

DEFINING EMPLOYEE STATUS UNDER THE HEALTH AND SAFETY AT WORK ACT 1974

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Defining the Status of Employees under the Health and Safety at Work Act 1974

Introduction

1. The definition of employee status in the context of both criminal and civil jurisdictions has consistently challenged lawyers, business, trade unions and the Courts alike. The test for all parties concerned has been to identify in clear, unequivocal language, a formula which embodies the essential elements of what constitutes an employee. This exercise has not proved straightforward.

2. The Courts have been besieged by competing interests for both a wider and narrower definition of an employee. The undesirability of employee status from a tax perspective brings with it additional burdens to business of health and safety protection. Some would-be employees have been content to abandon this regulatory protection in favor of ensuring contractual paid work albeit on a self employed basis.

3. The advent of increased immigration has realised a new dynamic to the definition of employee status. The problem of poorly regulated migrant labour, both legal and illegal, was tragically highlighted by the Morecambe Bay disaster. The regulatory response to this unfortunate event was realised in the Gangmaster Licensee Act 2004. The individuals now protected under this legislation are defined as ‘workers’, which will be shown to be a wider definition than that of employees.

4. The context of this seminar arises in advance of the forthcoming consideration of the definition of employee status in under the Health and Safety at Work Act 1974 by the Court of Appeal in the case of *R v Shab Nawaz Pola*.

5. The reason why the definition of employee is important under the 1974 Act is because it identifies who the relevant / responsible 'employer' is, as there is no separate test for employer within the 1974 Act. The definition of 'employee' therefore points us towards the individual (or other legal entity) upon whom all the primary health and safety duties are then imposed, (as the employer) starting with the 1974 Act and coming up to date with the more recent regulatory regime of statutory instruments [i.e. The Management of Health and Safety at Work Regulations 1999.]

The Health and Safety at Work Act 1974

6. The 1974 Act was a very important step in advancing health and safety regulation within the context of domestic legislation. The Act followed the publication of the Report of the Robens Committee (1972 Cmnd 5034). It was intended to consolidate the existing, but fragmented health and safety provision which was then in force. Some commentators argue that we are now in need of 'Robens 2' in order to both modernise and homogenize the existing regulatory framework.
7. The 1974 Act is, of course, the rock upon which so much of health and safety legislation is built. When it was enacted, the Act had contained within it, its own special provision, for the creation of any number of legislative offspring, namely Section 15 'Health and Safety Regulations'.
8. It is this Section which has given birth to so many of our current regulations. However it is the mixed genus of these regulations which has, in reality, created a certain tension, which has yet to be resolved, between our domestic health and safety legislation and EU sponsored legislation/directives.

9. On the one hand the Health and Safety at Work Act 1974 can be viewed as a continually evolving legislative framework or structure, which has adapted with time, to provide ever wider regulation in order to meet with the challenges our developing social, economic and industrial landscape.
10. On the other hand the Act may be seen as a rather stern legislative parent who keeps his/her 'daughters', the offspring from a second (European marriage), either firmly locked up, or if permitted to go out, only when modestly dressed in the restrictive clothing of the '74 Act, rather than the more cosmopolitan (European) fashions of the 1990's.
11. When we come to the key definitions, and therefore to defining duties, the question is going to be; will the courts, where there is opportunity to 'judicially legislate or interpret' embrace the intention and language behind the EU 'Framework Directive' [89/391] or will they stay with the more restrictive definitions of domestic legislation?

The Obligations on Employers

12. S.2(1) of the 1974 Act enacts general duties on employers with regards to their employees:-
"It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees."
13. S.3(1) of the 1974 Act requires employers to look after the well being of persons who are not employed by them:-
"It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, in so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety."
14. These duties only apply to an employer. The 1974 Act does not define what constitutes an employer. It is important to observe that it appears on its face that in order for s.3 to apply it is a pre-requisite that the Defendant 'employer' can actually be shown to employ someone in an approach that it consistent with the other statutory definitions contained in the Act.

