Personal Injury

Employers' liability and personal injury: employee status following Atholl House

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Traditionally, the law has drawn a sharp distinction between 'employees' and others, specifically those properly characterised as self-employed or independent contractors. Albeit still the appropriate starting point for determining the extent and scope of duty owed in a work environment, it should be noted that the significance of 'employee status' has been questioned in the light of changes to the labour market and, in particular, the growth in the numbers of 'atypical' workers, for example agency workers, those on casual and zero-hours contracts, those whose employment is so intermittent that they may be regarded as employees (if at all) only when working, and those who are 'workers' but not 'employees': see Munkman at [4.5].

In *Lee Ting Sang v Chung Chi-Keung* [1990] 2 AC 374, Lord Griffiths, when delivering the advice of the Privy Council, described the question of what was the appropriate English common law standard by which to determine whether a workman was working as an employee or as an independent contractor as one which '…has proved to be a most elusive question'. He added, '… despite a plethora of authorities the courts have not been able to devise a single test that will conclusively point to the distinction in all cases'.

For the purpose of most employment rights, an employee is defined by the Employment Rights Act 1996, s 230 as: '… an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.' Section 230(2) goes on to provide that: '… in this Act "contract of employment" means a contract of service … whether express or implied, and (if it is express) whether oral or in writing'. It follows from the decided cases, that for the purposes of employers' liability an employee is someone who works under a contract of service, in contrast to an independent contractor who works under a contract for service - tracking employment law.

As foreshadowed in the previous paragraph, employee status is relevant to a number of different areas of the law, including: employment; tax; and personal injury. The decided cases demonstrate a degree of cross-pollination in relation to determining the existence of an employer-employee relationship. Cross-pollination is particularly evident in relation to the approach to and reliance upon the test set out by MacKenna J in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 ('***RMC***'), which still appears to be the starting point for determining the existence of such a relationship in all three of the areas of law mentioned above.

However, context matters, and it would appear that situations may arise in which an individual is an employee for the purposes of health & safety considerations but not for the purposes of IR35 or statutory protection of employment rights. The decision of the Court of Appeal in *HMRC v Atholl House Productions Ltd* [2022] EWCA Civ 501 provides a helpful reminder, in holding that the unorthodox (described by Lord Clarke as a 'purposive approach') approach to contractual construction outlined in *Autoclenz Limited v Belcher & Ors* [2011] UKSC 41, expanded in *Uber BV v Aslam* [2021] UKSC 5, flows from considerations pertinent to determining a worker's entitlement to statutory protections and does not apply to IR35 appeals: see para 156.

In a personal injury context, the public interest in safety standards (and perhaps the compulsory nature of employers' liability insurance) may incline courts to recognise a worker as an employee rather than an independent contractor: see *Lane v Shire Roofing Co (Oxford) Ltd* [1995] I.R.L.R. 493.

Turning to the three three-stage test in *Ready Mixed Concrete* at p.515:

> 'A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service.'

The judgment is authority that, first, mutuality of obligation and a right of control are necessary elements of a contract of employment and, second, that the right of control is not determinative.

Recently, the Court of Appeal in *Atholl House* (on appeal from the First-tier Tribunal (Tax Chamber)) made a number of observations in respect of the *RMC* test which a court is, in my view, likely to be influenced by when determining employers' liability claims:

1. the words of *RMC* should not be treated as though they are a statute, laying down an exhaustive and immutable test: at para 72;

2. at the third stage the court will have to analyse the terms of the contract and reach a conclusion whether they are consistent or inconsistent with a relationship of employment: at para 75;

3. the issue of control is not limited to the second stage, the extent of control may be a relevant consideration at the third stage: at para 76;

4. the approach taken by Cooke J in *Market Investigations Ltd v Minister for Social Security* [1969] 2 QB 173 ('***Market Investigations***') – was in effect an application of the *RMC* test, if there is a difference with the test set out by MacKenna J, it is that the language used for the third stage is widened a little to include the 'nature' as well as the 'provisions' of the contract: at paras 77 – 84;

5. at the third stage the court is not restricted to the terms of the contract, rather a broad multi-factorial analysis is required: at para 113; and

6. at the third stage, the factors to be taken into account are those that, adopting an orthodox approach to contractual interpretation, are the 'facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to the parties': at para 123.

Where work is undertaken sporadically, as is not uncommon in the construction industry, it is possible that each separate engagement might itself be a free-standing contract of employment: see Market Investigations, in which part time interviewers for a market research company were held to be engaged under a series of separate contracts of employment. In my view, Market Investigations is instructive:

1. there was sufficient mutuality of obligation in each engagement because 'it is clear that on each occasion on which Mrs Irving engaged herself to act as an interviewer for a particular survey she agreed with the company, in consideration of a fixed remuneration, to provide her own work and skill in the performance of a service for the company';

2. Cooke J found that the control which the company had the right to exercise was so extensive as to be entirely consistent with Mrs Irving being employed under a contract of service: see p.186. Including: instructions which according to the Interviewer's Guide gave details of whom to interview, what to say to informants, how to handle the questionnaire and other forms, and also dealt with contact with the office; and

3. as to the third stage, there were factors pointing both in favour of, and against, an employment relationship and the judge concluded, '[t]aking all the factors into account', that Mrs Irving was an employee. He specifically took into account:

> '…the more general question whether Mrs. Irving could be said to be in business on her own account as an interviewer. In considering this more general question I take into account the fact that Mrs. Irving was free to work as an interviewer for others, though I think it is right to say that in this case there is no finding that she did so. I also take into account the fact that in her work as an interviewer Mrs. Irving would, within the limits imposed by her instructions, deploy a skill and personality which would be entirely her own. I can only say that in the circumstances of this case these factors are not in my view sufficient to lead to the conclusion that Mrs. Irving was in business on her own account. The opportunity to deploy individual skill and personality is frequently present in what is undoubtedly a contract of service. I have already said that the right to work for others is not inconsistent with the existence of a contract of service. Mrs. Irving did not provide her own tools or risk her own capital, nor did her opportunity of profit depend in any significant degree on the way she managed her work.'

