

# Chapter 2: Who is an Employee?

Outline	2.1	Introduction	2.6	Fixed-term employees and part-time workers
	2.2	Employment status		
	2.3	Identifying a contract of employment	2.7	Reform
	2.4	Sham contracts	2.8	Summary
	2.5	Some special cases		



## Aims of this Chapter

This chapter will enable you to achieve the following learning outcomes from the CILEx syllabus:

- 1 Understand key concepts and themes in the development of employment law in England and Wales
- 3 Understand aspects of employment protection given to different types of workers

## 2.1 Introduction

If you currently work, take a moment to think about your own status. Would you consider yourself to be an employee? Do you perhaps work freelance as an independent contractor? Do you work part-time or through an agency? These are questions that an ET will need to answer before it can decide on the rights you are entitled to. Depending on the type of employment, this can be a difficult question to answer and, as a result, ETs have developed a number of different tests to determine an individual's employment status. These tests and the implications of an individual's employment status will be explored in this chapter.



## 2.2 Employment status

Employment law covers three main groups of individuals, with varying degrees of statutory protection being afforded to each of them.

### (1) Employees

The most statutory protection is awarded to employees. Unfortunately, there is no definitive guidance as to who an employee is. **s230(1) Employment Rights Act 1996 (ERA 1996)** defines an employee as:

*an individual who has entered into or works under (or where employment has ceased, worked under) a contract of employment.*

A contract of employment is defined as a *contract of service or apprenticeship* (**s230(2)**). This rather unhelpful definition means that it is usually left to the courts to decide whether or not an individual works under a **contract of service**, using one of the tests that will be discussed later in this chapter.

## (2) Workers

Workers are defined in **s230(3) ERA 1996** as individuals who perform work or services for another party whose status is not that of a client or customer of any profession or business undertaking carried on by that individual. The term “worker” covers a wider range of people than employees, but does not offer the same amount of rights. Examples of workers include agency workers and casual workers (sometimes described as zero-hours workers, required workers or regular casual workers).

## (3) Independent contractors

Independent contractors (also known as the self-employed, sole traders or consultants) work under a **contract for services**, as opposed to a **contract of services**. They are described as being in business on their own account and have limited statutory employment protection.

The differences in statutory protection afforded to employees and workers can be seen in the table below. Independent contractors are not included in the table as they have very little statutory employment protection.

<b>Status: employee</b>	<b>Status: worker</b>
Protection from unfair dismissal.	No protection from unfair dismissal.
Statutory redundancy pay.	No statutory redundancy pay.
Protection during a transfer of undertaking.	No protection during a transfer of undertaking.
National minimum wage.	National minimum wage.
Protection against unauthorised deductions from pay.	Protection against unauthorised deductions from pay.
Rights under the <b>Working Time Regulations 1998</b> , including rest breaks, paid holiday and limits on night work.	Rights under the <b>Working Time Regulations 1998</b> , including rest breaks, paid holiday and limits on night work.
Maternity, paternity and adoption leave and pay.	Maternity, paternity and adoption pay <b>only</b> .
Statutory sick pay.	Statutory sick pay.
Protection against less favourable treatment because of being part-time.	Protection against less favourable treatment because of being part-time.
Protection against less favourable treatment for making a disclosure in the public interest (“whistle-blowing”).	Protection against less favourable treatment for making a disclosure in the public interest (“whistle-blowing”).

Status: employee	Status: worker
Protection from discrimination.	Protection from discrimination.
Right to equal pay.	Right to equal pay.
Right to a statement of particulars of terms.	Right to a statement of particulars of terms.

Looking at the table, it might be asked why anyone would choose to be an independent contractor, given the number of rights they are excluded from. There are, however, advantages. Independent contractors pay their own tax and national insurance directly to HM Revenue & Customs and are given a number of tax benefits (unlike employees, whose employers deduct their tax and national insurance payments through the PAYE (Pay as You Earn) system). They also have considerable flexibility in their working patterns.

