CHAPTER 3
The Employment Relationship

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I. Introduction

[3–01] Work remains one of the most importance sources of identity, meaning and social affiliation in contemporary life.[1] The modern workplace is a locus of seemingly constant change and, as a result, people increasingly work under a variety of arrangements. This chapter looks at how the law regulates the formation and definition of the employment relationship. As we saw in the previous chapter, the common law has been an important driving force in the development of many employment law principles. In particular, the employment relationship has traditionally been founded on the individual contract of employment, with the result that the principles of contract law developed by the courts have had a significant impact on how the boundaries of the employment relationship have been defined. In the next chapter, we will consider in detail the formation, content and interpretation of the typical contract of employment. Here, however, we are concerned with how the law categorises relations in the employment sphere.

[1] Doherty, "When the Working Day is Through: the End of Work as Identity?" (2009) 23(1) *Work, Employment and Society* 84.

II. Classifying the "Employee"

[3–02] Kahn-Freund described the contract of employment as the cornerstone of the modern labour law system.[2] Great scope was given to the parties themselves by the common law courts to define the scope of the employment contract and, while this freedom is now circumscribed by the provisions of the Constitution, European law and domestic legislation, the result is that the "starting point for the analysis of legal obligations arising in the context of working relations must always be the terms of any contractual arrangement".[3] As we will see further below, this has resulted in the courts constructing a standard model of rules based on a "binary divide" between employment and self-employment, between subordinated labour (referred to as "servants" in the older case law) and independent or autonomous work relations (which would include work done by what we refer to nowadays as "independent contractors").[4] Those who fell within the former category could claim to work under a *contract of employment*, while others, who worked under a *contract for services*, fell outside of the "employee" categorisation. The primary basis for such a distinction was (or, at least, became in relatively modern times) that those in self-employment, those in business on their own, needed less protection against unemployment, sickness and old age than those in a "master-servant" relationship.

[3–03] It is important to note that this "binary divide" has come in for criticism in recent years, given the increasingly differentiated organisation of working life in the post-industrial era.[5] Freedland, in particular, has heavily criticised the "strict legal dichotomy" between the employed and self-employed.[6] He has powerfully advocated a conceptual shift away from the contract of employment model to a model based on what he refers to as a "personal work nexus". This refers to the

> "connection or connections, link or links, between a person providing a service personally and the persons, organisations or enterprises who or which are involved in the arrangements for, or incidental to, the personal work in question".[7]

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[2] Kahn-Freund, *Labour and the Law* (Stevens, London, 1977).

[3] Collins *et al*, *Labour Law: Text and Materials* (2nd ed, Hart, Oxford, 2005), p 70.

[4] Deakin, "Does the 'Personal Employment Contract' Provide a Basis for the Reunification of Employment Law?" (2007) 36(1) ILJ 68, at p 70.

[5] See Deakin and Wilkinson, *The Law of the Labour Market* (Oxford University Press, Oxford, 2005); Davidov, "Who is a Worker?" (2005) 34(1) ILJ 57; Barmes, "The Continuing Conceptual Crisis in the Common Law of the Contract of Employment" (2004) 67(3) MLR 435; Grandi, "Would Europe Benefit From the Adoption of a Comprehensive Definition of the term 'Employee' Applicable in All Relevant Legislative Modes?" (2008) 24(4) Int J. Comp LLIR 495. For debates on the nature, form and implications of contemporary work organisation see, for example, Beck, *The Brave New World of Work* (Polity, Cambridge, 2000); Green, *Demanding Work: The Paradox of Job Quality in an Affluent Economy* (Princeton University Press, Princeton, 2006); Fevre, "Employment Insecurity and Social Theory: The Power of Nightmares"' (2007) 21(3) *Work, Employment and Society* 517; and Doherty, *op. cit*.

[6] Freedland, *The Personal Employment Contract* (Oxford University Press, Oxford, 2003), p 22.

[7] Freedland, "From the Contract of Employment to the Personal Work Nexus" (2006) 35(1) ILJ 1, p 16.

Essentially, Freedland argues that the employment relationship should be reconceptualised so that employment law recognises (and offers protection to) a wider set of relationships categorised by personal service and economic dependence on the part of those working (even where these do not conform to the traditional model of contractual arrangement). This would necessitate the expansion of the idea of the traditional "employer" to include tri-lateral or multi-lateral arrangements, whereby different "employing entities" may have different and overlapping obligations to the same worker (as is the case in relation to agency work, for example).[8]

[3–04] This debate has arisen, in large part, due to concerns about the conceptual and practical difficulties of drawing the distinction between a contract *of* service and a contract *for* services. This is exacerbated by the fact that there is no comprehensive statutory definition of either "employee" or "contract of employment". Instead, it has been left largely to the courts to define these concepts, a task with which, as we will see, they have struggled.

