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Types of Employment Relationship: In-depth

Summary

The determination of an individual's employment status is not always straightforward and there is no single definition. Employment tribunals and HMRC may consider different factors in deciding the issue. This topic explores the distinctions in statute and common law between an employee (who works under a contract of employment), a worker and an independent contractor. This topic examines each of these in turn, including the tests established by common law to determine employment status. It also considers the atypical types of contract that have grown in popularity in recent years, notably part-time and fixed-term contracts, zero-hours contracts, apprentices and individuals employed by employment agencies.

In Practice

Definitions and Rights

This section looks at the employment status and rights of:

- an employee
- a worker
- an independent contractor.

Employment tribunals and HM Revenue & Customs (HMRC) may consider different factors in deciding an individual's employment status. This means that, even if a person does not have employee status with HMRC, he or she may nevertheless be able to prove employee status for the purposes of employment rights (or vice versa).

The distinction between employees, workers and independent contractors is important because employees have a much greater range of rights than others, and in particular (subject to a service qualification) have the right to claim unfair dismissal and to receive a redundancy payment, if made redundant.

Employee Status

The Employment Rights Act 1996 defines an employee as "an individual who has entered into or works under (or where the employment has ceased, worked under) a contract of employment". The legislation goes on to define a "contract of employment" as a contract of service (or apprenticeship) whether expressed (orally or in writing) or implied.

Employees' main Employment Rights

The main employment rights enjoyed by employees are summarised below, some of which are subject to a period of continuous qualifying service with the employer. An employee has the right to:

- a written statement of terms and conditions
- statutory sick pay
- continuity of employment on transfer of an undertaking
- maternity, shared parental, paternity and adoption leave and pay
- time off to care for dependants
- minimum notice periods
- protection against unfair dismissal (subject to the employee having had at least two years' continuous employment)
- (on request) a written statement of reasons for dismissal
- the right to request flexible working after six months' continuous service
- redundancy rights and statutory redundancy pay (subject to two years' continuous employment)
- equality of treatment for fixed-term employees in certain respects.

Factors required for Employee Status

The following factors (some of which are derived from the HMRC leaflet IR56/NI39: *Employed or Self-employed?*) are likely to mean that the individual has a contract of employment, ie that he or she is an employee. The points below are not in any particular order.

- The person is required to work regularly unless he or she is on leave, eg holiday, sick leave or maternity leave.
- He or she is required to work for a minimum number of hours each week.
- He or she is fully integrated into the organisation.
- A manager or supervisor exercises direction and control over the person's work, including how it should be done.
- The individual cannot send someone else to do the work in his or her place.
- The employer deducts tax and National Insurance contributions (NICs) from the individual's wages.
- The employer's disciplinary and grievance procedures are applied to the individual.
- The company provides the materials, tools and equipment for the person's work.
- If the individual needs assistance to do the work, the company (rather than the individual) will hire the necessary staff.
- The individual does not take any degree of financial risk in working for the company.
- The person works only for the company, or if he or she does have another job, it is a completely different type of work.

- The individual’s contract, statement of terms and conditions or offer letter uses terms like “employer” and “employee”.

These are important factors but it should be stressed that courts and tribunals have reiterated repeatedly that there is no definitive checklist that decides employee status. All relevant factors will be taken into account in order to determine the status. This is sometimes known as the “multiple test”. There is often a fine line between the status of different individuals.

Nevertheless, for an individual to be an employee, the following factors must apply.

- There must be a contract between the individual and the company.
- There must be “mutuality of obligation”, ie the company must be obligated to offer work and the individual obligated to perform the work that is offered.
- The individual must be obliged to perform the work personally (duty of personal service), ie he or she cannot have authority to provide a substitute person to do the work.
- The employer must exercise a reasonable degree of direction and control over the person’s work — the greater the overall control and direction that the employer has over the individual, then the more likely it is that he or she will be categorised as an employee.

In *Johnson Underwood v Montgomery and O&K Limited* [2001] IRLR 269, the Court of Appeal stated that mutuality of obligation and control are an “irreducible minimum” necessary to create a contract of employment. In practice, if any of the four factors above does not apply, the individual will not be an employee of the company — although he or she may be a well worker (see below).

Employee Shareholders

A new type of employment status was introduced in September 2013: employee shareholder. Employers may offer employee shareholder status to new and existing staff — although existing staff cannot be forced to agree to this change in their employment status as the arrangement is voluntary.

Under this scheme, the employee gives up certain employment protection rights, namely the right to claim unfair dismissal, the right to a redundancy payment, and the right to request flexible working and time off for training) in return for shares in the business worth at least £2000. Employee shareholders also have longer notice requirements (16 weeks) if they intend to return to work early from maternity, adoption or shared parental leave.