### Employee shareholders

This scheme was introduced in 2013. It is voluntary, with neither employers nor employees required to offer or accept such a contract. Where it is offered, employees can be given shares in the company worth a minimum of £2,000 which will be exempt from some capital gains tax. In return, employees will waive their rights to:

- claim unfair dismissal (with certain exclusions);
- statutory redundancy pay;
- request flexible working;
- request training.

Employees are also required to give longer periods of notice if they wish to return early from maternity or adoption leave (16 weeks compared to eight weeks generally).

Reactions to this scheme were not favourable. There were concerns about how the scheme would work, whether anyone would actually offer or accept such terms and who the scheme would benefit. Given the low take-up of the scheme to date, it seems those concerns were justified.

### The EU definition of worker



Under **Art 45 TFEU** workers have the right to free movement within the EU and must not be discriminated against because of their nationality as regards employment, remuneration and other conditions of work and employment. In **Hoekstra [1964]** the ECJ held that for the purposes of **Art 45**, the definition of worker for was for the EU to decide. In **Allonby v Accrington and Rossendale College [2004]** “worker” was defined as “a person who, for a certain period of time, performs services for and under the direction of another person for remuneration”. In **Lawrie-Blum [1986]** a UK national had gained her teaching qualifications but

was refused admission by Germany to train as a teacher. Germany argued that she was a trainee and not a worker. In response, the ECJ stated that there were three questions that can be used to determine worker status:

- Is the person under an obligation to work for another?
- Is the work done for monetary reward?
- Is the person subject to the direction of another?



### Self-assessment Questions

- (2) List the statutory rights that are not available to workers.

## 2.3 Identifying a contract of employment

Before looking at the various tests used by the courts to decide whether a contract of employment exists or not, it may be helpful to look at the policy considerations.

If a court is faced with a claimant who wishes to be classified as self-employed for tax purposes, it will be concerned with preventing tax avoidance. If, however, the issue is one of health and safety, the court's main interest may be the protection of injured parties. Many exam papers have problem questions which involve a discussion of whether an individual is an employee or not. A good way to tackle such a question is to begin by asking why the status of this person is important. What right are they trying to exercise? The answers to these questions may well affect the emphasis the court or tribunal places on different tests. In ***Lane v Shire Roofing Co (Oxford) Ltd [1995]*** the Court of Appeal stated that the courts are more likely to hold that a worker is an employee in a health and safety case than in other cases.

Ascertaining whether or not a worker is an "employee" is not always straightforward. The main tests that have been developed are:

- the **control test**;
- the **organisation/integration test**;
- the **multiple** (economic reality) **test**;
- the **personal services test**; and
- the **mutuality of obligation test**.

You may find in your reading that the names of these tests and the cases ascribed to them vary from textbook to textbook.

**© 2019 Copyright CILEx Law School Limited**

All materials included in this CLS publication are copyright protected.

All rights reserved.

Any unauthorised reproduction or transmission of any part of this publication, whether electronically or otherwise, will constitute an infringement of copyright. No part of this publication may be lent, resold or hired out for any purpose without the prior written permission of CILEx Law School Ltd.

**WARNING: Any person carrying out an unauthorised act in relation to this copyright work may be liable to both criminal prosecution and a civil claim for damages.**

This publication is intended only for the purpose of private study. Its contents were believed to be correct at the time of publication or any date stated in any preface, whichever is the earlier.

This publication does not constitute any form of legal advice to any person or organisation.

CILEx Law School Ltd will not be liable for any loss or damage of any description caused by the reliance of any person on any part of the contents of this publication.

Published in 2019 by:  
CILEx Law School Ltd  
College House  
Manor Drive  
Kempston  
Bedford  
United Kingdom  
MK42 7AB

**British Library Cataloguing in Publication Data**

A catalogue record for this manual is available from the British Library.  
ISBN 978-1-84256-1099-6