[3–05] However, the debate is also significant as many important implications flow from the classification of "employee". First, much employment legislation (particularly protective legislation), excludes from its coverage those who do not work under a contract of employment (for example, the Unfair Dismissals Acts discussed in chapter 10). Secondly, certain rights and duties are implied into the contract of employment that do not apply to contracts for services.[9] Thirdly, in the law of tort, the contract of employment has been used to fix the scope of the vicarious liability of employers for the negligent acts of employees done in the course of employment.[10] Fourthly, differing obligations arise under income tax and social security legislation depending on whether or not one is classified as an employee.[11] Fifthly, employees are preferential creditors in the event that their employer is wound-up or put into receivership.[12] Given these factors, the courts must always be alive to the possibility that it may be in the interest of one, other, or all of the parties to an employment relationship to seek to classify it as *not* involving a contract of employment. For example, the employer may try to evade taking

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[8] See also Waas, "The Legal Definition of the Employment Relationship" (2010) 1(1) *Europan Labour Law Journal* 45. The author examines the increasing complexity of the issue of determining the existence of an employment relationship between an organisation and a worker, with reference to the definitions of an employee under German and EU law. Waas considers the German law category of "quasi-salaried workers", self-employed persons who are economically dependent on a single entity.

[9] See chapter 4.

[10] See Cox *et al*, *Employment Law in Ireland* (Clarus Press, Dublin, 2009), p 87-106; Feeney, "The Supreme Court and Vicarious Liability- Implications for Employers" (2009) 6(2) IELJ 43. Note the decision in *Phelan v Coillte Teoranta* [1993] 1 IR 1, where the plaintiff employee was injured in the course of employment as a result of the negligence of a welder engaged as an independent contractor by the defendant. Barr J in the High Court, while suggesting that, in his view, the welder probably *was* an employee, said that it was not necessary for him to consider that issue because in the circumstances the degree of *control* exercised by Coillte over his work was such that vicarious liability would attach irrespective of the legal status of the worker. It seems there was a hint of a purposive interpretation of the statute at issue in the case, the Safety and Welfare at Work Act 1989, which was designed to ensure that employees are protected at work.

[11] Forde, *Employment Law* (2nd ed, Round Hall, Dublin, 2001), p 23.

[12] Companies Act 1963, s 285(2). See also *In Re Sunday Tribune* [1984] IR 505.

on legislative responsibilities in relation to notice or redundancy requirements, while the worker might seek to maximise his or her tax benefits. Employers may also seek to reduce their exposure to business risks by shifting these onto the worker through, for example, using a piece-work or performance-related remuneration system or offering work on a casual basis. The more risks the worker agrees to bear the less likely it will be that he or she will be classed as an employee at all.[13]

[3–06] We will look below at various, increasingly prevalent, forms of "atypical employment", such as fixed-term and part-time work, as well as various forms of employment relations. First, though, we need to look more closely at how the courts have grappled with the "binary divide" between employment and self-employment.

III. Employee or Independent Contractor?

[3–07] Who is classed as an "employee" varies depending on the piece of legislation in question. Virtually all employment legislation simply (and unhelpfully!) refers to an employee as someone who works under a "contract of employment". This, in turn, is typically defined in one of three ways. The Terms of Employment (Information) Act 1994 (s 1) defines a contract of employment as:

> "(a) a contract of service or apprenticeship, and
> (b) any other contract whereby an individual agrees with another person, who is carrying on the business of an employment agency within the meaning of the Employment Agency Act 1971, and is acting in the course of that business, to do or perform personally any work or service for a third person (whether or not the third person is a party to the contract)".

A similar definition is provided for in the legislation on statutory notice periods, unfair dismissal, redundancy, working time, maternity protection, adoptive leave, carer's leave, parental leave, protection of young workers, part-time work and transfer of undertakings.[14] This covers agency workers and apprentices, but excludes totally the self-employed and most casual workers.[15]

[13] Collins et al, *op. cit*, p 160.

[14] The Minimum Notice and Terms of Employment Act 1973 (although here there is no reference to agency workers); the Unfair Dismissals Act 1977 (as amended by the Unfair Dismissals (Amendment) Act 1993, s 13, which deems the end-user, rather than the agency to be the employer); Redundancy Payments Act 1967 (as amended by the Redundancy Payments Act 2003, s 3); Organisation of Working Time Act 1997; Maternity Protection Acts 1994 and 2004; Adoptive Leave Acts 1995 and 2005; Carer's Leave Act 2001; Parental Leave Acts 1998 and 2006; Protection of Young Persons (Employment) Act 1996; Protection of Employees (Part-Time Work) Act 2001; and European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 (SI No 131/03). Agency workers (unless they have a contract of employment with the agency) and apprentices are excluded from the scope of the Protection of Employees (Fixed-Term Work) Act.