Definition of Employee with the 1974 Act

15. S.53(1) states ‘employee’, “*means an individual who works under a contract of employment [or is treated by section 51A as being an employee], and related expressions shall be construed accordingly;*” As stated above, there is no definition of who or what constitutes an employer. The inference to be drawn from the reference to ‘related expressions’ guidance, which is to be found within the section, is that an ‘employer’ is therefore someone who employs ‘employees’ under a contract of employment.
16. Therefore in order to understand who is an employee, we must have regard to the definition of a ‘contract of employment’. S.53(1) defines a contract of employment as, “*a contract of employment or apprenticeship (whether express or implied and, if express, whether oral or in writing);*”
17. It may be that the legislature took the view that a contract of employment was a creature sufficiently well known to the law and it was therefore content to leave it to the courts to apply the principles established in the existing case law for determining when a contract of employment exists or does not exist. We believe that even if it was the case in 1974, it cannot be the case today. There is an obvious doubt as to whether it was ever a readily identifiable concept:-

'It is almost impossible to give a precise definition ... It is often easy to recognise a contract of [employment] when you see it, but difficult to say wherein the difference lies' (Stevenson Jordan and Harrison Ltd v MacDonald and Evans [1952] 1 TLR 101 at 111, per Denning LJ).

[The essential question is:] 'Was his contract a contract of [employment] within the meaning which an ordinary person would give to the words?' (Cassidy v Ministry of Health [1951] 2 KB 343 at 352, per Somervell LJ).

18. An interesting feature of this discussion, is that if one looks at the ‘**Preliminary**’ to the Act at s(1)(a) we see that the intention of the Act, is, inter alia, to ‘secure the health, safety and welfare of persons at work’. The reference to ‘persons’ is broader and wider than the more restrictive definition of employees. It is akin the European language of ‘workers’. However,

sections 2 and 3 of the Act, the most important provisions, define the legal tests in terms of employers and employees.

The European Dimension

19. Reference to statutory instruments and the EC Directives they seek to implement may assist the Courts in their interpretation of the extent of an employer's duties. The Management of Health and Safety at Work Regulations 1999 provides an excellent starting point. The '99 Regulations replaced and revoked the MHSW Regulations 1992, which had been intended to introduce many of the provisions of the Framework Directive [89/391].
20. The '99 Regulations also introduced part of the Temporary Workers Directive [June 1991], (which had in turn had introduced, in part, the EU Framework Directive's concept of 'temporary workers' to domestic legislation).
21. The Framework Directive's definition of employer within, Article 3, is much wider than that of the 1974 Act:-

For the purposes of this Directive, the following terms shall have the following meanings:

(a) worker: any person employed by an employer, including trainees and apprentices but excluding domestic servants;

(b) employer: any natural or legal person who has an employment relationship with the worker and has responsibility for the undertaking and/or establishment;

(c) workers' representative with specific responsibility for the safety and health of workers: any person elected, chosen or designated in accordance with national laws and/ or practices to represent workers where problems arise relating to the safety and health protection of workers at work;

22. When we look at Articles 3 and 5 of the Framework Directive we see reference to the concept of a broader 'employers' duty to 'workers'. The term employer is bound up in a definition which refers to 'an employment relationship'. This is a much broader and adaptable definition of the employer.
23. Articles 6 and 10 of the Framework Directive stipulate that there ought to be obligations on employers to assess risks to which workers are exposed and provide workers with information. Yet regulations 3 and 12 of the '99 Regulations still define those duties by reference to the definition of employer and employees under the 1974 Act.
24. In other words the wider duties hinted at within the context of social justice, the Employment Rights Act 1996 ("the ERA"), does not appear to have been adopted in the context of health and safety legislation. Indeed the ERA's definition seems limited to that Act only, see below.