The process for offering or accepting a job on employee shareholder status is different from that relating to other employment contracts. The employee shareholder status will not have legal effect unless certain conditions are met, including that the individual must receive independent legal advice on the proposed agreement with a “breathing space of seven days” for him or her to consider the offer.

However, this scheme has not been used much and, following the removal of tax exemptions from 1 December 2016, it is effectively dead in the water. It is now an unattractive option for individuals although any scheme entered into prior to 1 December 2016 will still benefit from the tax exemptions.

Employees and Office Holders

There is a further distinction between employees employed under contracts of employment and office holders. Office holders (eg an organisation's directors) may or may not be employees of the organisation. The factual details of the relationship should be examined on a case-by-case basis to determine if the director is also an employee. The greater the control that a director has over an organisation and the more shares he or she holds, the less likely it will be that he or she will be found to be an employee by a tribunal.

Workers

The definition of a "worker" is broader than that of an "employee".

The Employment Rights Act 1996 says that a person is a worker if he or she has entered into or works under a contract of employment or some other contract, and undertakes to do or perform personally any work or services for another party to the contract who is not his or her client or customer. Such a contract is often known as a "contract for services". Some freelancers may work under this type of contract.

It can be seen from the definitions that all employees are workers; but not all workers are employees.

The three definitive factors to look for are whether the individual:

- has a contract (whether written or oral, express or implied)
- is obliged to provide his or her services personally
- is not in business on his or her own account.

Workers' Employment Rights

A worker's statutory rights are summarised below. There are no qualifying periods required before a worker can benefit from these rights.

- Paid annual leave.
- Rest breaks and rest periods.
- The National Minimum Wage (NMW).
- Equal pay for men and women.
- Health and safety protection.
- Not to be discriminated against because of any of the "protected characteristics" set out in the Equality Act 2010, ie age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.
- To be accompanied at disciplinary and grievance hearings.
- Protection in the event of whistleblowing.
- Trade union activities.
- Equality of treatment for part-time workers (compared to equivalent full-time workers).

Employees also enjoy all these rights.

Workers can be classified into the following categories.

Agency Workers (“temps”)

The agency who finds the individual work pays his or her wages and the company who hires the individual through the agency pays a fee to the agency for the work. Agency workers are considered in detail in the Agency Staff topic.

Short-term Casual Workers

Short-term casual workers hired directly by the employer (often with a written contract and usually paid through Pay As You Earn (PAYE), with tax and NICs deducted) are not usually part of the permanent workforce but supply their services on an irregular or flexible basis or have a “minimum guaranteed hours” or “zero hours” contract — for further information on these topics see below.

Freelancers and Contractors

There are occasions when those who are self-employed for tax purposes may be classified as “workers” for employment rights purposes — including when a self-employed person is personally providing a service under a contract for a party that is not his or her direct client. However, an individual cannot be a “worker” if he or she is self-employed and the contractual documentation provides a genuine right entitling the individual to “substitute” someone else to do the work.

Members of Limited Liability Partnerships

In May 2014, the Supreme Court ruled that members of limited liability partnerships are workers for the purposes of the Employment Rights Act 1996 — which gives them entitlement to statutory rights and protections including rest breaks, annual leave, part-time workers’ rights and whistleblowing protection.

The Independent Contractor

Individuals who operate as self-employed independent contractors have few employment protection rights (and are taxed differently). In general, independent contractors will be the people who run their businesses for themselves. Any contract that they enter into is likely to be a contract between their business and a client or customer — which is more akin to a commercial contract than an employment contract.

An individual is likely to be classed as an independent contractor if he or she:

- has to put in bids or give quotes to obtain work
- does not work under the direct supervision of the organisation with which he or she has contracted
- submits invoices for the work he or she has done
- is responsible for paying his or her own NI and tax
- is VAT registered
- is not granted holiday pay or sick pay when not working
- provides his or her own staff where necessary to help him or her perform the work

- operates under a contract (sometimes known as a “contract for services” or “consultancy agreement”) that uses terms like “self-employed”, “consultant” or “independent contractor”.

Independent contractors do, however, have protection for their health and safety and, in some cases, protection against discrimination under the Equality Act 2010.

The construction industry has a special scheme for self-employed contractors and subcontractors called the Construction Industry Scheme (CIS).

Employment in the Gig Economy

In the so-called “gig economy”, work is characterised by companies engaging self-employed individuals on a short-term and temporary basis. A company often uses a technology platform, which allows the service providers to offer their services to customers at low cost.

The Office of Tax Simplification (OTS) has defined the gig economy as “an environment in which temporary positions are common and organisations contract with independent workers for short-term or on-demand engagements”.