[15] In *Aughney v Hays Specialist Recruitment* (RP 148/2009), in the context of an agency worker's claim for redundancy, the EAT held that the issue of whether or not the agency worker is an "employee" is largely irrelevant; it is enough under the Redundancy Payments Acts if the agency worker has agreed with the recruitment agency to perform any work or service on behalf of a third party and the agency is liable to pay the wages of the person concerned.

[3–08] A wider definition applies in two acts relating to wages. Both the Payment of Wages Act 1991 and the National Minimum Wage Act 2000 apply to contracts where an individual has agreed with another person to do, or perform personally, any work or service for "a third person (whether or not the third person is a party to the contract) whose status by virtue of the contract is not that of a client or customer of any profession or business undertaking carried on by the individual" (1991 Act) or "that person or a third person (whether or not the third person is a party to the contract)" (2000 Act). A wider definition also applies in relation to the Employment Equality Act 1998 (as amended in 2004 by s 3 of the Equality Act 2004) which includes contracts whereby "an individual agrees with another person personally to execute any work or service for that person".[16] These wider definitions have given rise to much comment in the UK, where increasingly the concept of "worker" (formulated in the same terms as in those used in the Payment of Wages Act 1991) is being used in place of the traditional "employee".[17] The "worker" formulation may include, therefore, a group sometimes referred to as the "dependent self-employed"[18]; self-employed individuals who most likely enter into contracts to perform work personally for a single employer, who have a degree of dependence that is essentially the same as that of employees and who have no regular profession, or business of their own, to protect them.

[3–09] Aside from the equality legislation, the legislation that uses the wider definition relates to guaranteeing payment of wages (and in the UK, restricting excessive hours of work). Thus, the rationale appears to be that the type of self-employed workers mentioned above, or indeed casual workers, who do not fall within the traditional "employee" category should not be denied these basic protections, the primary purpose of which do not depend on the employment relationship being regular and long-term.[19]

[3–10] Before we move on to consider the core issues of how the courts construe a contract of employment, it should be noted that being classified as an "employee" does not necessarily afford automatic access to statutory rights. An important further threshold that must be crossed in many cases is that of continuity of employment. So, to acquire rights under unfair dismissals or redundancy legislation, for example, the

[16] This wider definition is required by EU law. In Case C-256/01 *Allonby v Accrington & Rossendale College and Others* [2004] IRLR 224 the ECJ held that the term "worker" in relation to equal pay under Article 141EC had to have an EU meaning and could not be defined by individual Member States' legislation. A worker, therefore, in the context of EU equal pay law means "a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration" but this does not include "independent providers of services who are not in a relationship of subordination with the person who receives the services" (paras 67-68).

[17] For example, in the National Minimum Wage Act 1998, s 54; the Working Time Regulations 1998, reg 2; and the Employment Relations Act 1996, s 230(3). See above, notes 4 and 5.

[18] See Burchell *et al*, *The Employment Status of Individuals in Non-standard Employment* (London, Department of Trade and Industry, 1999).

[19] Deakin and Morris, *Labour Law* (5th ed, Hart, Oxford, 2009), p 164. Note that, in the UK, some recent employment statutes (e.g. the Employment Relations Act 1999, s 21) delegate power to the Minister for Trade and Industry to extend the coverage of the legislation to other categories of workers of his designation.

employee must also demonstrate that he or she has been in continuous employment on a full-time basis by the employer for a specified period (52 weeks under s 2(1)(a) of the Unfair Dismissals Act 1977, as amended, and 104 weeks under s 4(1) of the Redundancy Payments Act 1967).