The Concept of Workers

25. The term worker is deliberately wider than employee. It is capable of covering persons not engaged under a contract of employment, such a self-employed individuals and those whose status is ambiguous. It is designed to be more inclusive. The term originated in trade union statutes, it was adopted by the Wages Act 1984, so when this was consolidated into the ERA the latter Act had to have a definition of the term worker.
26. The wide applicability of the concept of worker has been recently seen in litigation concerning the Working Time Regulations 1998. Many workers albeit not employees have been keen to assert their rights to holiday pay. In *Byrne Bros (Farmwork) Ltd v Baird* [2002] IRLR 96 the EAT upheld an employment tribunal's finding that building workers working under a

subcontractors agreement which provided that no work was obligatory on either side, were workers even though they could have worked elsewhere. This case was later approved by the Court of Appeal in *Wright v Redrow Homes Ltd* [2004] EWCA Civ 469.

The Gangmasters (Licensing) Act 2004

27. The Gangmasters (Licensing) Act 2004 set up a regulatory regime whereby gangmasters providing labour now have to do so under a license provided by the Gangmasters Licensing Authority. It is an offence to provide labour to the agriculture or fishery industry without such a license, see s.3 and s.6.

28. S.4 of the 2004 Act widely defines gangmasters as follows:-

This section defines what is meant in this Act by a person acting as a gangmaster.

(2) A person (“A”) acts as a gangmaster if he supplies a worker to do work to which this Act applies for another person (“B”).

(3) For the purposes of subsection (2) it does not matter—

(a) whether the worker works under a contract with A or is supplied to him by another person,

(b) whether the worker is supplied directly under arrangements between A and B or indirectly under arrangements involving one or more intermediaries,

(c) whether A supplies the worker himself or procures that the worker is supplied,

(d) whether the work is done under the control of A, B or an intermediary,

(e) whether the work done for B is for the purposes of a business carried on by him or in connection with services provided by him to another person.

(4) A person (“A”) acts as a gangmaster if he uses a worker to do work to which this Act applies in connection with services provided by him to another person.

(5) A person (“A”) acts as a gangmaster if he uses a worker to do any of the following work to which this Act applies for the purposes of a business carried on by him—

(a) harvesting or otherwise gathering agricultural produce following—

(i) a sale, assignment or lease of produce to A, or

(ii) the making of any other agreement with A,

where the sale, assignment, lease or other agreement was entered into for the purpose of enabling the harvesting or gathering to take place;

(b) gathering shellfish;

(c) processing or packaging agricultural produce harvested or gathered as mentioned in paragraph (a).

In this subsection "agricultural produce" means any produce derived from agriculture.

(6) For the purposes of subsection (4) or (5) A shall be treated as using a worker to do work to which this Act applies if he makes arrangements under which the worker does the work—

(a) whether the worker works for A (or for another) or on his own account, and

(b) whether or not he works under a contract (with A or another).

(7) Regulations under section 3(5)(b) may provide for the application of subsections (5) and (6) above in relation to work that is work to which this Act applies by virtue of the regulations.

29. The definition of gangmaster is deliberately wide. Different considerations may apply to the rigid standards of the 1974 Act as opposed to the less onerous requirement to be a licensed gangmaster under the 2004. Nevertheless, the problem of unregulated migrant labour pervades the construction industry and the workers in that industry who do not attain employee status seem to be afforded less protection than workers within the agriculture or fisheries industries.

The Employment Rights Act 1996

30. S.230 of the Employment Rights Act 1996 provides:-

(1) In this Act “employee” means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

(2) In this Act “contract of employment” means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

(3) In this Act “worker” (except in the phrases “shop worker” and “betting worker”) means an individual who has entered into or works under (or, where the employment has ceased, worked under)—

(a) a contract of employment, or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;

and any reference to a worker’s contract shall be construed accordingly.

(4) In this Act “employer”, in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.

(5) In this Act “employment”—

(a) in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and

(b) in relation to a worker, means employment under his contract;

and “employed” shall be construed accordingly.

31. When drafting the ERA the legislature importantly took the view that it was not sufficient to provide only definitions of an employee and contract of employment. The definition of employer embodies the notion that an employee is capable of being defined by reference to

not just employees but also the wider concept of ‘workers’. An employer can be someone who employs workers. On its face this expands the definition of what constitutes an employer further than the 1974 Act.

