‘WORKER’ STATUS, THE ‘CONTRACT PERSONALLY TO EXECUTE WORK OR LABOUR’ AND THE STATUS OF AGENCY WORKERS

Preparation:

In order to prepare for this seminar you should read from one or two of the textbooks in the general reading listed below. You should then look at and consider the five questions that will be discussed. For each question you should read any specific material cited and undertake any specific tasks set.

General Reading:
Selwyn chapters 1 & 2 & pp. 88-94*
Deakin and Morris chapters 2 & 3 & pp.217-255*
Painter and Holmes chapters 1 & 2 & pp. 97-111 *
Honeyball & Bowers chapters 2 & 3*
Pitt, pp. 117-129 & chapter 3*
Smith & Wood chapter 2 & pp.115-120*

Advanced Reading:
D. Brodie, The Employment Contract: Legal Principles, Drafting, And Interpretation (Oxford: OUP, 2005) at 19 - 22*
D. Brodie, The Contract of Employment (Thomson/W Green, SULI, 2008) chapters 1, 2, 3 & 6

Journal Reading:
Guy Davidov, “Who is a Worker?” (2005) 34 Industrial Law Journal 57*

Question 1.

How do the Employment Tribunals and Courts decide whether someone providing a personal service is a ‘worker’?

Specific Reading:
Guy Davidov, “Who is a Worker?” (2005) 34 Industrial Law Journal 57*  

Byrne Brothers (Formwork) Limited v Baird [2002] I.R.L.R. 96*  
Redrow Homes (Yorkshire) Ltd v Wright [2004] IRLR 720  
James v Redcats (Brands) Ltd. [2007] IRLR 296*  
Redrow Homes (Yorkshire) Ltd v Buckborough [2009] IRLR 34  
Community Dental Centres Ltd. v Sultan-Darmon [2010] IRLR 1024

Specific Task

List the statutes and subordinate legislation which confer rights on workers.

Question 2.

How does the definition of ‘worker’ in the National Minimum Wage Act 1998 and the Working Time Regulations 1998 differ from: -  
(i) the definition of a ‘worker’ for the purposes of Article 157 of the Treaty on the Functioning of the European Union?  
(ii) The definition of a ‘worker’ for the purposes of Part IVA of the Employment Rights Act 1996?  

Why is this significant?

Specific Reading:
The Working Time Regulations 1998 (SI 1998/1833), Reg. 2(1)  
The National Minimum Wage Act 1998, s. 54(3)  
The Employment Rights Act 1996, s. 43K
Question 3.

How do the Employment Tribunals and Courts decide whether someone providing a personal service is working on the basis of a ‘contract personally to execute work or labour’?

Specific Reading:
Mingeley v Pennock & Ivory t/a Amber Cars [2004] IRLR 373*
Muschett v HM Prison Service [2010] IRLR 451*

Specific Task

List the statutes and subordinate legislation which confer rights on persons who have entered into a ‘contract personally to execute work or labour’.

Question 4.

Are agency workers ‘employees’? If so, who is their employer – the recruitment agency or the end-user of their services? Is the existing legal position clear? Will the Agency Workers’ Regulations 2010 (SI 2010/93) resolve the difficult legal issues surrounding the identity of the employer of an agency worker?

Specific Reading:


Motorola Ltd. v Davidson & Melville Craig Ltd. [2001] IRLR 4
Montgomery v Johnson Underwood Ltd [2001] IRLR 269*
Franks v Reuters Ltd. [2003] IRLR 423
Dacas v Brook Street Bureau [2004] IRLR 358*
Cable & Wireless v Muscat [2006] IRLR 354*
James v Greenwich Council [2008] IRLR 302*
Consistent Group Ltd. v Kalwak [2008] IRLR 505
Muschett v HM Prison Service [2010] IRLR 451*
Tilson v Alstom Transport [2011] IRLR 169
Question 5.

Are the contract of employment, 'worker' contract and/or the 'contract to personally execute work or labour' sufficiently robust vehicles (i) to cope with the growth in atypical working in the UK labour market and (ii) for the purposes of the provision of employment rights?

Specific Reading:
Simon Honeyball, "Employment Law and the Primacy of Contract" (1989) 18 Industrial Law Journal 97*
M. Freedland, “Rethinking the Personal Work Contract” (2005) Current Legal Problems 517*
Worker’ V. ‘Employee’

- 1 year claim period for unfair dismissal.
  if <1 year service may be better to prove ‘worker’
  RATHER than ‘employee’

- Holiday pay
  Less stringent test for ‘worker’

Question 1
How do the ETs and Courts decide whether someone providing a personal service is a ‘worker’?

