Chapter 4: Alternative personal work contracts and relations

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1. Do you agree with the parliamentary policy response of crafting intermediate categories between the contract of service and the contract for services in order to afford a measure of statutory employment protection to atypical workers incapable of satisfying the definition of 'employee'?

Author's answer: One of the advantages of such a technique is that it becomes possible to carefully ascribe employment rights to different classes of individual providing a service to hirers of their labour. In other words, it avoids the 'all or nothing' nature of the binary divide that stands between the world of employment and that of self-employment. The counterargument is that the recognition of intermediate categories masks the precarious nature of the work undertaken by such atypical workers. For example, the fact that an atypical worker is unable to satisfy one of the basic elements for the establishment of employment status does not mean that they are somehow independent businesspersons exercising independent and autonomy. On the contrary, they may be precarious in terms of their working patterns, hours and methods. For that reason, some commentators argue that the introduction of intermediate categories is the wrong regulatory response and that instead, the criteria for the recognition of the contract of employment should be relaxed so that more individuals negotiate their way successfully through the gateway of employment.

2. In policy terms, what would be the effect of assimilating the 'worker' and 'contract personally to do work' categories, bearing in mind that individuals falling within the latter concept are entitled to the protection of equality laws, whereas 'workers' are entitled to a broader range of employment laws, including equality laws?

Author's answer: In essence, this would mean that all persons falling within these assimilated categories would be entitled to the following statutory employment rights, namely statutory rights conferred under the Equality Act 2010, the Working Time Regulations 1998 (WTR), the National Minimum Wage Act 1998 and the Part-time Workers' Regulations 2000 (PTWR). In such a case, it would be irrelevant whether the individual was running his/her own business or not. It would render the existence of the two concepts pointless and lead to the accusation that the law looked rather illogical to have two concepts doing the same work. More importantly, it would mean that sole practitioner professionals and other sole traders would find that their clients and customers would be not only subject to anti-discrimination laws in respect of their conduct and behaviour vis-à-vis such sole traders, but that such clients and customers would also be subject to the obligations in the WTR and PTWR and have to pay sole traders the national minimum wage. For obvious reasons, it would come as a bit of a shock for clients and customers to learn that their contractors were entitled to a limit of 48 hours on their working week, that they were entitled to be paid holiday pay and also entitled to annual leave, rest breaks, and the receipt of the national minimum wage.

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1. In your opinion, are the 'dominant purpose' or 'integration' tests both convincing means of distinguishing between the 'worker' contract and the contract for services? Give reasons for your answer.

Author's answer: The 'dominant purpose' test claims that if personal performance of a service is the dominant purpose of an individual's contract with the hirer of his/her labour, then the more likely it will be that the individual is a 'worker': see *James v Redcats (Brands) Ltd.* [2007] ICR 1006, 1017D-1020G per Mr Justice Elias. This is an alternative test to the 'integration' test which asks whether that individual actively markets his/her services as an independent party to the world in general or is recruited by the hirer as an integral part of the hirer's operations. If the latter, then the more likely that individual is a 'worker': see Hospital *Medical Group Ltd. v Westwood* [2013] ICR 415, 426C-427D per Maurice Kay LJ. In *Bates van Winkelhof v Clyde & Co. LLP* [2014] 1 WLR 2047, Baroness Hale recognised that whether an individual is a 'worker' or not is a very fact-sensitive issue, and she appeared to prefer the 'integration' test.

4. To what extent is it necessary for the criterion of 'subordination' to play a role in identifying the existence of a 'worker' contract? Do you agree with Baroness Hale's approach in the decision of the Supreme Court in *Bates van Winkelhof v Clyde & Co LLP* in this regard?

Author's answer: There is no legal requirement for an individual to establish that he/she is subordinate in any sense to the putative employer in order to satisfy the court that a 'worker' contract is in existence. If you agree with Baroness Hale's approach which provides that subordination is not essential, then you would take the view that the following criteria are more significant, namely whether the individual was running a personal service, engaged under a contract, or running a business for his/her clients or customers, or not, as the case may be. The absence of any requirement to establish subordination also has the added appeal of acting as a factor distinguishing the 'worker' contract from the 'contract personally to do work': in the case of the latter it is essential to prove 'subordination'. On the other hand, those who are critical of Baroness Hale's ruling that there is no requirement to establish 'subordination' for a 'worker' contract might claim that factors such as 'control' by a putative employing entity and the 'subordination' of the putative 'worker' to the putative employing entity are essential in conceptual terms for an individual to be engaged in the 'world of work', rather than the 'world of commerce'. Proponents of this view would cling to the notion that concepts such as 'dependency' and 'subordination' are essential for employment law to hold, in order for it to be convincing enough that the provision of the services by the individual is work-related, rather than business-related.