32. Arguably, within the context of health and safety law, there is currently no clear definition of the terms ‘employer’ and ‘employee’. Furthermore, the current definition and its application are out of kilter with the European approach to health and safety law and the domestic interpretation of the employment relationship in the field of employment law.
33. All this may be about to change in the context of an appeal in the case *Regina v Shah Nawaz Pola*, which is due before the Court of Appeal shortly.

R v Shah Nawaz Pola

34. This case involved a prosecution of a man whom the Crown alleged had employed a number of migrant (Slovakian) workers in order to undertake building works on a large extension to his family home in Bradford.
35. The defendant was prosecuted in respect of a number of offences, including an offence under Section 2(1) of the Health and Safety at Work Act 1974. It was the Crown's case that these workers were the defendant’s ‘employees’ and that as such he, as their employer, owed them the usual statutory duties.
36. The defendant denied he was their employer. He claimed they were employed by his contractor and/or that they were not his employees because there was no evidence of the required ‘mutuality of obligations’, as between himself and the workers, such as could properly found a finding that there was a contract of employment between them.

37. The defendant was convicted after a trial, but he has now been given leave, upon a renewed application, to appeal his Section 2(1) conviction, and therefore to argue that the migrant workers were not the defendant's 'employees'. The appeal is to be held shortly.
38. The approach of the trial judge, when directing the jury, in the absence of a definition within the context of the Act itself, was to look to the definition of 'employee' in the context of employment law. We shall now examine the approach adopted by the tribunals and courts within this field.

Approaches in Employment Law

39. The editors of 'Harvey on Industrial Relations' observe that a satisfactory definition of an employee has proved elusive.

"A satisfactory definition of 'employee' has proved elusive. An employee is one who serves, in the sense that he puts himself and his labour at the disposal of another (his 'employer'), in return for some remuneration in cash or kind. The resulting contract is called a contract of employment. But it is difficult to define absolutely the degree of submission necessary to constitute 'employment'; and in any event not everyone who serves is necessarily an employee in the narrowest sense."

Policy

40. A particular problem with finding and applying a universal definition of the term 'employee' is that the courts have had to adopt an individual approach depending on the legislation which they are required to interpret. Many of these cases focus on the nature of the ongoing relationship, (if any,) between the claimant 'employee' and his or her 'employer'.
41. The focus is more often on the rights and entitlements of the worker/employee, rather than on the nature and/or the extent of the employer's statutory and/or common duties in respect of that individual.

The Tests for Employee Status

42. Interestingly it is the field of employment law which has generated the most appeal authorities on the issue of employee status as opposed to health and safety or personal injury. This is understandable given the right of unfair dismissal turns on whether a complainant can fit himself into the definition of employee under s.230, which mirrors the 1974 Act definition.
43. In order to cover the wide range of different scenarios the Courts have formulated a variety of different legal tests to apply when considering the employee status of an individual.
44. The starting point for most employment lawyers seeking to ascertain the existence of a contract of service is the case of *Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance* [1968] 2 QB 497. MacKenna J's judgment identified the criteria for determining whether a contract of employment exists the following way:

“A contract of service exists if 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 provisions of the contract are consistent with its being a contract of service.

...As to (i). There must be a wage or other remuneration. Otherwise there will be no consideration, and without consideration no contract of any kind. The servant must be obliged to provide his own work and skill. Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be.”

45. After the important concepts of personal service and control comes the most important determinative factor in construing whether a contract constitutes a contract of service or not, this is the concept of ‘mutuality of obligation’. In *Carmichael v National Power PLC* [2000] IRLR 43 the House of Lords held that there was “an absence of irreducible minimum of mutual

obligation necessary to create a contract of service” such a condition was a prerequisite for a finding that a contract of service existed. A mutuality of obligation is best understood as an obligation to provide work and obligation to undertake the work when provided.

46. In *James v Greenwich MBC* [200] UKEAT/0006/06/ZT Mr Justice Elias confirms the possibility that such an irreducible minimum of mutual obligations may continue to exist through an umbrella contract of employment where there are a number of contracts of service which are interrupted in time, see para 19.
47. Determining the existence of a contract of employment had proved particularly troublesome in agency cases where an employment agency contracts workers to work for the end service user. These tripartite relationships often require the Courts to examine the existence of any mutuality of obligation.

