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*A survey of 16 UK law students in September 2014.

EMPLOYMENT LAW

5th edition

David Cabrelli

Senior Lecturer in Commercial Law, University of Edinburgh,
and a qualified solicitor in Scotland

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Dedication and acknowledgements

I would like to dedicate this book to my mother, Rosanna Cabrelli. Thanks go to Hannah Marston, Christine Statham, Donna Goddard, Tim Parker, Lauren Hayward, Natasha Whelan, Sue Gard, Zoë Botterill and Katherine Cowdrey at Pearson for their patience and encouragement. The feedback of the anonymous reviewers of the draft chapters was also most helpful and I would like to thank them. In addition, the universities of Edinburgh and Dundee and their students offered excellent insights into certain aspects of employment law which are covered in this book.

David Cabrelli

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Introduction

Employment law is an optional subject which students may take as part of a qualifying undergraduate law degree. Although it is optional, it is extremely popular. Students who choose to take employment law find it very interesting and are often engaged by the breadth of coverage of the topics comprising the subject. This, together with the fact that employment law is a growth area in legal practice and that more and more solicitors specialise in this area of law, means that its popularity and appeal among students is likely to be guaranteed for many years to come.

Employment is an integral part of everyday life. It is a prominent feature in the news and media. Indeed, one of the advantages of studying a subject such as employment law is that many students are also (or have been) employees and are able to conceptualise and connect with many of the topics which are covered. For example, most students will have a basic understanding of what is meant by redundancy, dismissal and discrimination. The contrast with concepts such as ‘easements’ and ‘adverse possession’ in land law is stark.

Employment law is statute based and case law based. The most important statutes are the Employment Rights Act 1996, the Trade Union and Labour Relations (Consolidation) Act 1992 and the Equality Act 2010. Employment law is an extremely dynamic area of law and changes very quickly. During your studies, there are likely to be a number of key changes in the law.

This revision guide will help you to identify and apply the law. Its objective is to provide frequent reminders of the importance of understanding the legal definitions of key employment law concepts, such as ‘redundancy’, ‘dismissal’, ‘trade union’, ‘direct discrimination’ and many others. It is written to be used as a supplement to your course materials, lectures and textbooks. As a revision guide, it should do just that – guide you through revision; it should not be used to cut down on the amount of reading (or thinking) that you have to do in order to succeed. Employment law is a vast, complex and dynamic subject – you should realise this from looking at the size of your recommended textbook. It follows that this revision guide could never be expected to cover the subject in the depth and detail required to succeed in exams and it does not set out to do so. Instead, it aims to provide a concise overall picture of the key areas for revision – reminding you of the headline points to enable you to focus your revision and identify the key points that you need to know.

 REVISION NOTE

- Do not be misled by the familiarity of the terminology; ensure that you learn each topic afresh and focus on the legal meanings of the words that you encounter.
- Do rely on this book to guide you through the revision process.
- Do not rely on this book to tell you everything that you need to know about employment law – that is the job of your lecturer’s recommended textbook.
- Make sure you consult your own syllabus frequently to check which topics are covered and in how much detail.
- Make use of your lecture notes, handouts, textbooks and other materials as you revise as these will ensure that you have sufficient depth of knowledge.
- Take every possible opportunity to practise your essay-writing and problem-solving technique; get as much feedback as you can.
- Be aware that many questions in employment law combine different topics. Selective revision could leave you unable to answer questions which include reference to material that you have excluded from your revision.

Before you begin, you can use the [study plan](#) available on the companion website to assess how well you know the material in this book and identify the areas where you may want to focus your revision.

Guided tour



Topic maps – Visual guides highlight key subject areas and facilitate easy navigation through the chapter. Download them from the companion website to pin on your wall or add to your revision notes.



Revision checklists – How well do you know each topic? Use these to identify essential points you should know for your exams. But don't panic if you don't know them all – the chapters will help you revise each point to ensure you are fully prepared. Print the checklists off the companion website and track your revision progress!



Sample questions with answer guidelines – Practice makes perfect! Read the question at the start of each chapter and consider how you would answer it. Guidance on structuring strong answers is provided at the end of the chapter. Try out additional sample questions online.



Assessment advice – Not sure how best to tackle a problem or essay question? Wondering what you may be asked? Use the assessment advice to identify the ways in which a subject may be examined and how to apply your knowledge effectively.



Key definitions – Make sure you understand essential legal terms. Use the flashcards online to test your recall!



Key cases and key statutes – Identify and review the important elements of the essential cases and statutes you will need to know for your exams.



Make your answer stand out – This feature illustrates sources of further thinking and debate where you can maximise your marks. Use them to really impress your examiners!



Exam tips – Feeling the pressure? These boxes indicate how you can improve your exam performance when it really counts.