The "Tests"— Control, Integration and Economic Reality

[3–11] Given the lack of precision with which the legislature has defined a "contract of employment" it has fallen to the courts to flesh out the concept. The courts have developed a number of tests to use in deciding whether a contract of employment exists.[20] However, as we will see, while these tests provide a useful framework, and are helpful as reference points, ultimately the courts have not been able to develop a particularly sound conceptual distinction between employment and self-employment and cases tend to turn on their overall factual matrix.[21]

Control

[3–12] One of the first tests to be developed by the courts focused on the extent to which, under the terms of the contract, the employer has control over the employee. In *Yewens v Noakes*[22] it was held that "a servant is a person subject to the command of his master as to the manner in which he shall do his work." In *Roche v Kelly*[23] Walsh J held that in a master-servant relationship, the master must have right to tell servant what to do and how to do it, whether or not he exercises that right. The main problem with this test, however, is that (especially in the case of skilled professionals) the employer may exercise very little actual, day-to-day control over the work done, but the relationship can still be classed as one of employment. This has been the case in relation to, for example, journalists,[24] hospital doctors,[25] university lecturers,[26] and so on. The idea of tight inspection and surveillance of employees that is implicit in the control test is somewhat anachronistic in much contemporary employment.[27] As a result the control test is now rarely used as a stand alone test.[28]

[20] Barrett, "Employed v Self-employed Status" (2010) 23(1) *Irish Tax Review* 59.

[21] Cox *et al* note that much seems to depend on the background policy considerations at play in a given case, for example, whether what is at issue relates to imposing vicarious liability (in which case *control* is often key) or whether the issue is one related to tax or insurance (in which case the parties' *financial arrangements* are heavily significant); *op. cit*, p 64.

[22] (1880) 6 QBD 530, at 532 *per* Bramwell LJ.

[23] [1969] IR 100.

[24] *In Re Sunday Tribune* [1984] IR 505.

[25] *O' Friel v St Michael's Hospital* [1990] IRLM 260.

[26] *Cahill v DCU* [2007] ELR 113 (HC); [2009] IESC 80 (SC).

[27] See *Beloff v Pressdram Ltd* [1973] 1 ALL ER 241, where Ungoed Thomas J (at 250) noted that the greater the skill required for an employee's work, the less significant control is in determining if there is a contract of service.

[28] *Hogan v United Beverages*, Unreported, Circuit Court, Smyth J, 14 October 2005. However, the test was relied upon by the Supreme Court in *O' Keefe v Hickey* [2009] 1 ILRM 490, in deciding that a teacher in a state school was an employee of the school management rather than the Department of Education.

Integration

[3–13] An alternative test looks at the extent to which an individual is employed as an integral part of the business. In the *Sunday Tribune* case[29] a freelance journalist who got commission in advance but was under no obligation to the newspaper to publish her work was held to be employed under a contract for services. By contrast a "staff" journalist working 50 weeks per year for the newspaper was an integral part of the newspaper and therefore had a contract of service. This case illustrates that the nature of the work itself is not always significant, as both journalists did the same *substantive* work (writing columns for the newspaper) but each had a different employment status. The problem with the integration test is that the courts have not spelt out clearly what is meant by "integration". While it applies quite well to professionals over whom the employer does not have direct control, it does not fit so well with others, such as outworkers or sub-contractors, who may be highly "integral" to the employer's business without necessarily being employees. This is particularly the case given the growth in the use of outsourcing by employers.[30]

Economic Reality

[3–14] This test (sometimes referred to as the "enterprise test") essentially asks if the worker has engaged him or herself to perform the services, performing them as a person in business on his or her own account. This looks at a range of factors (whether the worker has helpers, whether he or she takes a financial risk, etc) and asks whether or not the worker is actually running a separate business. The test was outlined in the English case of *Market Investigations Ltd v Minister of Social Security*, where according to Cooke J:[31]

> "The fundamental test to be applied is this: 'Is the person who has engaged himself to perform these services performing them as a person in business on his own account?' If the answer to that question is 'yes' then the contract is a contract for services. If the answer is 'no' then the contract is a contract of service".

This test was noted with approval by Barr J in *O 'Coindealbhain v Mooney.*[32] Although this test has the attraction of clarity, in reality it is less of a conceptual categorisation and more of an approach, which encourages the courts to examine a range of features of the work relationship and come to a conclusion, on balance, as to how it should be categorised.[33] That no one test is determinative can be clearly seen in the key Irish and UK decisions in this area, to which we now turn.

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29 *In Re Sunday Tribune* [1984] IR 505.
30 See Fevre, *op. cit*.
31 [1969] 2 QB 173 at 184.
32 [1990] 1 IR 422.
33 Note, too, the comments of Edwards J in *Minister of Agriculture and Food v Barry* [2008] IEHC 216, where he pointed out that this test could not be treated as being of universal application where the issue for determination involves the broader question as to what is the nature of a particular work relationship between two parties. This is because in certain cases a work relationship is not capable of being defined in terms of a simple choice as to whether it is governed by a contract of service or a contract for services (for example in the case of a statutory office holder).