Discussion

48. However in the context of Regulatory and criminal law, it is we suggest important to look beyond the technical formalities of contract law and look at the realities of the relationship and the intention of Health and Safety at Work Act 1974 and the protection it was intended should be provided to ‘employees’.
49. In this regard we invite reference to the decision of Elias J in the EAT case of *Mrs. James v Redcats Brands Limited* [Transcript UKEAT/0475/06/DM] Whilst this case focused on whether the appellant was a ‘worker’ as defined by relevant minimum wage legislation, the learned judge undertook a very careful review of the authorities in relation to the issue of ‘mutuality of obligations’, including the House of Lords decision in the case *Carmichael v National Power* relied upon by the appellant. [See paragraphs 75 to 94 below]
50. At paragraph 84 Elias J. observed:

'Mutuality of obligation'.

78 ...The only obligations which in practice are likely to arise are some duty on the employer to offer work and some duty on the worker to accept work if offered. If there are no mutual obligations of any kind, there can be no contract. That is a simple principle of contract law, not unique to contracts of employment.

83. Since when working she is plainly providing a service, the two potentially relevant questions are whether she is obliged to perform the service personally; and whether she is doing so in the course of a business. The fact that there is no contract in place when she is not working – or that if there is, it is not one which constitutes her a worker – tells us nothing about her status when she is working. At that point there is a contract in place. **If the lack of any mutual obligations between engagements precluded a finding that an individual was a worker when carrying out work pursuant to an engagement, it would severely undermine the protection which the minimum wage legislation is designed to confer.**

84. Many casual or seasonal workers, such as waiters or fruit pickers or casual building labourers, will periodically work for the same employer but often neither party has any obligations to the other in the gaps or intervals between engagements. There is no reason in logic or justice why the lack of worker status in the gaps should have any bearing on the status when working. There may be no overarching or umbrella contract, and therefore no employment status in the gaps, but that does not preclude such a status during the period of work. **If casual and seasonal workers were to be denied worker status when actually working because of their lack of any such status when not working, that would remove the protection of minimum wage and other basic protections from the groups of workers most in need of it.**

85. Accordingly, I would respectfully dissent from the decision of the EAT in the Bly case. The facts were that a labourer was employed as what was termed a "self employed sub-contractor". The employers employed some 220 such people. It was accepted that he was not an employee. He was subject to a carefully drafted contract under which he was under no obligation at any time to do anything for the employer and nor they for him.

86. The issue was whether he was a worker under the Working Time Regulations 1998 when he was at work. A majority of the EAT considered itself bound by Mingeley to conclude that the contract did not confer upon him the status of a worker even when work was being performed. The employer was not obliged to offer work nor the worker to accept it and that was considered fatal to his status as a limb (b) worker. I respectfully disagree. For reasons I have given, I do not accept that Mingeley has anything to say about the status of the individual once work is actually being performed.

87. Furthermore, in my judgment the decision in Bly is inconsistent with at least two decisions of the higher courts. **In the Carmichael case the question was whether certain guides could be said to be employed**

under contracts of employment when they were not actually at work. The House of Lords held that they could not since there was no mutuality of obligation in such periods. **However, Lord Hoffmann observed in his speech (p.1235) that "it may well be that, when performing that work, they were being employed."** If Bly were correct, they could not be so employed.

88. Perhaps even more directly on point is the decision of the Court of Appeal in *McMeechan v Secretary of State for Employment* [1997] ICR 549. The question there was whether the worker was an employee of an employment agency. There was no obligation on the employee to accept any particular offer of employment that might be made or any obligation to offer work to him. The worker did, however, carry out engagements given by the agency. The agency went into insolvency and the question was whether he was an employee so as to recover against the Secretary of State pursuant to the insolvency provisions in the *Employment Rights Act*.