Revision notes – Get guidance for effective revision. These boxes highlight related points and areas of overlap in the subject, or areas where your course might adopt a particular approach that you should check with your course tutor.



Don't be tempted to... – This feature underlines areas where students most often trip up in exams. Use them to spot common pitfalls and avoid losing marks.



Read to impress – Focus on these carefully selected sources to extend your knowledge, deepen your understanding, and earn better marks in coursework as well as in exams.



Glossary – Forgotten the meaning of a word? This quick reference covers key definitions and other useful terms.

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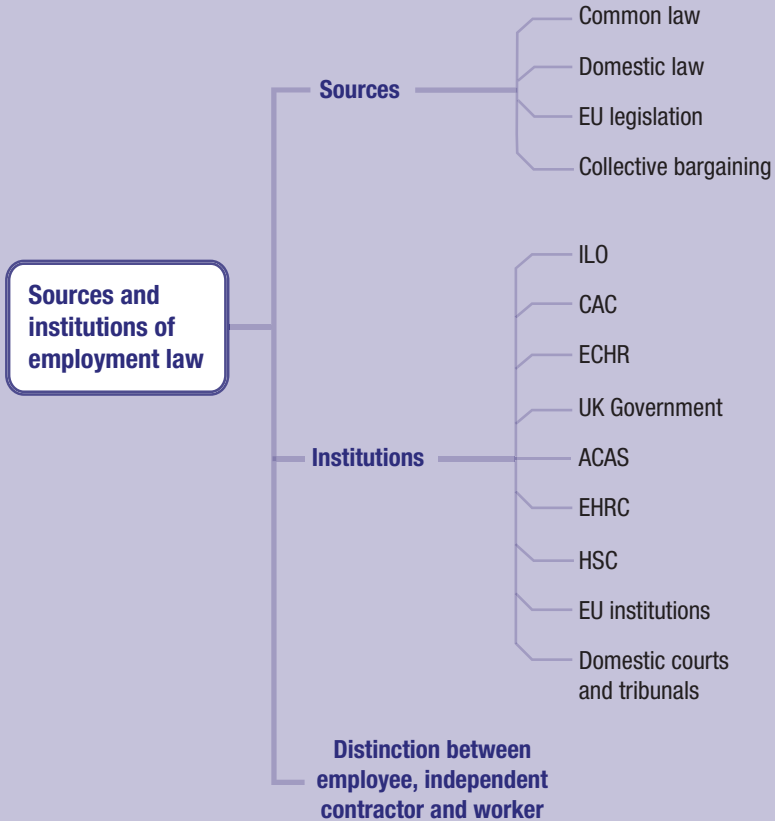
The sources and institutions of employment law and key definitions

Revision checklist

Essential points you should know:

- The sources of employment law
- The institutions of employment law
- Distinction between an 'employee' and an 'independent contractor'
- An understanding of the 'worker' and 'contract personally to do work' categories
- Relationship between each of the categories

■ Topic map



■ Introduction

Employment law has a number of sources and specific institutions and employment rights are available to employees, workers and independent contractors who have entered into a ‘contract personally to do work’.

Exam questions that ask students to determine whether an individual is an employee or an independent contractor are common and so this chapter will equip you with the tools to answer such a question confidently. There are three sections to this chapter:

- the sources of employment law;
- the institutions of employment law;
- an analysis of the concepts of ‘employee’, ‘worker’ and independent contractors who have entered into contracts ‘personally to do work’.

ASSESSMENT ADVICE

Essay questions

In connection with the sources and institutions of employment law, essay questions require broad general knowledge of those sources and institutions and their effect on the development of employment law and the enforcement of employment rights. You will also be expected to explain how legislation and the common law define the key concepts of ‘employee’, ‘worker’ and the ‘contract personally to do work’. An understanding of key cases in respect of each of these concepts is required. You must also exhibit knowledge of the employment rights enjoyed by ‘employees’, ‘workers’ and certain categories of self-employed persons. In tackling essay questions, you should always directly answer the question(s) asked and apply the relevant law.

Problem questions

Concentrating on the sources and institutions of employment law, problem questions may be framed in such a way that you are asked to advise employees regarding the source of the rights available to them (e.g. rights based on domestic legislation, rights enshrined in domestic legislation which are based on EU law, rights having EU law directly as their source) and the competing prospects of success in raising a claim based on these sources in an employment tribunal, or a legal action in the courts. Most problem questions on the concepts of ‘employee’ and ‘worker’ will involve an examination of a person’s relationship with an enterprise and whether that person amounts to an ‘employee’ working under a contract of employment, a ►

'worker' or an independent contractor who has entered into a 'contract personally to do work'. In answering problem questions, you will need to discuss the relevant statutory definitions and common law tests which distinguish between these categories. This may also be combined with other areas of employment law (e.g. if the person is a 'worker', what employment rights do they enjoy). In tackling problem questions, you should always directly answer the question(s) asked and apply the relevant law to the facts at hand.