Defining the Employment Relationship

[3–15] The question of whether or not a person is an employee is a mixed question of fact and law.[34] In *Ready Mixed Concrete (South East) Ltd v Minister for Pensions and National Insurance*[35] MacKenna J adopted an open-ended approach to the question of determining employee status. According to MacKenna J:[36]

> "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 servant must be obliged to provide his own work and skill. Freedom to do a job 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 . . .".

Although at first glance, this may appear to be a more comprehensive "test" than those outlined above, it arguably simply restates the control test (parts (i) and (ii)) and invites the court to consider all the other elements of the employment relationship (part (iii)) in coming to a conclusion. The final part of the quote relates to the idea of personal service to which we will return below.

[3–16] In the case, the question was whether an owner-driver of a vehicle used exclusively for the delivery of the company's concrete was engaged under a contract of service. The worker entered into a hire purchase agreement to purchase a lorry but the mixing equipment on the lorry was the company's property. The truck was painted in company colours and he wore a company uniform. He was also obliged to carry out the company's orders and was paid on a mileage basis, but the contract described him as an independent contractor. The Court concluded that he looked more like a small independent business than an employee.

[3–17] The leading Irish authority in this area is the Supreme Court decision in *Henry Denny & Sons v Minister for Social Welfare*.[37] Here, a worker was hired as in-house demonstrator, demonstrating and marketing the company's (Henry Denny & Sons) products in supermarkets. She was placed on a panel from which demonstrators were selected by the company. The demonstrator was employed by the company under yearly renewable contracts from 1991 to 1993. Her written contract of employment for 1993 described her as an "independent contractor" and purported to make her responsible for her own tax affairs. The demonstrator worked an average of 28 hours a week for 48 to 50 weeks a year and carried out approximately 50 demonstrations a year. The demonstrations were not carried out under the supervision of the company, but the demonstrator was required to comply with any reasonable directions given by

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[34] See Regan, "The Contract and Relationship of Employment" in *Employment Law* (Regan ed, Tottel, Dublin, 2009), pp 41-42.
[35] [1968] 2 QB 497.
[36] *ibid* at 515.
[37] [1998] 1 IR 34.

the owner of the supermarket and she had been provided with written instructions as to how she was to carry out her work. She was supplied by the company with the materials for performing the demonstration (demonstration stand, uniform and products) and required the consent of the company prior to sub-contracting any of the demonstrations assigned to her. She was not a member of the company's pension scheme.

[3–18] In 1992 both parties were required to fill out a form to determine whether she was an insurable person under the Social Welfare Acts 1993-1997 (if her contract was one of service she would be insurable). The social welfare officer decided she was an insurable person. The company appealed this decision and the appeals officer rejected the appeal. The company then appealed to High Court, where Carroll J also held that the worker was an insurable person. The company then appealed to Supreme Court.

[3–19] Keane J dismissed the appeal. He referred to the the English decision of *Market Investigations v Minister of Social Security*,[38] where Cooke J noted that it was likely that no exhaustive list could be compiled of considerations which are relevant in determining the question of whether a person is, or is not, on business on his or her own account and nor could strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. Keane J concluded that:

> "while each case must be determined in the light of its particular facts and circumstances, in general a person will be regarded as providing his or her services under a contract of service and not as an independent contractor where he or she is performing those services for another person and not for himself or herself. The degree of control exercised over how the work is to be performed, although a factor to be taken into account, is not decisive. The inference that the person is engaged in business on his or her own account can be more readily drawn where he or she provides the necessary premises or equipment or some other form of investment, where he or she employs others to assist in the business and where the profit which he or she derives from the business is dependent on the efficiency with which it is conducted by him or her".[39]

[3–20] In *Minister for Agriculture and Food v Barry*,[40] an appeal to the High Court on a point of law from the EAT, the respondents had worked as temporary veterinary inspectors (TVIs) at a meat factory in Cork. In order to become a TVI, each respondent had to apply for approval from the appellant. Once Departmental approval had been granted, each respondent had to apply in writing to the appellant for inclusion in a TVI panel, from which they would be periodically selected to do work in particular meat plants, assisting the permanent VI. When the Cork plant closed down, the respondents claimed entitlements under the legislation on redundancy and notice. The key issue was that any such entitlement was dependent on the respondents being employees of the appellant. The EAT decided that the respondents had all been employed under contracts of service and had therefore been employees of the appellant. The appellants appealed to the High Court.

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[38] [1969] 2 QB 173 at 184.
[39] [1998] 1 IR 34 at 50.
[40] [2009] 1 IR 215.