Those who provide services in the “gig economy” are traditionally categorised by the company as self-employed but UK tribunals and courts have put the spotlight on this business model. They have increasingly been prepared to look behind the written documentation, examine the reality of the contractual arrangements, and rule that these individuals are not independent contractors but “workers” entitled to a range of employment protection rights — notably the right to the NMW and to holiday pay and eligibility for auto-enrolment into a workplace pension. See the Court of Appeal’s ruling in *Pimlico Plumbers v Smith* [2017] EWCA Civ 51, in which it ruled that the degree of control between the two parties made their relationship incompatible with that of a genuinely self-employed person. This is unlikely to be the last word on the issue.

As a result, wrongly classifying an individual as self-employed could lead a company not only to the employment tribunal but also to considerable potential liability for tax and NI.

These legal developments have potentially huge implications for present employment models in the gig economy, not least a considerable increase in staff costs that could make some enterprises uneconomic.

Acas has published new and updated guidance to help employers understand employment arrangements in the modern workplace, especially in the gig economy.

Umbrella Companies

An umbrella company is a company that will act as an employer to agency staff who work under fixed-term contract assignments. The umbrella company will normally sign a business-to-business contract with the recruitment agency and the agency will sign a contract with the client. The agency will invoice the client for completed work, the client pays the agency and the agency then pays the umbrella company. This money becomes the umbrella company’s income.

The umbrella company deducts the necessary tax and NICs, including employers’ NI, and any other deduction necessary before paying the worker through PAYE.

Labels and Intentions

It is open to the parties to a contract to agree that an individual is to be an employee, a worker or an independent contractor. Although this is likely to be a significant factor in determining the employment status of that individual, it will not be conclusive. A tribunal will look behind the labels and intentions of the parties. The label of “self-employed”, for example, may merely be a device to prevent the individual from being entitled to employment rights — or it may just be wrong.

In *Autoclenz Ltd v Belcher* [2011] UKSC 41, the House of Lords provided precise guidance for courts and tribunals in determining employment status when the nature of the arrangement between the parties is in dispute. The question at issue is the true agreement between the parties. The courts and tribunals should focus on the reality of the relationship between the parties, which might not be reflected accurately by the written documentation.

Where there is room for doubt as to whether an individual is an employee or a worker, the employer should — to be safe — treat the person as their employee and deduct income tax (at the basic rate) and NICs and pay the individual net of these. This offers some protection in the event of an HMRC investigation.

Of equal significance is the fact that if a person who was deemed to be self-employed is found to be an employee, then he or she becomes eligible for benefits arising from employee status, including the right to make a claim for unfair dismissal.

IR35

IR35 (named after the HMRC press release in which the rules were announced) was introduced in 1999. It is sometimes known as the “intermediaries legislation”. This set of rules governs an individual’s tax and NICs where he or she is contracted to work through his or her own personal service company or other intermediary (such as an agency). He or she pays taxes in a similar way to employees, irrespective of the personal service company or other intermediary that he or she works through.

Part-time Contracts

Under the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, employers must not treat part-time workers less favourably than full-time workers employed on the same type of contract. Part-time employees and workers thus have the same rights to contractual benefits as comparable full-time employees and workers (on a *pro rata* basis). Such contractual benefits include pay, holiday entitlements, occupational sick pay, access to company facilities and so on.

This does not mean that a part-time worker’s benefits must always be identical to those of a full-time worker — the law simply prohibits unfavourable treatment because of the individual’s part-time status. An employer will have a defence to a claim if the less favourable treatment of a part-timer is unconnected to the fact that he or she works part-time or if the treatment is justified, eg if there is a genuine business reason for the different treatment.

A part-time worker must compare himself or herself with a full-time worker who carries out the same or broadly similar work under the same type of contract, who works at the same establishment and who has similar relevant qualifications, skills and experience. Where there are no suitable comparators at the establishment where the part-timer works, he or she may cite a comparator at another establishment of the same employer.

Where a full-time worker moves from full-time work to part-time work, he or she has the right to enjoy the same terms and conditions (on a *pro rata* basis) as those

he or she enjoyed when working full time.

A part-time employee who feels that he or she has been subject to unfavourable treatment may ask the employer for a written reason for the unfavourable treatment. The employer must provide the employee with a response within 21 days of the request being made.

Fixed-term Contracts

Fixed-term contracts are contracts that specify when the contract will end, which can be on a specified date, when a specific task or project comes to an end or on the occurrence (or non-occurrence) of a specified event (for example on the return to work of an employee who has been on maternity leave).

The Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 require that fixed-term employees are not treated less favourably (on a *pro rata* basis) in respect of their pay and other contractual terms and conditions than comparable permanent employees of the organisation, unless the employer can objectively justify the treatment. These regulations apply only to employees, not to workers.