■ Sample question

Could you answer this question? Below is a typical essay question that could arise on this topic. Guidelines on answering the question are included at the end of the chapter, while a sample problem question and guidance on tackling it can be found on the companion website.

ESSAY QUESTION

Analyse how the law distinguishes between persons working under a contract of service and independent contractors. What is the legal significance of this distinction and is the law in need of reform?

■ Sources of employment law

With the exception of Chapter 11, this revision guide is concerned with the individual rights of **employees**, **workers** and independent contractors who have entered into contracts '*personally to do work*' – which are directly enforceable against employers. The sources of employment law and employment rights are diverse. The topic map outlines the key (but not all) sources of individual employment law. One of the most important sources is EU law. EU law provides employees, workers and certain self-employed persons/independent contractors with employment rights directly enforceable in the UK courts and tribunals via the Treaty on the Functioning of the European Union, EU regulations and the decisions of the Court of Justice of the European Union. EU Directives provide employment rights directly

in the national courts when domestic legislation implementing the terms of a Directive has come into force.

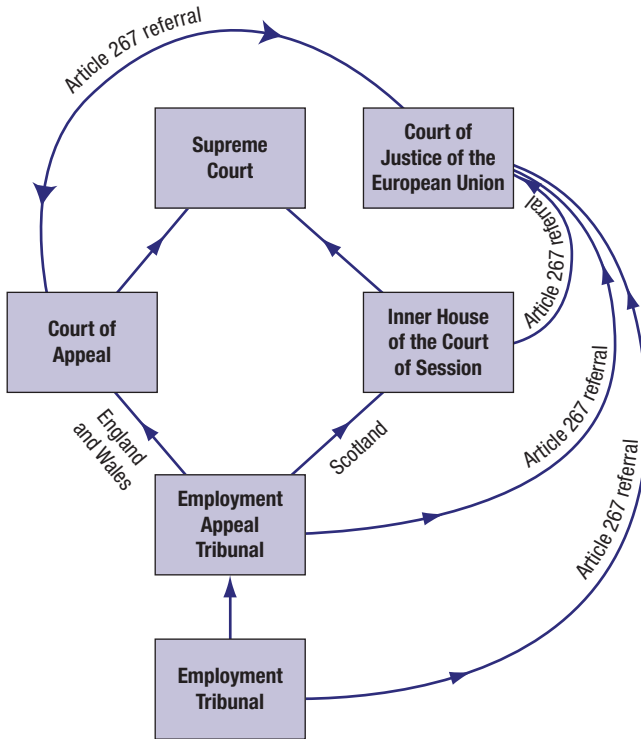
■ Institutions of employment law

There are a number of distinctive institutions of employment law. Some are designed to enforce employment rights and resolve employment disputes, such as the domestic courts, Employment Tribunals, the Employment Appeal Tribunal, the Central Arbitration Committee (CAC), the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union. Others are intended to act as institutions that prevent such disputes arising in the first place, such as the Advisory, Conciliation and Arbitration Service (ACAS) and the Equality and Human Rights Commission (EHRC). Some act as standard-setters, such as the International Labour Organization (ILO) and ACAS (Codes of Practice), while others act as rule-makers, such as the European Parliament, the Council of the European Union and the UK Government. (See the topic map.)

Employment tribunals and the Employment Appeal Tribunal

Specific mention must be made of the Employment Tribunals (ETs) and the Employment Appeal Tribunal (EAT). ETs are specialist tribunals comprising one qualified lawyer and two laypersons. One layperson is selected after consultation with employers' organisations. The other layperson is appointed after consultation with **trade unions**. The ETs are tribunals and are designed to be informal and cheaper for the public to use than domestic courts. ETs resolve disputes about employment rights which have legislation as their source. However, there are limited rights to raise employment claims before the ET where the dispute has the common law as its source. The constitutional basis and procedures of ETs are contained within the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 and the Employment Appeal Tribunal Fees Order 2013. Meanwhile, the EAT is composed of divisions with hearings taking place in London or Edinburgh. The EAT is staffed with judges of the High Court in England or Senators of the College of Justice in the Court of Session in Scotland. Such judges or Senators must have experience or an understanding of employment law and employment relations. The EAT hears appeals from the ETs on points of employment law, *inter alia*. See Figure 1.1 for a flowchart of the channel of appeals and how an Article 267 referral for a preliminary ruling may be made to the Court of Justice of the European Union (CJEU, formerly the European Court of Justice, ECJ).

Figure 1.1



■ Distinction between an ‘employee’, ‘worker’ and ‘independent contractor’

‘Employees’ are entitled to the full suite of common law and statutory employment rights. ‘Workers’ and certain categories of self-employed persons/independent contractors enjoy varying degrees of limited employment rights.

