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 four questions which will be discussed in class. For each question you should read any specific material cited and undertake any specific tasks set.

NB that all references to “ILJ” throughout this handbook are a reference to the Industrial Law Journal – see http://ilj.oxfordjournals.org/

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 1- 19 and 22 - 23*
D. Brodie, The Contract of Employment (Thomson/W Green, SULI, 2008) chapters 1, 2, 3 & 6

Journal Reading:
Simon Honeyball, "Employment Law and the Primacy of Contract" (1989) 18 Industrial Law Journal 97*
Questions to Consider:

Question 1.

What institutions are important in labour law?

Question 2.

Is employment best viewed as a contract or a status? What is the distinction between the two?

Is the contract of employment purely (a) an exchange transaction whereby work is exchanged for remuneration or payment, i.e. the 'work-wage' bargain or (b) a relational contract which delimits the relationship between legal persons over a period of time?

Specific Reading:

Question 3.

Consider how the law decides whether a person is an employee. Is there one test or more than one? What are the three ‘basic ingredients’ of the contract of employment? How are employees distinguished from independent contractors?

Specific Reading:
Selwyn chapter 2*
Deakin and Morris chapters pp.109-144*
General

Stevenson, Jordan & Harrison Limited v MacDonald & Evans Ltd [1952] 1 T. L.R. 101

The “tests”:

Integration - the Denning test
Stevenson, Jordan & Harrison Limited v MacDonald & Evans Ltd. [1952] 1 T. L.R. 101

Personal nature of service
MacFarlane v Glasgow City Council [2001] IRLR 7
Staffordshire Sentinel Newspapers Ltd v Potter [2004] IRLR 752
Real Time Civil Engineering Ltd. v Callaghan [2006] All ER (D) 222 (Jan)
MPG Contracts Ltd. v England [2009] All ER (D) 92 (May)

Control
Montgomery v Johnson Underwood Ltd [2001] IRLR 269

The economic reality/business autonomy test
Market Investigations Ltd v Minister of Social Security [1969] 2 QB 173

Mutuality or reciprocity of Obligation
Nethermere (St Neots) Limited v Gardiner & Taverna [1984] IRLR 240, CA
O’Kelly v Trusthouse Forte plc [1983] IRLR 369
Cotswold Developments Construction Ltd. v Williams [2006] IRLR 181
Cornwall County Council v Prater [2006] IRLR 362
R v Pola [2009] EWCA Crim 655

The ‘Multiple’ Test
Hall (inspector of Taxes) v Lorimer [1994] ICR 218 (CA)

Question 4.

In what circumstances will the courts disregard the written express terms of a document and find that it bears no relation to reality on the basis that it is a ‘sham’? This is the so-called 'disguised employment'.
Specific Reading:
Anne Davies, "Sensible Thinking About Sham Transactions: Protectacoat Firthglow Ltd v Szilagyi" (2009) 38 Industrial Law Journal 318
Alan Bogg, "Sham Self-Employment in the Court of Appeal" (2010) 126 Law Quarterly Review 166*

Snook v London and West Riding Investments Ltd. [1967] 2 QB 786*
Autoclenz Ltd v Belcher [2011] UKSC 41*

Question 5.

Compare the employee with the following: -

1. Company director
2. Company shareholder
3. Distributor
4. Agent
5. Franchisee
6. Partner (Fixed Share or Equity)
7. Designated Member of an LLP
8. Volunteer
9. Sub Post Office Worker
**Performing Rights Society v Buecher 1924 KB**
NATURE + DEGREE of CONTROL

**Collins v Herts County Council 1947 KB**
Distinction between contract of services (what is to be done AND how it is to be done) \( \vee \) contract for services (what is to be done only)

**Hillyer v Governors of St Bartholemew’s Hospital 1909**
SURGEON CASE
Negligence in operating theatre
Claim for delict
Surgeons in the operating theatre were NOT employEes
CONTROL
(Policy rather than principle
Hospitals were charities
Potential consequences for hospitals)

“The plaintiff selected a consultant who negligently performed an operation.

**Held:** Hospital NOT liable, 
because the consultant was an INDEPENDENT who was merely using the facilities of the hospital.” (Selwyn, 2.54)

EmployER often hire somebody to do something they couldn’t do themselves.

**Cassidy v Minister of Health**
SURGEON CASE
Contract of service (employEE) – what would the ordinary person say?
“Ordinary Person” test = UNRELIABLE

ULTIMATE RIGHT OF CONTROL = DISMISSAL
(only employEEs can be dismissed).

“A resident surgeon operated negligently on the plaintiff.

**Held:** The hospital board, as employER, was LIABLE” (Selwyn, 2.54)
Question 1
What institutions are important in labour law?

- The Advisory, Conciliation and Arbitration Service (ACAS)
  “Charged with the general duty of improvement of industrial relations.” *(Selwyn, 1.1)*
  Intervention between EmployEE V. EmployER in ET (mediator)
  EmployER often prepared to settle outside of court.
  Preventing unrest via Codes of Practice
  NOT legally binding.

- Central Arbitration Committee (CAS)
  - “A central role in the new statutory scheme for the recognition of trade unions, created by the *Employment Relations Act 1999*.
  - Also resolves disputes concerning the provision of information, consultation and participation arising from European Public Limited-Liability Company (Employee Involvement) (Great Britain) Regulations 2009 and
  - Can act as a voluntary arbitration body following a reference from ACAS under *TULR(C)A, s.212*. *(Selwyn, 1.19)*

- Employment Appeal Tribunal (EAT)
  - “To hear appeals on points of law from decisions of Employment Tribunals under the various statutory provisions set out in *s.21 of the Employment Tribunals Act 1996*, which generally cover most, but not all, of the jurisdiction enjoyed by employment tribunals;
  - To hear appeals from the decisions of the Certification Officer on various matters arising out of the *TULR(C)A*.
  - To hear appeals from the decisions of the Central Arbitration Committee arising from the Transitional Information and Consultation of Employees Regulations 1999, the Information and Consultation of Employees Regulations 2004 and the European Regulations 2004 and the European Public Limited-Liability Company (Employee Involvement) (Great Britain) Regulations 2009.” *(Selwyn, 1.21)*

- Employment Tribunals (ET)
  (Central Office of Employment Tribunals (COET))
  The ETs are inferior courts 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.

- Industrial Training Boards
  “Provide for industrial and commercial training of persons who are over school-leaving age.” *(Selwyn, 1.46)*
• Equality and Human Rights Commission (EHRC)
  “Fundamental duty to create a society in which:
  o People’s ability to achieve their potential is not limited by prejudice or discrimination;
  o There is respect for and protection of each individual’s human rights;
  o There is respect for the dignity and worth of each individual;
  o Each individual has an equal opportunity to participate in society; and
  o There is a mutual respect between groups based on understanding and valuing of diversity and on shared respect and human rights.” (Selwyn, 1.48)

• Health and Safety Executive
  “Duty to do such things and make such arrangements as it considers appropriate for the general purposes of the Health and Safety at Work Act 1974.” (Selwyn, 1.52)

• Low Pay Commission
  “Responsible for recommending to the Secretary of State the level of the national minimum wage.” (Selwyn, 1.55)

Question 2
Is employment best viewed as a contract or a status?
What is the distinction between the two?
Is the contract of employment purely
(a) an exchange transaction whereby work is exchanged for remuneration or payment, i.e. the ‘work-wage’ bargain or
(b) a relational contract which delimits the relationship between legal persons over a period of time?