctrine does represent a balanced and viable model for the process of recharacterisation. Of course, adherents of the opposite view would argue that it is never valid for a court to recategorise contracts freely entered into between two bargaining parties, since this represents an unwarranted interference with the doctrine of freedom of contract and the liberty and intention of the parties.