Is an individual an ‘employee’?

The courts have developed a number of tests to distinguish an ‘employee’ from an independent contractor.

KEY STATUTE

Employment Rights Act 1996 (ERA 1996), s. 230(1) and the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA 1992), s. 295(1)

An 'employee' is 'an individual who has entered into or works under. . . a contract of employment'.

KEY STATUTE

ERA 1996, s. 230(2) and TULRCA 1992, s. 295(1)

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'.

Common law tests for establishing 'contract of service'

No further statutory guidance is provided as to how the courts determine whether a 'contract of service' exists. Hence, the common law has established a number of tests in order to ascertain whether an individual is undertaking work on the basis of a contract of employment:

- The 'integration' test. Here, the courts enquire whether the work of the individual is an integral part of the business or organisation of the employer. If the answer is yes, then this is a factor in favour of the individual being an employee. See *Stevenson, Jordan and Harrison Ltd v Macdonald and Evans* (1952).
- The 'economic reality' test. This involves asking whether the individual is not working for his own account. If the answer is yes, this is a factor in favour of the individual being an employee. See *Market Investigations Ltd v Minister of Social Security* (1969).
- The 'mutuality of obligation' test. Here, one asks whether there is an obligation on the part of the enterprise to provide a minimum or reasonable amount of work to the individual and pay for it and whether there is a corresponding obligation on the individual to undertake a minimum or reasonable amount of work. If the answer is yes, then this is a factor in favour of the individual being an employee. See *Carmichael and Leese v National Power plc* (1999).
- The 'control' test:

KEY CASE

***Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 1 All ER 433**

Concerning: contract of employment, 'control' test

Facts

A yardman batcher entered into a new contract with a company which made and sold concrete. The contract involved the carriage of concrete and a dispute emerged regarding the status of the individual.

Legal principle

In order for a contract of service to exist, each of the following must be present:

- (1) the individual must provide his own work and exercise skill in the performance of his work in return for wages or other remuneration;
- (2) the individual must subject himself to the control of the other to a sufficient degree; and
- (3) the other provisions of the contract must be consistent with a contract of service.
- (4) As for the meaning of 'control', it includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when, and the place where it shall be done.

The 'multiple' test

In coming to a view as to whether an individual is an employee, the courts and tribunals now apply a 'mixed/multiple' test: *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* (1968). In other words, they take into account each of the above four tests and a number of other factors. The greater the number of tests which have been satisfied and the greater the number of factors present, the more likely it is that the individual will be an employee. The relevant factors are as follows:

- Does the contract give the individual no absolute right to send along a substitute to provide the work? If the answer is yes, then the more likely it is that the individual is an employee.
- Is the individual paid wages or a salary rather than a fee, commission or royalties? If yes, then the more likely it is that the individual is an employee.
- Has the individual invested no capital in his work and does he suffer no risk of loss? If yes, then the more likely it is that the individual is an employee.

DISTINCTION BETWEEN AN 'EMPLOYEE', 'WORKER' AND 'INDEPENDENT CONTRACTOR'

- Does the enterprise provide the individual's tools, uniform, stationery, equipment or materials? If yes, then the more likely it is that the individual is an employee.
- Does the individual pay income tax and NICs as an employee rather than charge VAT on his services or pay income tax and NICs as an independent contractor? If the latter, then the more likely it is that the individual is an employee.
- Does the enterprise have the power to suspend, discipline or dismiss the individual or initiate or respond to disciplinary or grievance procedures? If yes, then the more likely it is that the individual is an employee.
- What label have the parties attached to their relationship? This will not be definitive, but may be relevant in a borderline case – see *Massey v Crown Life Insurance Co.* (1978).

Basic ingredients for contract of employment

Although the courts and tribunals apply the multiple test, what is clear is that if any one of the following three criteria are absent, then the courts will hold that the individual concerned is not an employee:

- control;
- mutuality of obligation;
- a degree of personal service on the part of the individual providing services.

The above three factors represent the 'irreducible minimum criteria' (i.e. the basic ingredients) which the courts require to be present.

KEY CASE

***Montgomery v Johnson Underwood Ltd* [2001] IRLR 269**

Concerning: contract of employment, basic ingredients

Facts

Montgomery was registered as an agency worker with Johnson Underwood (the agency) and was placed with a client company of the agency. There was a dispute as to whether the agency or the client company was her employer.

Legal principle

Montgomery was not the employee of the agency or the client company. The Court of Appeal held that 'mutuality of obligation' and 'control' represented the irreducible minimum required for the establishment of a contract of employment. The fact that there was insufficient control on the part of the agency in this case meant that Montgomery could not be their employee.