If an employee completes four years' continuous service under a series of consecutive fixed-term contracts, or has his or her fixed-term contract renewed after four years' continuous service on a single contract, the employee will be considered as permanent unless the fixed-term status can be justified.

A fixed-term employee who considers himself or herself to be a permanent employee on this four-year basis is entitled to ask his or her employer to confirm in writing that the employee's contract is no longer fixed term. The employer must respond within 21 days of the request. If the employer does not agree, then it must justify (give reasons) as to why it believes the contract remains fixed term. For more information, refer to Fixed-term Contracts in the topic Contracts of Employment.

Notice

While there is no requirement to have a notice clause in a fixed-term contract, it may in some circumstances be advisable to have one as it allows an employer to end the relationship before the expiry date should it be genuinely necessary to do so. A project may, for example come to an early end. If there is no notice period in the contract allowing the employer to give notice and end the contract early, the employee may be able to claim damages to cover his or her losses for the outstanding period of the contract.

Less Favourable Treatment

Employees on fixed-term contracts have the right not to be treated less favourably than comparable permanent employees in relation to:

- terms and conditions of employment (eg pay and bonus schemes) unless there are objective reasons for the less favourable treatment
- training, promotions and transfers.

Employees on fixed-term contracts also have the right to be informed of any permanent vacancies that arise within the organisation.

Termination of a Fixed-term Contract

Where a fixed-term contract expires and is not renewed, then this is regarded as a dismissal in law. However, provided that the reason for the dismissal is the expiry of the fixed-term contract (and not some other reason), and provided that the employer has acted reasonably, the dismissal (if challenged) is likely to be fair. One essential action that the employer must take is to consult with the employee in good time before the expiry of the contract, so the potential effects of the non-renewal of the contract can be explained and explored, together with any other opportunities within the organisation.

If the employee has at least two years' continuous service with the organisation when the contract expires and is not renewed, then he or she will be entitled to a statutory redundancy payment.

Job Share Contracts

Job share contracts occur where two part-timers share one full-time job. Benefits and pay are *pro rata* according to the number of hours worked. Variations to standard contracts will be necessary and clarification on the following areas will be required.

- Allocation of bank/public holidays (must be shared on a *pro rata* basis).
- Procedures for work handover.
- Procedures for covering the absence of one employee.
- Requirements to attend meetings, courses, etc outside of normal working hours.

Consideration should also be given to what would happen if one partner leaves the organisation or moves to another role. Options might include whether the remaining partner would be offered the choice to move to full-time working or whether a new job share partner would be sought.

Temporary Contracts

Temporary contracts are no different from open-ended contracts other than that the nature of their work is short term.

Temporary employees are therefore entitled to the same rights and benefits as permanent employees and may be protected by the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002. See Fixed-term Contracts above.

However, certain employment rights require the employee to have a minimum period of continuous service in order to qualify, namely the right to claim unfair dismissal (two years), the right to statutory redundancy pay (two years), the right to request flexible working (six months) and the right to maternity, paternity, adoption or shared parental pay (six months).

Annualised Hours Contracts

The basic principle of annualised hours is that, instead of defining working time in terms of a standard working week, the number of hours to be worked is averaged over the year. In its simplest form, the calculation of annual working hours is based on the number of weeks in a year multiplied by the number of hours in a working week less the number of holidays and public holidays.

Further variable elements such as shift arrangements and overtime will add

complexity to the calculation. Whatever formula is chosen, it is essential that this should be reflected in the contract of employment.

As with traditional contracts based on normal working hours, annualised hours contracts should specify whether employees will receive overtime pay for working additional hours.

In addition, an annualised hours contract should make clear:

- the number of hours an employee will be expected to work in any given period
- the procedure by which employees are to be notified of this
- any “protected” periods, ie periods when employees will not be required to work
- any “rest” periods and periods when the employee is “on call”
- procedures to enable employees to notify their employer if their particular shift is inconvenient, eg if the employee has booked holiday which falls within one of the rostered periods
- provision which allows the employer to vary the arrangements upon notice.

Annualised hours’ contracts may also have an impact on other contractual terms and benefits such as holiday arrangements and payment structures and these should also be specified.

Homeworking Contracts

The number of employees working from home is steadily increasing. Employers should always consider if the job and the job holder are suitable for homeworking.

Homeworkers may be employees of the company or may be workers. This will depend on a wide range of factors (see above).

In general, the particulars of employment for homeworkers follow the standard form for all employees but also take account of the particular position of homeworking.

Even though homeworkers typically enjoy a degree of flexibility as regards how and when they do their work, this will not necessarily prevent the person from being an employee of the company. For this to be the case, however, there must be minimum obligation on both sides (ie to provide work and to do the work provided). For example, although the hours of work may not be specified (eg where payment is by piecework alone), there must be some minimum obligation on the employee to complete the tasks allocated within a certain timeframe.

