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A response to the challenges posed by the binary divide between employee and self-employed

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Abstract
Purpose – The purpose of this paper is to examine the nature of the legal relationship tying workers to employers. It explores how the individual who is categorised as an employee is distinguished from a self-employed or independent contractor or a worker. The common law tests for classifying employment status are analysed against a backdrop of emerging research literature. Recommendations for reform are provided, drawing from the work of prominent scholars such as Mark Freedland and Simon Deakin.

Design/methodology/approach – The paper reviews court decisions and examines arguments raised in relation to the binary divide between employed and self-employed. The paper is largely conceptual.

Findings – This paper has shown that divergence between law and realities of employment still puzzle modern law reformers and judges alike. The common law test have proved to be inadequate and new solutions have been recommended. One of the suggest solutions is to import the doctrine of good faith into the tests.

Originality/value – The paper makes recommendations that will further refine and clarify the employment relationship in a bid to create a more inclusive “labour law” capable of protecting a wider range of atypical and vulnerable work relations. This paper will inform managers on the challenges in relation to classification of employment status brought about by the growth in atypical work.

Keywords Employment relationship, Agency, Atypical work, Employment Rights Act 1996, Employment status, Self-employed

Paper type Conceptual paper

1. Introduction
The conditions of contemporary market economies have brought conceptual forms of labour into dispute. For centuries, this field has witnessed legal-doctrinal debates over the scope of the employment contract, reflecting the changing social and economic landscape. At the centre of these debates, judicial and academic circles sought to conceptualise the emerging disparity caused by the growth in new forms of labour contracts. During the twentieth century, a number of common law tests were developed to oversee the emerging divide between employees and self-employed. However, the rapidly changing nature of labour challenged many of these tests, with new forms of employment such as agency, part-time working and shareholding workers emerging. The impact on areas such as taxation and employers liability under tort compounded the need for reform.
The paper examines the nature of the legal relationship tying workers to employers. It explores how the individual who is categorised as an employee is distinguished from a self-employed or independent contractor or a worker. The common law tests for classifying employment status are analysed against a backdrop of emerging research literature. Recommendations for reform are provided, drawing from the work of prominent scholars such as Mark Freedland and Simon Deakin. The aim of this paper is to further refine, clarify and move beyond this binary divide, in an effort to create a more inclusive “labour law” capable of protecting a wider range of atypical and vulnerable work relations.

Employers have a choice as to the form of labour they contract for. They can choose whether they employ under a contract of employment or under a contract between employer and independent contractor. An employee has a contract of service and an independent contractor has a contract for services. Only employees have protection under statute. As employers have the choice, they will often make a decision which is suitable to their business. The advantage for the employer in setting up the worker in self-employment is that this incurs fewer obligations. The worker who is a part-time, casual, temporary or seasonal worker, thus, suffers a number of disadvantages.

The distinction of employee status is important because many employment rights are accorded only to “employees” (sometimes only after a qualifying period of continuous employment[1], for example, protection from unfair dismissal, right to redundancy compensation[2], minimum notice upon termination[3], protection from discrimination on grounds of membership or non-membership of a trade union[4], protection on transfer of undertakings[5] and information concerning terms and conditions of employment[6]. Furthermore, only employees qualify for social security payments such as unemployment benefits, industrial injuries benefits and sickness benefits and entitled to protection of wages and other payments on insolvency of employer.

2. Work contracts and patterns
There are four categories of work contracts. First, the most common form of contract is that of an employee. The Employment Rights Act 1996 (ERA) only provides a limited definition of employment status. It defines the employee as an individual who has entered into or works under a contract of employment[7]. Similarly, Section 230(2) defines a contract of employment as a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing[8]. Second, a “worker” is defined under Section 230(3) as [...] an individual who has entered into or works under a contract of employment [...], 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 undertaking carried on by the individual.