[3–21] The High Court found, first, that the EAT had erred in law by formulating the issue as a straightforward choice between a contract of service or a contract for services. Edwards J noted that other possibilities should have been considered, such as whether the TVIs worked under a single contract (be it of service or for services), or whether on each occasion they worked they entered a new contract (again, be it of service or for services), or whether by virtue of a course of dealing over a lengthy period of time the relationship had become refined into an enforceable "umbrella" contract.

[3–22] Secondly, Edwards J held that the EAT had erred in law in its approach to the correct tests to be applied. The EAT had first looked at whether a "mutuality of obligation" existed between the parties. This approach stresses that without the existence of reciprocal promises between the parties, their relationship lacks a genuine contractual character: it has been characterised by the House of Lords as "that irreducible minimum of mutual obligation necessary to create a contract of service".[41] While Edwards J felt that the mutuality of obligation approach was an "important filter", in that its absence meant the Court need not go further in examining the relationship, the existence of such an obligation could not be determinative of the issue. In any case, here, he felt the EAT had been incorrect in deriving a mutuality of obligation from an "implied agreement" as between the parties that the TVIs would carry out inspections on an ongoing basis where, he found, no such agreement existed.

[3–23] Thirdly, Edwards J found that the EAT had misconstrued the decision of Keane J in *Henry Denny*. The EAT had referred to Keane J's judgment as providing a "single composite test", the enterprise test. The issues of control and integration were, according to the EAT, simply to be used as elements in applying the enterprise test. Edwards J found this to be a misreading of the *Henry Denny* decision:

> "I believe that this confusion derives primarily from misguided attempts to divine in the judgment the formulation of a definitive, 'one size fits all' test in circumstances where the learned judge was not attempting to formulate any such test... I think it can sometimes be unhelpful to speak of a 'control test', or of an 'integration test', or of an 'enterprise test', or of a 'mixed test', or of a 'fundamental test' or of an 'essential test', or of a 'single composite test' because, in truth, none of the approaches so labelled constitutes a 'test', in the generally understood sense of that term, namely, that it constitutes a measure or yardstick of universal application that can be relied upon to deliver a definitive result".[42]

[3–24] Edwards J concluded by re-stating that every case must be considered in the light of its particular facts and it is for the court or tribunal considering those facts to draw the appropriate inferences from them. This requires the exercise of judgement and analytical skill and it is not, according to Edwards J, possible to arrive at the correct result by testing the facts of the case in some rigid, formulaic way. The judgment in *Barry* is useful in terms of clarifying that no one test can be determinative

[41] *Carmichael v. National Power PLC* [1999] ICR 1226 at 1230 *per* Lord Irvine.
[42] [2009] 1 IR 215 at 239.

of the issue. However, essentially it asks the courts and tribunals to consider a range of factors in coming to its conclusion,[43] some of the most important of which we will now consider.

The Idea of Personal Service

[3–25] At the core of the definition of a contract of employment is the requirement for the employee to "personally" execute the work. It has been suggested that the "boundary of labour law" should be fixed by this requirement that the work be performed *personally* as opposed to contracts that permit or expect the contractor to use *substitutes* or employ *others* to do the work.[44] The extent to which a party can delegate or sub-contract work has been a factor examined many times in the case law.

[3–26] In *Henry Denny & Sons v Minister for Social Welfare* the Supreme Court noted that the inference that a person is engaged in business on his or her own account can be more readily drawn where he or she employs others to assist in the business.[45] In *Tierney v An Post*[46] the applicant was a sub-postmaster. McCracken J, in the High Court, noted that, while the applicant had the ability to employ an assistant, An Post had to approve of the assistant in advance. He held this to be indicative of a contract of service. On appeal, however, the Supreme Court said this was a contract for services. The Court noted that it was not normal to find a clause in a contract of service allowing an employee to hire assistants for the work he was employed to do.[47] The Court also noted that it was not surprising, in a situation like this, that An Post would wish to retain a right of veto over the appointment of persons who for any reason it might not be appropriate to employ in a post office; see also *McAuliffe v Minister for Social Welfare*.[48] However, very strict conditions regarding the use of substitutes might themselves be indicative of a high level of *control* by one party over the other; this could be indicative of an employer-employee relationship.[49]

Other Factors to Consider

[3–27] As noted, the courts and tribunals need to engage in a "balancing exercise" in order to determine employment status. Under the 2000-2003 social partnership agreement (the *Programme for Prosperity and Fairness*) an Employment Status Group was set up.

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[43] This has been rather pithily described by Wedderburn as the "elephant test"; the contract of employment has become "an animal too difficult to define, but easy to recognise when you see it"; Wedderburn, *The Worker and the Law* (3rd ed, Penguin, Harmondsworth, 1986), p 116. In the leading English case of *O' Kelly v Trusthouse Forte* [1983] ICR 728 the employment tribunal looked at *18* relevant factors in coming to its decision. See also the Labour Court decision in *Connaught Gold Co-op Society Limited* (AD 0818/2008).