A deductions clause allowing the employer to make deductions from wages if work is not of the required standard will enable the employer to impose certain standards of quality on the homeworker.

The performance management of homeworkers should be consistent with that of office-based staff. Regular face-to-face reviews are helpful and can assist this process.

It is also prudent to set out the system of work and arrangements relating to the provision of equipment and insurance in some detail and ensure that homeworkers are aware of the main provisions of the Health and Safety at Work, etc Act 1974 and that a risk assessment is undertaken.

Acas has produced a guide to help both employers and employees deal with the implications of working from home.

Zero-hours Contracts

A zero-hours contract is generally understood to be a contract between an employer and a worker where the:

- employer is not obliged to provide any minimum working hours
- worker is not obliged to accept any work offered.

Payment is only made for work that is carried out.

Legal Definition

Zero-hours contracts were given a legal definition under s.153 of the Small Business, Enterprise and Employment Act 2015. A zero-hours contract is defined as "a contract of employment or other worker's contract under which":

- the undertaking to work or perform work is an undertaking to do so conditionally on the employer making work or services available to the worker
- there is no certainty that any such work will be made available to the worker.

Exclusivity Clauses

Section 27A(3) of the Employment Rights Act 1996 states that a provision in a zero-hours contract that prohibits the worker from doing work under any other arrangement (an exclusivity clause) is unenforceable. An exclusivity clause would be where an employer seeks to restrict a zero-hours worker from working for other employers. Subsequent regulation provides that individuals on zero-hours contracts may not be dismissed or subjected to a detriment for working elsewhere in contravention of an exclusivity clause.

There is no qualifying period to bring an unfair dismissal claim for this reason. Remedies include compensation from an employment tribunal.

The Department for Business, Energy and Industrial Strategy (BEIS) has published guidance on how zero-hours contracts should be used. The guidance is aimed at employers and provides information on employment rights, appropriate use of such contracts, exclusivity clauses and best practice.

Casual Contracts

Casual contracts are generally used where an employer requires workers to work on an "as and when" basis. Such contracts are particularly common in the hospitality and catering industries. Individuals are not required to be available for work or accept work and are free to turn work down. As a result, there is no mutuality of obligation or continuing contract and the individuals cannot be categorised as employees (see *Carmichael v National Power plc*).

If workers undertake to work on a regular basis, however, continuity could result or mutuality of obligation could be implied, leading to an employer-employee relationship.

The key factors relating to casual contracts are as follows.

- Whether a casual worker is an employee or not depends upon all the

circumstances of the particular case.

- Where work is of a truly casual nature, workers are free to turn down work if they choose to do so.
- The absence of mutual obligation — on the part of the organisation to provide work and on the worker to accept work — means that normally the contract of a casual worker will be a contract for services rather than a contract of employment.
- During periods when the casual worker is not working, no contract remains in force.
- Casual workers will, therefore, be excluded from many employment protection rights.
- Even where there is no mutuality of obligation it is open to a tribunal to find that over the course of several years a contract of employment may be implied, in particular if — through custom and practice — the individual pattern of working has become regular and it is expected that he or she will continue to be available on that set pattern.
- If organisations have a regular need for casual labour, it is advisable to:
    - maintain a list of individuals who are prepared to take on casual work
    - offer jobs on a rotating basis
    - avoid approaching the same workers repeatedly.
- Casual workers who are not employees do still have some rights (when working), namely protection against unlawful discrimination under the Equality Act 2010, rights under the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, the right to paid holidays and to the NMW and the right not to have unlawful deductions made from their wages.

Volunteers

Volunteers carry out unpaid work for organisations such as charities, voluntary organisations or fundraising bodies. They usually have a volunteering agreement and a role description rather than a contract of employment and a job description.

Volunteers are not entitled to the NMW as they are not paid for their services, but they are often paid for their travel and lunch expenses. Such volunteers are not regarded in law as either employees or workers. The position might be different if the expenses were in reality payment and the individual attended work on a regular basis under the control of a manager.

Interns

Interns are graduates or students who spend a fixed amount of time working to gain skills and experience in a particular industry or sector. Students often have to do an internship as part of their further or higher education courses.

An intern’s employment rights will depend on his or her employment status: if an intern is classed as a worker, then he or she will normally be entitled to the NMW. However, if the internship is part of a UK-based further or higher education course (eg a sandwich course) lasting less than a year then interns are not normally entitled to the NMW.

Internships should not be confused with work experience, which involves a person spending a limited period with an employer to learn about working life and the working environment.

Agency Workers Regulations 2010

The Agency Workers Regulations 2010 apply where agency workers are supplied by an agency to a hirer (ie a client of the agency) to work “temporarily for and under the supervision and direction” of that hirer.