Workers enjoy rights under Section 54 of the National Minimum Wage Act 1998 (NMWA), Regulation 2 of the Working Time Regulations 1999 and protection for whistleblowers under sections 43A-43L of ERA. However, the definitions of a worker and an employee fail to clarify who should be given a contract of employment because an employee can be hired under a contract of service or a contract for services (Countouris, 2008). Thus, the question is left to be decided under conflicting case law.
Third, contractors who are self-employed workers, do not have a business of their own, such as independent contractor, are also workers and protected under the ERA. Section 53 of Health and Safety at Work Act 1974 (HSWA) defines a self-employed person more broadly than the Equality Act 2010 as an individual who works for gain or reward otherwise than under a contract of employment, whether or not he himself employs others. They are protected under HSWA which places a duty on employers to ensure the health safety and welfare of “persons at work”[9].

Last but not least, on 8 September 2012, the Chancellor of the Exchequer announced plans to introduce a new type of work contract called “the owner-employee” contract. Under the new type of contract, employees will be given between £2,000 and 50,000 of shares that are exempt from capital gains tax. In exchange, they will give up their rights on unfair dismissal, redundancy and the right to request flexible working and time off for training, and will be required provide 16 weeks’ notice of a firm date of return from maternity leave, instead of the usual 8. It was merely a drive to stimulate economy by encouraging employers to recruit more people with less statutory obligations towards them. Whether these proposals will ever reach the statute book remains to be seen; however, it is very unlikely, as they represent an erosion of the employment rights of those hired under employee-owner contracts.

The growth in forms of labour contracts is due to a number of legal, economic and social factors. First, changes affecting the system of capitalist industrial production have meant a decline of “Fordism” and the rise of “lean production” (Deakin and Morris, 2012). This has allowed employers to become less dependent on skilled and permanent labour. Furthermore, deindustrialization and the rise of the “service economy” has enabled the creation of short-term and low skilled jobs (Davies and Freedland, 2000). Second, changes affecting human resource management practices such as core versus periphery workers and functional versus numerical flexibility have resulted in the growth of atypical work. Third, changes affecting the relative powers/preferences of the two sides of industry exemplified by the decline of union power and employers’ preference for cost/risk reduction strategies such as having a workforce without having employees (Supiot, 2001). Fourth, changes affecting the regulatory framework such as tolerance or even promotion of atypical work by employment law/policy and legal reasoning not keeping up with structural changes in the economy (Collins, 1990). Last but not the least, changes in society such as women’s role and the dual breadwinner model.

3. The judicial response to atypical work

The law responded to the growth in atypical work by expanding the notion of “employee”, regulating “intermediate” category of “workers”, regulating specific forms of “atypical work” and expanding the reach of selected rights beyond the binary divide. These responses have come from the judiciary, legislation (including European Union [EU] legislation) and some further suggestions have been made by academics.

The judiciary has occasionally come up with some progressive judgements as a response to the growth in atypical work. First and foremost, by drawing up an “umbrella contracts” in Cornwall County Council v. Prater [2006] EWCA Civ 102. The Court of Appeal held that the numerous short contracts held by a home tutor with the Council over a 10-year period were all contracts of employment and could be linked together by the continuity provisions to entitle her to claim continuous employment throughout

Last, the court took a more generous approach in constructing the notion of “worker” and “home worker” in the absence of an umbrella contract in *James v. Redcats (Brands) Ltd* [2007] IRLR 296. Elias J[10] observed that:

[…] 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.

A prominent academic, Sandra Fredman summed up the judicial approaches by stating that:

“[…] the courts (swing) between a contractual approach and one sensitive to the social policy aimed at distinguishing the genuinely independent from marginal worker […] However, the dominant trend has been contractual and technical, displaying a distinct reluctance on the part of the courts to use the definition to achieve the social purpose for which it was intended” (Fredman, 1997).

4. Determining employment status

The binary divide between self-employed and employed has long puzzled legislative drafters and judges alike, with roots stretching back into the mid-seventeenth century. The King’s Bench was the first court to explore this divide in the *locus classicus case of Hobbs v. Young* [1689] Holt K.B. 666. The court attempted to define a conduct of trade under the Statute of Artificers 1562[11]. Although this case was effectively overturned a century later, the conceptual difficulties of enterprise subordinate versus autonomous labour were beginning to surface. Against a backdrop of poorly drafted legislation, the late eighteenth and early nineteenth century was used to determine the existence of a settlement by hiring or a yearly contract of service. During the twentieth century, terms such as “master” and “servant” or “workman” were replaced with terms such as “employee” and “self-employed”, to reflect the modern manifestation of corporatism and labour.