89. Waite LJ, with whose judgment Potter and McCowan LJJ agreed, held that there was no inconsistency in finding that **there was a contract of employment for particular contractual stints even though there was no continuing overarching contract between the agency and the individual because of a lack of mutual obligations in the period between engagements.** Waite LJ put the matter as follows (page 563):

"In a case like the present where the money claimed is related to a single stint served to one individual client, it is logical to relate the claim to employment status to the particular job of work in respect of which payment is being sought. I note that the editors of *Harvey on Industrial Relations and Employment Law* appear to take a similar view, where they suggest, at paragraph A53: **"The better view is not whether the casual worker is obliged to turn up for, or do, the work but rather if he turns up for, and does the work, whether he does so under a contract of service or for services."**

90. I think a useful analogy can be drawn with the decision of the Supreme Court of the United States in *US v Silk* (1946) 331 US 704. This case was considered by MacKenna J in the seminal case of *Ready Mix Concrete (South East) Ltd v Minister of Pensions & National Insurance* [1968] 2 QB 497 at 521. *Silk* sold coal by retail. They used un-loaders to move coal from railway vans into bins. The un-loaders were under no obligation to do any work at all. They came to the yard when they wished. They were given a wagon to unload and somewhere to put the coal. They provided their own tools and they were paid by reference to the amount of coal shifted.

91. The issue was whether they had the protection afforded by the *Social Security Act 1935*. That depended on whether they were employees. All nine judges held that they were, thereby disagreeing with the two lower courts. The Court said this:

"That the unloaders did not work regularly is not significant. They did work in the course of the employer's trade or business. This brings them under the coverage of the Act. They are of the group that the Social Security Act was intended to aid."

92. The fact that the unloaders had no relationship with Silk when they were not working, and that they were entirely free to work or not, did not affect their status when working. Any other conclusion would have frustrated the operation of the Act. In my judgment that conclusion is equally apt here.

93. Accordingly, in my view the fact that there is a lack of any mutual obligations when no work is being performed is of little, if any, significance when determining the status of the individual when work is performed. At most it is merely one of the characteristics of the relationship which may be taken into account when considering the contract in context. It does not preclude a finding that the individual was a worker, or indeed an employee, when actually at work.

51. It is interesting to note that Elias J. has followed this with a consistent ruling in the appropriately named case of *Consistent Group v Kalwark* [2007] IRLR 560. We shall have to wait and see whether these decision attract attention from the Court of Appeal, which has been trying to 'put this issue to bed' for some time.

52. Elias J.'s review of the authority in *Redcats* shows that:-

- (a) There may be breaks in the periods of engagement but the relationship can still defined as a contract of service if there remains a mutuality of obligation between the break periods.
- (b) If there is no mutuality between the break periods, that does not negate the existence of a series of successive contracts of service arising each time the employee undertakes to work on a particular engagement for the employer.

Policy

53. The editors of Harvey point out that different tribunals may reach different conclusions as to status, on the same facts, because the issues are being litigated for different purposes. Here it is important to remember the role of the jury in the context of a criminal trial, is that of being the tribunal of fact.
54. It is also important to consider whether or not it is fair and reasonable to conclude that it was the intention of Parliament, that this jury, (depending upon the facts as they may find them to be, in due course), should be constrained to determine the nature and/or extent of the duty imposed upon the defendant, by virtue of Sections 2(1) and 3(1) of the Health and Safety Act of 1974, only by reference to the definitions of 'employer/employee' made in the civil jurisdiction.
55. Arguably it should be a matter of fact for the jury upon which issue they have heard sufficient evidence (referred to above) upon which they could conclude that the defendant was an 'employer' during the relevant periods.

The Employment Rights Act 1996 Revisited

56. The ERA provides protection for employees not to be subjected to 'any detriment' by his employer done on the grounds that he acted in the capacity as a health and safety representative, s.4(1). This protection only applies to an employee. The ERA does not seek to extend the nature or duty of care which an employer must be presumed to owe workers.
57. The question arises whether the Courts can consider the wider definition of an employer within the meaning of the ERA when interpreting who constitutes an employer within a health and safety context of the 1974 Act. In short, if an act of parliament is unclear, can the Courts interpret the act by reference to a later statute's definition of the same terms or may only Parliament address the perceived lacuna with fresh legislation?