The main feature of the Agency Workers Regulations 2010 is the requirement of “equal treatment” for agency workers after they have worked for 12 weeks on a particular assignment with the hirer. “Equal treatment” covers basic working and employment conditions, namely:

- pay
- hours of work
- holiday entitlement.

An agency worker is essentially entitled under the regulations to benefit from the terms and conditions that are applicable to equivalent permanent employees as if they had been directly recruited by the hirer.

Additionally, certain rights apply from day 1 of the agency worker’s assignment. These include the use of the hirer’s facilities, such as canteen, childcare and transport facilities that are available to permanent employees. The agency worker has the further right from day 1 to be informed of any available vacancies within the hiring organisation.

The agency worker can request information about relevant terms and conditions from either the agency or the hirer.

The BEIS has published non-statutory guidance on these regulations. They contain some helpful case studies.

Rights of Agency Workers

The issue of whether agency workers are employed by their agency, their hirer or indeed by anyone, has been the subject of much case law.

Agency workers are not generally entitled to the benefits enjoyed by employees, other than rights under the Working Time Regulations 1998 and the right to the NMW. They are also protected by discrimination legislation (the Equality Act 2010).

Agency workers are usually either the employee of the agency or are self-employed and contract out their services to the agency, which then places them with a client or end user. They are rarely employees of the end user and this would generally only occur if there was a contract in place between the agency worker and the end user. There have been many cases challenging the contractual position of agency workers, but the decision in the case of *James v Greenwich London Borough Council* [2008] EWCA Civ 35 CA effectively determined that, in the absence of a contract between the agency worker and the end user, there is no employment relationship between the two.

See the Agency Staff topic for full information.

Apprenticeships

An apprenticeship is a way for young people and adult learners to earn a wage while they train in a job and to gain a qualification.

There are now three types of apprenticeship.

1. Traditional or “common law” apprenticeship.
2. Framework apprenticeship.
3. The approved English apprenticeship.

Traditional or Common Law Apprenticeships

Apprentices were traditionally governed by common law. As a result, it was often difficult to get rid of an apprentice as their agreements were not terminable by notice. Indeed, if an employer dismissed an apprentice, it could be held liable for wrongful dismissal and compensation for financial loss and status.

These types of apprenticeships are now rare in England and Wales — they have been superseded (by the types of apprenticeships outlined below) but can still be found in Scotland and Northern Ireland.

Apprentices are afforded the same level of protection from dismissal as any other employee working under a contract of employment. The essential elements of the apprenticeship agreement required by legislation are described below.

Framework Apprenticeships

Employers can use an apprenticeship agreement to take on apprentices. This is a distinct concept that substantially differs from the original concept of a deed of apprenticeship which was traditionally used to take on an apprentice. If the correct format is used and the apprentice is enrolled on an accompanying training framework, then employers can treat such individuals in much the same way as “normal” employees and they are considered to work under a contract of service (effectively a contract of employment).

What an Apprenticeship Agreement must Contain

An apprenticeship agreement must include the following.

- A written document (known as a written Statement of Particulars of Employment) containing the terms of employment (or equivalent, ie a written contract or letter of engagement) in accordance with s.1 of the Employment Rights Act 1996. See the Contracts of Employment topic for full information on this.
- Reference that the person (the “apprentice”) undertakes to work for another (the “employer”) under the agreement.
- A statement of the skill, trade or occupation to which the apprenticeship relates.
- A statement that the agreement is governed by the laws of England and Wales.
- A statement that the agreement is entered into in connection with a qualifying apprenticeship framework.

The Frameworks available can be found here.

All apprenticeships for 16–18-year-olds must last a minimum of 12 months.

Employment Status — Apprentices

Section 35 of the Apprenticeship, Skills, Children and Learning Act 2009 provides that an apprenticeship agreement, which satisfies the prescribed conditions, should be regarded as a contract of service and not a contract of apprenticeship for common law or statutory purposes.

An apprentice who works under an apprenticeship agreement in the prescribed form will be considered as a fixed-term employee and he or she will be covered by the normal rules of unfair dismissal. An apprenticeship agreement can be terminated without the termination amounting to a breach of contract, as would be the case for a traditional apprenticeship.

Employers should take appropriate steps to consult with any affected apprentice about the ending of the fixed-term contract and ensure that he or she is made aware about any permanent employment opportunities in the employer's organisation.

Employers should not forget their commitment to help the apprentice to train or learn a skill and as such should consider whether they can refer the apprentice to another employer in cases of redundancy or dismissal for any other reason.

Employers must be mindful of a potential claim for age discrimination and should always be cautious when considering selection for redundancy if they are targeting apprentices.