- The presence of mutuality of obligation
- Personal service on the part of the individual providing services to another which must be the dominant feature of the contract (James v Redcats (Brands) Ltd. [2007] IRLR 296).
- The recipient of the services must not be the client or customer of the individual providing the services.

s.296(1) of Trade Union and Labour Relations (Consolidation) Act 1992
s.230(3) of Employment Rights Act 1996
reg.2(1) of the Working Time Regulations 1998
s.54(3) of the National Minimum Wage Act 1998
s.83 of Equality Act 2010

s.296(1) of Trade Union and Labour Relations (Consolidation) Act 1992
296.— Meaning of “worker” and related expressions.
(1) In this Act “worker” means an individual who works, or normally works or seeks to work—
  (a) under a contract of employment, or
  (b) under any other contract whereby he undertakes to do or perform personally any work or services for another party to the contract who is not a professional client of his, or
  (c) in employment under or for the purposes of a government department (otherwise than as a member of the naval, military or air forces of the Crown) in so far as such employment does not fall within paragraph (a) or (b) above.

s.230(3) of Employment Rights Act 1996
230.— Employees, workers etc.
(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.

**reg.2(1) of the Working Time Regulations 1998**
“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;

**s. 54(3) of the National Minimum Wage Act 1998**
(3) In this Act “worker” (except in the phrases “agency worker” and “home 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.

*James v Redcats (Brands) Ltd.* [2007] IRLR 296
Review of ‘worker’ status.

**s.83(2) of Equality Act 2010**
(2) “Employment” means—
(a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work;
(b) Crown employment;
(c) employment as a relevant member of the House of Commons staff;
(d) employment as a relevant member of the House of Lords staff.)

*Byrne Brothers (Formwork) Limited v Baird* [2002] I.R.L.R. 96
“There must be a personal obligation to perform the work or labour, and that performance must be the dominant purpose of the contract (Mingeley v Pennock & Ivory t/a Amber Cars [2004] IRLR 373). The fact that an employer permits the provision of a substitute worker does not take that contract outside the provision as long as the right to provide a replacement is limited in some way.” (Selwyn, 4.213)

“The claimant was a self-employed worker employed under a sub-contractor’s agreement. He was taxed under Schedule D (self-employed).
The employer was not obliged to do the work personally, although he was paid on a time basis. He claimed holiday pay for the Christmas and New Year closure under Working Time Regulations.

Held (ET): Upheld claim

Held (EAT): Confirmed the decision

As a 'labour-only sub-contractor' he undertook personally to provide work or services, and he did not work as part of 'any profession or business undertaking'. Thus, he was a worker within the meaning of the regulations.” (Selwyn, 7.55)

“Summary: A number of carpenters who had worked exclusively for their employer for a significant and indefinite period and had been paid on a time basis were “workers” for the purposes of the Working Time Regulations 1998 Reg.2(1)(b) notwithstanding that they had been labelled as "subcontractors" and had been taxed on a self-employed basis.

Abstract: BB, contractors, appealed against the decision of an ET to uphold a claim for holiday pay by its subcontractor, B. B was one of a number of workers who worked exclusively for BB as carpenters or labourers at a particular site. The workers were required to sign a subcontractor's agreement which provided that they were not entitled to holiday or sick pay. There was no obligation on BB to offer work and the workers were not obliged to accept an offer of work. Where a worker was unable to carry out the work the agreement provided that he could at his own expense provide an alternate worker but only with the express consent of BB. An ET found that they were workers within the meaning of the Working Time Regulations 1998 Reg.2(1) because they were obliged to perform work or services personally and they were not, as individuals, business undertakings.

Held: Dismissing the appeal, that the limited provision permitting the substitution of an alternate worker was NOT inconsistent with an obligation to provide services personally, and self-employed workers in the construction industry were exactly the sort of worker whom the Regulations were designed to protect. Whether someone was a business undertaking or a worker was a matter of fact in each case.”

James v Redcats (Brands) Ltd. [2007] IRLR 296

PERSONAL SERVICE on part of the individual providing the services to another Which must be the dominant feature of the contract.

“Summary: The appellant courier (J) appealed against a decision of an ET that she was not a worker or home worker employed by the respondent company (R) within the meaning of the National Minimum Wage Act 1998 s.54(3) and s.35 respectively.

Abstract: J had delivered parcels to private addresses for R. J had used her own car to make the deliveries and she had the right to deliver parcels for other enterprises. However, R had set the deadlines for J's deliveries and R had given detailed instructions on how the work was to be carried out. The ET held that there was only a contract to provide services between J and R, as there was no mutuality of obligation, as R gave no guarantee as to the volume of work and J could have declined work. J submitted that the tribunal erred in finding that there was no mutuality of obligation. She argued that she could not in fact decline work at will, and that the contract impliedly obliged R to provide J with parcels if there were any for delivery in her area.

Held: The lack of any mutual obligations when no work was being performed was of little, if any, significance when determining the status of the individual when work was performed. 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 because of a lack