Statutory Interpretation

58. In *R (Haw) v Secretary for the Home Department and the Commissioner of Police for the Metropolis* [2005] EWCA Civ 532, the Court of Appeal were keen to stress that when interpreting statute, “*The question is one of construction of the Act. Like all questions of construction, this question must be answered by considering the statutory language in its context, which of course includes the purpose of the Act. The search is for the meaning intended by Parliament. The language used by Parliament is of central importance but that does not mean that it must always be construed literally. **The meaning of language always depends upon its particular context.***”
59. The case of *Haw* confirmed that the task of the Court is to give effect to the intention of Parliament which should be construed objectively. It also considered the maxim of doubtful penalty when construing legislation, namely that an individual should not be penalized except under clear law.
60. In *Inco Europe Limited v First Choice Distribution* [2000] 1 WLR 586 the House of Lords held that before reading words into an act of Parliament the Courts must be keenly aware of the interpretative not legislative role. If the Court is to insert words into a statute it must be abundantly clear of:-
- (a) The intended purpose of the provision or statute in question.
 - (b) The inadvertence of the draftsman failed to give effect to the intention of Parliament.
 - (c) The substance, not exact words, of the provision Parliament would have made had the error been noticed.
61. Lord Nicholls also observed any insertion must ‘not be too big or too much at variance with the language used by the legislature.’ Furthermore, in penal legislation a stricter interpretation of the legislation is more appropriate.
62. In the case of *CD Northern Limited v GA Hardie* EAT [2000], Lindsay J. held that only Parliament could extend the definition of ‘employer’ to include ‘associated employer’. The

Claimant's claim had been rejected as falling within an old provision that provided an exemption to the application of the Disability Discrimination Act 1995 for small employers, less than 20 employees. The Claimant sought to argue on appeal that an 'associated employer' took the total number of employees over the requisite 20 figure but the legislation did not provide for the Court to consider associated employers. Lindsay J. held even if there were differences or perceived inconsistencies between the different discrimination acts on this point, which there weren't, there was no presumption that the Court should seek to interpret one Act so as to harmonise its definitions in line with similar discrimination statutes.

Common Law Duties of Care

63. Examination of the courts approach in personal injury litigation is perhaps a more helpful one when considering regulatory framework of the Health and Safety at Work Act 1974 and how it is intended to operate, from a policy point of view.
64. See in particular, the case of *Lane v Shire Roofing CA [1995] PIQR 417*. The Claimant sustained brain damage on account of falling during the course of working as a roofer. He sought to claim damages against his employer who in turn denied an employment relationship and accordingly any duty of care owed to the Claimant.
65. This case involved a claim for personal injury loss and damage arising out of the plaintiff's undertaking of specified roofing works, in respect of a residential property, on behalf of the defendant. Aside from the issue of liability, there was an important issue, as to whether or not the Plaintiff was working as the defendant's employee or whether he was acting as independent contractor.
66. The Court of Appeal found, contrary to the judge at first instance, that he was an employee. As *Clerk & Lindsell* remarks at Chapter 13-03, "the public interest in safety standard will incline courts to recognize a worker as an employee rather than an independent contractor."

67. The trial judge found the following four points militated against a finding that he was an employee:-

1. The Claimant had his own business.
2. The Claimant worked without supervision.
3. There was no guarantee of continuing work.
4. The Claimant paid his own tax.

68. Henry LJ held:-

Each of those four reasons given by the judge would apply equally to the work being done under a short-term single job contract of employment. All of them concentrate on what Mr. Whittaker wanted, and not on whose business it was. Mr. Matthews, for the respondents, rightly distinguishes between a Ferguson v. Dawson situation, where an employer engages men on "the lump" to do labouring work (where the men are clearly employees, whatever their tax status may be), and when a specialist sub-contractor is employed to perform some part of a general building contract. That team or individual clearly will be an independent contractor. He submits that the appellant in this case falls somewhere in between. With that I would agree, but would put this case substantially nearer "the lump" than the specialist sub-contractor. Though the degree of control that Mr. Whittaker would use would depend on the need he felt to supervise and direct the appellant (who was just someone answering the advertisement) the question "Whose business was it?" in relation to the Sonning Common job could only in my judgment be answered by saying that it was the respondents' business and not the appellant's. In my judgment therefore they owed the duties of employers to the appellant.