Pay

Employers pay the apprenticeship rate of the NMW to apprentices under age 19 and to older apprentices in the first year of their employment. Once an apprentice is over 19 and has completed a year of his or her apprenticeship, he or she is entitled to the NMW at the rate applicable to his or her age group.

Continuity of Service

If an employer keeps an employee on or after the apprenticeship has come to an end, there will be continuity of service.

Approved English Apprenticeships

Since May 2015, an employer can offer an approved English apprenticeship provided that this is within a sector for which the Government has published an approved apprenticeship standard. The scheme creates a single, standard set of qualifications. The employer is required to provide the training to assist the apprentice to achieve this standard.

As with the type of apprenticeships outlined above, an apprentice on an approved English apprenticeship agreement is governed by a contract of employment. The agreement should contain the basic terms of employment. A probationary period is recommended.

The Apprenticeship Levy

From April 2017, as part of the Government's plan to increase the quantity and quality of apprentices, UK employers with a pay bill of over £3 million are required to pay an apprenticeship levy. The levy aims to fund some three million

apprenticeships in England by 2020. It is estimated that less than 2% of employers will be liable for the levy.

The levy will be charged at a rate of 0.5% of the employer's pay bill and met through monthly PAYE contributions. There is an annual allowance of £15,000 to offset the levy.

Employers who are not liable to pay the apprenticeship levy are required to make a 10% contribution towards the cost of training.

Apprenticeships that started before the date of the first levy payment (April 2017) will continue to be funded for their full duration through the Skills Funding Council.

These arrangements do not apply in Wales, Scotland or Northern Ireland which have their own funding arrangements.

Apprentice targets

With the introduction of regulations on 31 March 2017 under the Enterprise Act 2016, the Government is able to set apprentice targets for prescribed public bodies (for example, NHS Trusts, local authorities, police and rescue services, and some educational institutions). It has stated that at least 2.3% of the workforce in public sector bodies in England will have to be apprentice starts each year.

Targets for large public sector employers (ie with 250 or more employees) in England came into force from 1 April 2017.

Extra funding for employers taking on apprentices

Employers in England who hire apprentices from August 2020 to 31 January 2020 will receive a payment of £2000 for each new apprentice they hire aged under 25, and a £1500 payment for each new apprentice they hire aged 25 and over.

Kickstart scheme

Overview

The Kickstart Scheme was announced in July 2020 and is aimed at creating new high-quality jobs to help 16–24-year-old unemployed people on Universal Credit. The Government is investing £2 billion into creating thousands of state-funded jobs for young people who are at risk of being in long-term unemployment. The aim is to provide opportunities for young people to enter the workplace, especially as many of those in this age bracket may have lost their jobs as a result of the 2020 coronavirus pandemic.

The scheme is being run across several industries in England, Scotland and Wales and is open to all employers who meet the minimum requirements for offering the scheme. Chancellor Rishi Sunak has urged every employer, big or small, to hire as many Kickstarters as possible. This scheme will cover participants' expenses for six months if employers take them on into new roles.

The scheme will be delivered by the Department of Work and Pensions (DWP) and will be open until December 2021 — with the option of it being extended. It consists of a young person being taken on and asked to work a minimum of 25 hours per week, paid at the National Minimum Wage (NMW), at the least, and provide key training in skills that will help them to progress in their career. The Government covers 100% of relevant NMW for 25 hours per week, as well as National Insurance contributions and employer minimum auto-enrolment pension contributions.

Employers are free to top up this payment if they wish.

The Government will also pay employers £1500 towards set up support and training for those on the Kickstart placement. This payment can also be used to pay for uniforms and other costs necessary. Employers who take part in this scheme are permitted to hire a second Kickstart participant into the same role after the first participant has completed their six months placement.

While the Kickstart Scheme is not an apprenticeship, the Government has expressed that participants can move on to become apprentices at any time during or after their Kickstart placement.

Employers, as well as supporters of the Kickstart Scheme, who wish to promote the roles they are offering through the scheme or promote the scheme itself, can utilise the tools provided by the Government which aim to present a consistent message across the UK. Interested parties will find more information here.

The first placements are likely to be available from November 2020; however, employer applications for the scheme are now open and can be accessed through this link.

Application process for the kickstart scheme

The assessment criteria being used to determine if an employer's application for a grant under the scheme has been successful applies to the whole of the UK.