Cooke J's approach was endorsed by Lord Griffiths in *Lee Ting Sang v Chung Chi-Keung* [1990] 2 AC 374, a case in which a mason, working for a building sub-contractor, fell from a high stool and suffered injury. The Privy Council concluded that the appellant was an employee, reversing the first instance decision. In so doing it relied upon the following facts:

1. the mason had been told to work at the construction site by the sub-contractor;
2. the sub-contractor gave him a plan showing him where to chisel, but did not thereafter supervise his work, although the foreman of the main contractor did check it from time to time;
3. his tools were provided by the sub-contractor;
4. the mason had worked at the site some 20 days before his accident;
5. he was normally paid in accordance with the amount of concrete he chiselled but on occasions, when the concrete was difficult to chisel or the work involved only a small area, he received a wage for an 8am to 5pm day;
6. when he completed his work before 5pm he would assist the sub-contractor to sharpen chisels and would, after so doing, be paid for that work on an hourly basis;
7. he worked from time to time for other contractors but would, when the work of the sub-contractor was urgent, give priority to him, telling any other employer, for whom he was then working to engage another to finish the work;
8. the uncontradicted evidence of the mason was that he would be sacked if he disappeared from site;
9. he had no responsibility for investment in, or management of, the work on the construction site, he simply turned up for work; and
10. he did not price the job which is normally a feature of the business approach of a subcontractor.

In the view of Lord Griffiths, the mason ran no risk whatsoever save that of being unable to find employment which was, in his view, a risk faced by casual employees who move from one job to another. Lord Griffiths also noted evidence of the mason prioritising the work of the sub-contractor, in his view, if he was an independent contractor in business on his own account one would expect that he would attempt to keep both contracts by hiring others to fulfil the contact that he had to decline.

In *Lane v The Shire Roofing Company (Oxford) Ltd* [1995] IRLR 493 ('***Lane***'), a personal injuries case, the Court of Appeal acknowledged the importance of control but recognised that it may not be decisive and that a broader enquiry into whose business the worker was carrying on might be required. In considering 'whose business was it', the court noted that the question had to be asked in the context of who held responsibility for the overall safety of the men doing the work.

Although forming the first stage of the *RMC* test, mutuality of obligation has played little part in the cases concerned with

employers' liability. The issue tends to be of significance in considering whether claimants have been working for long enough as employees to claim those employment rights, such as the right not to be unfairly, which may not be claimed unless first a sufficient qualifying period has been worked.

By way of final point of guidance, in *Moreira v (1) Moran (2) Dunne (3) Prolakeballs Ltd* [2021] EWHC 1800 (QB) the Claimant, a labourer, suffered a severe head injury when he fell from an unguarded mezzanine while performing construction work on the premises of the Third Defendant. The Third Defendant had engaged the First Defendant, a self-employed joiner, to construct an office on the mezzanine level of their premises. The First Defendant subcontracted part of the work to the Second Defendant, who was also a self-employed joiner; they had previously worked together on several projects.

The court found that Mr Moreira was an employee of the Second Defendant. The only authority referred to on the point in the judgment is that of *Lane*. In support of its conclusion the Court observed that the Second Defendant exercised complete control over the work carried out by the Claimant; the business was that of the Second Defendant; and the fact that the Claimant was responsible for his own tax and national insurance carried little weight when the question of whose business it was and the question of who exercised control pointed so clearly to the Claimant being an employee.

Learning Points

In my view, the following learning points might be distilled from the above:

1. whether or not an individual injured in the work place is an employee is not a straightforward question;
2. the starting point probably remains the three-stage test set out by MacKenna J in *RMC*;
3. mutuality of obligation and control are necessary but not sufficient conditions – it is likely that the former will not be a significant issue in most employers' liability cases;
4. as to the third stage, consistency with the existence of a contract of employment, the court's consideration is not restricted to the terms of the contract – it entails the identification and overall assessment of all the relevant factors present in the particular case – a 'multi-factorial approach';
5. on the assumption of further cross-pollination, following *Atholl House*
, the relevant circumstances are the same as those comprising the factual matrix admissible for the interpretation of contracts, namely: the "facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to the parties";
6. the fact that a purported employee is responsible for his own tax and national insurance may well carry little weight; and
7. evidence gathering should be thorough and witness statements detailed, addressing the sorts of factors identified above – having said that, a court may take a less forensic approach which centres on the extent of control exercised over the purported worker.

John Platts-Mills is a natural and persuasive advocate, with a busy court and tribunal based practice. As well as running his own portfolio of cases he is regularly instructed as junior to more senior juniors and silks in Chambers.