[44] See Collins et al, *op. cit*, p 186 for a discussion of this idea.

[45] [1998] 1 IR 34 at 50 *per* Keane J.

[46] [2000] 1 IR 536.

[47] See also *Castleisland Cattle Breeding Society v Minister for Social and Family Affairs* [2004] IR 150, where the Supreme Court held that the inclusion of terms requiring the approval of the Minister to the appointment of any substitute inseminators did not indicate a "master/servant" level of control, but were required to comply with statutory regulations.

[48] [1995] 2 IR 238.

[49] See Regan, "The Contract and Relationship of Employment" in *Employment Law* (Regan ed, Tottel, Dublin, 2009), pp 33-34.

The group produced a code of practice (updated in 2007 by the Hidden Economy Monitoring Group, set up under the *Towards 2016* agreement) which lists criteria that the courts have indicated are useful in reaching a conclusion as to a party's employment status.[50] We will look at three factors here that have come before the courts and tribunals on many occasions.

Profit and Loss: Opportunity and Risk

[3–28] The extent to which a person has the opportunity to benefit financially from the work over and above a salary or wage, or, conversely, the extent of exposure to financial risk or loss will be important in determining if such a person is an employee. In *Henry Denny & Sons v Minister for Social Welfare*[51] the Supreme Court held that it is easier to infer that a person is engaged in business on his or her own account where the profit which he or she derived from the business was dependent on the efficiency with which it is conducted by him or her. In the case, the shop demonstrator's earnings were totally dependent on the extent to which the company used her services.

[3–29] By contrast, in *O' Coindealbhain v Mooney*[52] the worker was the branch manager of a social welfare office and was paid a fixed fee depending on volume of work performed. Blayney J concluded that Mr Mooney was, in fact, in business for himself, as the lower he kept his overheads the greater was his profit. Similarly, in *Tierney v An Post*[53] a postmaster of a sub-post office carried on the post office business in the same premises as his own business. The Supreme Court held that, while the extent to which he could maximise the profit which he derived from carrying on the post office business was relatively modest, it was nevertheless the case that any expenditure by him on improving the premises or employing assistants, which had the effect of increasing the volume of the post office business, would increase his own profit also. In *McAuliffe v Minister for Social Welfare*[54] the High Court was concerned with the status of two delivery men contracted to deliver newspapers. Two key factors were that the drivers were remunerated on the basis of a sum per delivery run (rather than a set wage) and were themselves responsible for damage, destruction or loss of goods carried for the appellant and for losses caused by any delays. As a result, their profits were determined to a significant extent by how they carried out their work and they were held to work under contracts for services.

It is important to distinguish opportunities for profit-making from contractual provisions to do with, for example, profit-sharing or commission payments. These are relatively common terms of employment that would not necessarily be incompatible with a contract of service.

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[50] The code states that it is vital that the job as a whole is looked at, but goes on to stress that the economic independence of the worker is the "overriding consideration"; see the comments, above, of Edwards J in *Minister for Agriculture and Food v Barry* [2009] 1 IR 215. The code can be accessed at www.revenue.ie. Also not that, in the *Barry* case, the workers referred to the Code and, in their evidence to the EAT, claimed that the TVIs fit into the "employee" category under each and every relevant heading.

[51] [1998] 1 IR 34.

[52] [1990] 1 IR 422

[53] [2000] 1 IR 536.

[54] [1995] 2 IR 238.

Equipment and Materials

[3–30] Generally, employers will be required to supply employees with the equipment and materials necessary to perform the work. Where a worker supplies his or her own materials or equipment, this will point to a contract for services. In *McAuliffe v Minister for Social Welfare*[55] the delivery men owned the vehicles they drove and were responsible for the expenses involved in driving. They were also free to carry goods for other employers (albeit not at the same time as carrying goods for the appellant). By contrast, in *Henry Denny & Sons v Minister for Social Welfare*[56] the shop demonstrator was supplied by the company with the demonstration stand, uniform and products necessary for performing the demonstration. In both *O' Coindealbhain v Mooney*[57]and *Tierney v An Post*[58] the fact that the premises were provided and maintained by the workers in question was a significant factor in the courts concluding that neither were employees.