69. What Henry L.J. did in *Lane v Shire Sheeting* was to cut the 'Gordian Knot', of how to identify and/or define who or is not an 'employee', (by avoiding the requirement of having to make findings in relation to the so called 'badges of employment 'etc.,) and to approach the case on the basis that the defendant should be treated as owing the plaintiff the duties of an employer.

70. This approach has been followed by Garland J in *Albert Donovan Davies v Earldene Maintenance (1997)* in which he stated: 'I hold, as a matter of law, following LANE, that the Plaintiff, for the purposes of the health and safety legislation, was employed by SOS'.

71. This approach was also followed by HHJ Simon Hawkworth Q.C., sitting as a Deputy High Court Judge, in the case of *Derrick Whitcombe v Clarence Baker (2000)*. This was a case where the

defendant farmer employed the plaintiff to assist him, on an ad hoc basis, to lead bales of straw using a tractor and trailer. The Plaintiff fell from the top of a loaded trailer and sustained serious spinal injuries.

72. The learned judge then considered the judgment of Henry L.J. in Lane v Shire Roofing and he observed at page 4 of his judgment:

‘While [Henry LJ was] recognising the control test was not decisive, “these questions must be asked in the context of who is responsible for the overall safety of the men doing the work in question” Again it was recognised that the answer to such question would not be decisive “though it may be indicative”’

73. The judge found, having reviewed the evidence, that the Plaintiff was neither an independent contractor nor a self-employed person, he was, in effect a labourer hired for the day. On this basis he found that there did exist, as a matter of law, the relationship of employer/employee between the claimant and the defendant.

Conclusions

74. We have highlighted that the 1974 Act lacks a specific definition of who is an employer. Therefore the duties owed under the Act and the enforcement of those duties in criminal law are significantly hampered by a lacuna which enables defendant businesses or individuals to argue that there were an employer within the meaning of the Act.
75. The constriction in the 1974 Act that an employer is only someone who employs employees makes the application of the law in the criminal context uncertain. The defendant is at the mercy of the jury in finding whether or not he is an employer who employed employees under a contract of service. This ought to be contrasted by the fact that there are a slew of authorities at all levels of the appellate courts wrestling with this very issue.

76. A review of the law and the authorities which seek to interpret it, illustrates how the courts have been prepared, in certain circumstances, to step round the strict technicalities of the law, (both statutory and common law, each of which impose complex definitions on tribunals of fact and law), and to decide cases not solely on their specific facts, but by reference to an underlying social policy, which is to afford protection to those who are vulnerable and are in need of protection¹.
77. The editors of Redgrave [at paragraph 3.41] refer to an unreported case, *R v Secretary of State, ex parte NACODS CO/2576/93* in which it was held that it was Parliament and not for the courts to determine whether or not regulations made under Section 15 of the Health and Safety at Work Act 1974, 'were designed to maintain or improve' health and safety standards in earlier legislation, as required by Section 1(2) of the Health and Safety at Work Act 1974, which is, of course, where we started this whole discussion.
78. One way of dealing with the current situation would be the introduction of an amendment to the 1974 Act, to include a definition of employer in similar terms to its definition within the ERA. Furthermore, the duties owed under s.2(1) could to be extended to workers, this would provide protection for migrant workers who lack a consistent pattern of employment but are working in dangerous environments.
79. We have identified potential solutions to the lacuna posed by the 1974 Act by the application of Courts inferring successive contracts where the work undertaken is discontinuous.
80. We live in interesting times and we shall all have to wait and see how this area develops in future and whether we get some more clarity in the near future, either by the two developing strands of our law binding ever closer together (perhaps through further domestic legislation) or by one choking the other off (perhaps by judicial pronouncement).

¹ It is interesting that two of the cases referred to above, make special reference to the case of United States of America v Silk, and the importance of the social policy behind the decision that case, which dates back to 1946

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