



***The understanding of the distinction between a contract for services and a contract of service is an area of law that is of considerable importance. Indeed, it is an area that many qualified accountants may find affects them personally at some-point in their professional careers.***

*Jennifer Jackson BBLs, discusses this important distinction in the article below.*

Employment relationships can be divided into two forms – the employee and the independent contractor. The employee is hired under a contract of service and he is an independent contractor under a contract for services. The distinction between the two is not always obvious and it falls to the courts to decide on the issue of the nature of the employment relationship.

The distinction is important because it determines the statutory protection that applies. The rights and remedies provided for under the Unfair Dismissals Acts only apply to employees under a contract of service. Likewise of importance is that fact that employers are only vicariously liable for torts committed by employees who are under a contract of service. Independent contractors under a contract for services are responsible for their own torts.

Another reason why it is important to distinguish between a contract of services and a contract for services is that the system of taxation applied to each category is quite different. In a contract of services, the employer is responsible under the PAYE system, whereas in a contract for services, the independent contractor is subject to the self-assessment system.

The courts have established a number of criteria to determine the nature of the employment relationship. The first test is the control test, first established in *Yewen v. Noakes* (1880). The Irish courts have adopted this test. In *Roche v. Kelly* (1968), it was held that the principal test is the right of the master to direct servants as to what is to be done and how it is to be done. In this case, the defendants had a contract with a farmer to build a barn and had employed the plaintiff to build it for a lump sum of £300. The defendants were to supply the construction materials and the plaintiff was to build the barn under their specifications. The defendants monitored the progress of the construction but at no time did they tell the plaintiff how to do the job nor did they supervise his working methods. The plaintiff had considerable experience and expertise in building barns and had done similar jobs for the defendant in the past. The plaintiff was injured during the construction of this barn and one of the issues was whether he was an employee of the defendant or an independent contractor.

The Supreme Court found that the main factor in determining the relationship is the element of control that the employer can exercise over the employee. The Court found in this instance that the plaintiff was not an employee as the defendants did not have the right to interfere with the manner in which he carried out his obligations and hence they did not exercise any control over him.

In *Re Sunday Tribune* (1984), the court recognised that given difficulties in relation to skilled workers who are told what to do but not how to do it, the control test was no longer of universal application and cannot be used definitively as in a modern context, the nature of the employment relationship may not be so simplistic.

The second test that can be used in determining the relationship is the integration or organisation test. This test was introduced by Denning LJ in *Stevenson, Jordan & Harrison Ltd.*

Macdonald & Evans Ltd. (1952). He stated that an employee is a person who is integrated with others in the work place or business even though the employer does not necessarily exercise a detailed control over what he does. The courts, in applying this test, will consider whether the worker was a vital part of the operation of the work place.

The third test, one favoured by the Irish courts is the mixed test, developed by McKenna J in *Ready Mixed Concrete v. Minister for Pensions* (1968). A contract between the plaintiff company and a lorry driver stated that the lorry driver was self-employed. He owned, insured and maintained his own lorry, but the plaintiffs had helped finance its purchase. He wore a uniform, and the lorry was painted with the company's colours. He could delegate the driving and was paid per mile driven. The issue arose as to whether he was an employee and whether the plaintiffs should have been making pension contributions for him to the defendants. McKenna J stated that three conditions had to be fulfilled to establish a contract of service:

- (1) there must be an obligation of the person to provide his own skill and work in return for a wage or other remuneration,
- (2) there must be a sufficient degree of control by the employer,
- (3) the other provisions of the contract must not be inconsistent with its being a contract of service

The court found that the economic reality of the situation should also be considered when coming to a decision. Having regard to all of the factors, the court concluded that the lorry driver was an independent contractor.

In *Kirwan v. Dart Industries and Leahy* (1980), the Employment Appeals Tribunal applied the mixed test and set out a number of criteria to consider including the extent of control over the task, the manner in which it is carried out, the means used to carry it out and where it is to be carried out; whether the person was in business of his own account or whether he was an integral part of the business; whether the person was required to provide personal service or whether he could delegate the job and finally whether the person was free to work for other employers.

Whether a shop demonstrator was an employee or not was examined in the case of *Henry Denny & Sons (Ireland) Ltd t/a Kerry Foods v The Minister for Social Welfare* (1998). Despite the contract stipulating that she was not an employee and the fact that she was responsible for her own tax affairs, Keane J held that she was an employee, applying a combination of tests. Keane J stated that: '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.' In making this assessment, regard had to be had to the degree of control, the contract of employment and its express and implied terms, the level of integration of the individual into the workplace, whether the individual provides equipment, premises or investment, employment for others, whether they work on their own account, whether the person engaged receives holiday pay, sick pay or is part of the pension scheme.

Despite the fact that the contract stated that she was not an employee, the other terms of the contract – the requirement to be at work during specified hours, the requirement to wear a certain uniform provided by employers, the requirement to carry out tasks in a particular way - led the court to conclude given other factors that she was an employee.

The Irish courts, whilst favouring the mixed test, tend not to stick rigidly to any particular test but to view each contract as a whole, examine its terms and compare them with the reality of the relationship between the parties.