The Parties' Categorisation

[3–31] In many contracts the parties themselves may use particular labels, most commonly that one party is ''an employee'' or ''an independent contractor''. However, the courts will disregard such labels if they do not, in fact, correspond with reality. In *Henry Denny & Sons v Minister for Social Welfare*[59] the company argued that the appeals officer had erred in law in failing to have sufficient regard to the terms of the written contract between it and the store demonstrator, which expressly stated that the latter was "deemed to be an independent contractor'' and nothing in the agreement should ''be construed as creating the relationship of master and servant or principal and agents''. Murphy J was satisfied that the appeals officer had been correct in his conclusion as he was required to consider ''the facts or realities of the situation on the ground'' to enable him to reach a decision. He was required to, and did, attempt to ascertain the true bargain between the parties, rather than merely rely on the ''labels ascribed by them to their relationship''.[60]

[3–32] Similarly, in *Castleisland Cattle Breeding Society v Minister for Social and Family Affairs*[61] the Supreme Court held that, notwithstanding the requirement to examine the terms of the written contract, in determining whether a contract was one of service, or for services, an appeals officer was bound to examine and have regard to what was the real arrangement, on a day-to-day basis, between the parties. A statement in a contract to the effect that a person was an ''independent contractor'' was not a contractual obligation but merely a statement which might or might not be reflective of the actual legal relationship between the parties. However, in this case, the Court found that, apart from matters of minor detail, the written contract, which was consistent with the worker being an independent contractor, seemed to have been the contract that was actually worked.

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55 [1995] 2 IR 238.
56 [1998] 1 IR 34.
57 [1990] 1 IR 422.
58 [2000] 1 IR 536.
59 [1998] 1 IR 34.
60 *ibid* at 53. See also *In Re Sunday Tribune Ltd* [1984] IR 505.
61 [2004] IR 150.

[3–33] In *Millen v Presbyterian Church in Ireland*[62] the EAT determined that a minister of the Presbyterian Church of Ireland was not an employee within the meaning of the Terms of Employment (Information) Act 1994. The issuing of a P60 to the minister did not determine the employment relationship regardless of the use of the descriptions "employer" and "employee". In *Nyamhovsa v Boss Worldwide Promotions*[63] the Equality Tribunal looked at the terms of the contract, which included a clause stating "nothing contained in this agreement shall be construed as constituting any relationship of employer and employee". The Tribunal found, however, that most of the remaining clauses in the contract were highly prescriptive of how the worker should perform her tasks and held that a contract of service existed.

IV. Atypical Employment

[3–34] The increasing regulation of the employment relationship has been driven to a significant extent by the changing nature of contemporary employment. After World War II, the "Fordist" model of employment predominated in most Westernised countries, based on the idea of an employee working full-time, with standard hours (generally conceived of as "9 to 5", five days a week) for a single employer and for a fixed-wage. In our "post-Fordist" working world,[64] however, "atypical" or "non-standard" work is more and more common and the forms of work in which contemporary workers engage are becoming increasingly differentiated. Atypical work refers to the use by employers of labour that is not regular or full-time or based on indefinite employment contracts (or, indeed, all three) and refers, particularly, to part-time, fixed-term and temporary work.[65] In response to the growing nature of such work, and particularly concerns about the exploitation of atypical workers, there have been some significant legislative interventions in this area in recent years, most of them driven by EU law.[66] We will consider, next, three of the most prevalent forms of atypical work.

Part-Time and Casual Work

[3–35] Part-time work is not, by any means, a recent phenomenon but part-time workers make up the biggest share of atypical workers in the EU.[67] In 1997, the Part-Time Workers

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62 [2000] ELR 292.

63 DEC-E2007-072.

64 Lash and Urry, *The End of Organised Capitalism* (Polity, Cambridge, 1987).

65 See, for example, Bauman, *Work, Consumerism and the New Poor* (Open University, Buckingham, 1998); Bosch and Lehndorff, *Working in the Service Sector: A Tale From Different Worlds* (Routledge, London, 2005); Doogan, "Long-Term Employment and the Restructuring of the Labour Market in Europe" (2005) 14(1) *Time and Society* 65; and above, n 5. Note a recent report by the European Foundation for the Improvement of Living and Working Conditions (Eurofound) focuses on what is referred to as "very atypical work", including non-written employment contracts, contracts of less than 10 working hours a week and very short fixed-term contracts of six months or fewer; Broughton *et al, Flexible Forms of Work: 'Very Atypical' Contractual Arrangements* (Eurofound Report, 2010, available at www.eurofound.europa.eu).

66 See Middlemiss, "Legal Rights of Atypical Workers" (2005) 23 ILT 132.

67 Corral and Isusi, *Part-time Work in Europe* (Eurofound Report, 2006, available at www.eurofound.europa.eu).