The minimum eligibility requirements for employers to be considered for the scheme are:

- applications should be for at least 30 vacancies which should be new and not a replacement of an existing job, or cause current staff to have a reduced workload
- employers must be prepared to offer at least 25 hours a week to participants, for at least six months, who are paid at the appropriate National Minimum Wage for their age group
- employers must demonstrate at application stage what employability support they will provide to participants to give them the transferable skills needed to continue into gainful employment, training or education, such as teamwork, organisational or communication skills
- employers must also demonstrate that the jobs they are offering are quality placements — meaningful and suitable — that will benefit the participant in future
- employers must show how they plan to monitor the progress of participants to the satisfaction of the compliance and quality requirements for the scheme — covering participants' safety, employer liability insurance, risk assessments for the vulnerable, and Disclosure and Barring Services for 16/17-year-olds
- lastly, employers must show how publicity activities, such as branding, will comply with the DWP publicity requirements.

Employers should also be able to demonstrate how they will help employees to develop their skills and experience in areas such as:

- support to look for long-term work, including career advice and setting goals
- support with CV and interview preparations

- supporting the participant with basic skills, such as attendance, timekeeping and teamwork.

If employers are unable to achieve the 30 job placements minimum criteria, particularly smaller businesses who only want to offer one or two placements, they can partner with other organisations to reach the minimum placement requirement. Employers who fall into this category will be asked to make an offer for 30 or more placements as a combined bid from several businesses (similar employers, local authorities, trade bodies, or registered charities) through an intermediary — a local authority or chamber of commerce.

Applications can be submitted via the Government website. When making an application, employers will need the following to hand:

- Companies House reference number or Charity Commission number
- the organisation address and contact details
- details of the job placements and their location
- supporting information to show that the job placements are new jobs and meet the Kickstart Scheme criteria — see above
- information about the support the organisation can give to develop employability skills of young people.

It is currently expected that applications will be responded to within one month. To submit an application, click here.

Becoming a kickstart scheme representative

A representative will be nominated to “represent” a group of businesses, by said businesses, who do not meet the 30 placements minimum criteria to apply for the kickstarter team on their own. The chosen representative will be responsible for checking that the proposed job placements are eligible under the scheme and then submit the application for the grant on the business' behalf.

Representatives must:

- be experienced in managing partnership agreements with third parties
- have a robust financial and governance process to help with managing the application process.

This is the minimum experience level for becoming a representative at the moment, but more information on who can become a representative will be released in future — no specific date has yet been given; this is for those who do not meet the eligibility requirement.

Eligible representatives will need to be able to offer a minimum of 30 jobs from the group of employers that they represent, as well as:

- details of the job placements being proposed
- details of their business
- information about the support being offered to the young people.

Representatives can receive £300 to help towards the associated costs that will be incurred.

List of Relevant Legislation

- Employment Act 2002
- National Minimum Wage Act 1998
- Employment Rights Act 1996
- Trade Union and Labour Relations (Consolidation) Act 1992
- Working Time Regulations 1998

List of Relevant Cases

- *Lee v Chung* [1990] IRLR 236 PC
- *Hall (HM Inspector of Taxes) v Lorimer* [1994] IRLR 171, CA
- *Clark v Oxfordshire Health Authority* [1998] IRLR 125, CA
- *Autoclenz Ltd v Belcher* [2011] UKSC 41 SC
- *Cable & Wireless plc v Muscat* [2006] IRLR 354, CA
- *Flett v Matheson* [2006] IRLR 277, CA
- *Department for Work and Pensions v Webley* [2005] IRLR 288, CA
- *Giles v Cornelia Care Homes* ET 3100720/2005, unreported
- *(1) Coutts & Co plc (2) Royal Bank of Scotland v (1) Mr Cure (2) Mr Fraser* EAT/0395/04
- *James v London Borough of Greenwich* [2008] IRLR 302, CA
- *Pipe v Hendrickson Europe Ltd* [2003] All ER (D) 280, EAT
- *Carmichael v National Power plc* [2000] IRLR 43, HL
- *Esso Petroleum Company v (1) Jarvis and others (2) Brentvine Ltd* EAT/0831/00
- *Berwick Salmon Fisheries Co Ltd v Rutherford* [1991] IRLR 203, EAT
- *Nethermere (St Neots) Ltd v Taverna and Gardiner* [1984] IRLR 240, CA
- *Ford v Warwickshire County Council* [1983] IRLR 126, HL
- *Airfix Footwear Ltd v Cope* [1978] IRLR 396, EAT
- *Ready Mixed Concrete v Ministry of Pensions and National Insurance* [1968] 2 QB 497
- *Pimlico Plumbers Ltd v Smith* [2017 EWCA Civ 51

Further Information

Organisations

- **Department for International Trade (DIT)**

https://www.gov.uk/government/organisations/department-for-international-trade

DIT is responsible for developing and delivering UK industrial strategy, promoting competitive markets and ensuring that the UK has a reliable, low-cost and clean energy system.

- **Employment Lawyers Association**

  http://www.elaweb.org.uk

  The Employment Lawyers Association’s members are qualified barristers and solicitors who practice employment law in the UK, and organisations engaged in the practice of employment law.