There are three options upon which the binary divide can be drawn. First, it can be drawn based on the reality of the relationship or intentions of the parties. Thus, the parties themselves would be left declare the nature of the relationship. For example, in *Ferguson v. John Dawson and Partners (Contractors) Ltd* [1976] 1 WLR 1213, Ferguson fell off a roof while removing some scaffolding boards, both parties labelled Ferguson a “self-employed labour-only subcontractor”, but the court disagreed and held the relationship between them was that of employer and employee. However, it is not enough to call a person “self-employed” if all the terms and conditions of the engagement point towards employment. If other factors are neutral, the intention of the parties will then be the decisive factor in deciding employment status. This approach has been endorsed in subsequent cases such as *Massey v. Crown Life Insurance Co* [1978] 1 WLR
676 and Young and Woods Limited v. West [1980] IRLR 201 to show that the label the
parties put on their relationship does not always determine the employment status.
Second, a question at the heart of determining employment status is whether such an
issue is one of law or one of fact. If it is one of law, that might suggest that there is a
correct answer that is best determinable or determined by judges and which applies
across the board through the application of rules or principles. If it is one of the facts, that
might suggest that the law recognises that the question is one which is subject to tests
of empirical truth, about which reasonable people could disagree if they had insufficient
knowledge of the empirical data. In Ferguson, Browne LJ took the view that this
question was an issue of fact and thus not open to challenge on appeal. The later decision
of the Court of Appeal in O’Kelly v. Trusthouse Forte Plc [1984] QB 90 suggested that the
question was one of law but that it involved matters of fact which were essentially for
the employment tribunal to determine. However, in Nethermere (St Neots) Ltd v.
Taverna and Gardiner, the same court held that the Employment Appeal Tribunal
(EAT) could not interfere with a tribunal’s decision unless it had misdirected itself in law
or its decision was one which no tribunal properly directing itself on the relevant facts
could have reached.
Third and most significantly, over the years, courts have developed tests to
determine employment status. The control test was the first to emerge in Yemens v.
Noakes [1880-1881] L.R. 6 Q.B.D. 530, where Bramwell LJ observed that the manner in
which an employee carries out his/her work is subject to the command of the master. The
test measures the degree of control that the employer has over the individual employed
to perform the job. If the worker agrees to be expressly or impliedly bound or be subject
to a degree of control by the employer in the performance of his/her duty as subjecting
himself to the control of the employer, he/she would rightly be classified as an employee.
However, this test did not reflect the proliferation of technical skilled labour which
flourished during the twentieth century leading to the erosion of traditional employee
and master control and monitoring over labour. This test is not well suited to
temporary industrial relations in which a class of so-called professional employees
has emerged because a person who works under a contract for services can be told what
to accomplish by his principal but not how to execute what he/she is to accomplish.
Thus, employees may enjoy a great deal of autonomy in the way they execute their work
but still be bound by a contract of employment. Although the control test was
subsequently used in cases such as Lane v. Shire Roofing [1995] I.R.L.R. 493, it is rarely
used as a stand-alone test (Burchell et al., 1999).
Half a century later, the integration test emerged courtesy of the judgement in
Stevenson Jordan and Harrison v. MacDonald and Evans [1952] 1 T.L.R, where it was
held that an employee must be an integral part of the business. When formulating the
test, Lord Denning M.R observed:

It is often easy to recognise a contract of service when you see it, but difficult to say wherein the
difference lies. A ship’s master, a chauffeur, and a reporter on the staff of a newspaper are all
employed under a contract of service; but a ship’s pilot, a taxi-man, and a newspaper
contributor are employed under a contract for services. One feature which seems to run
through the instances is that, under a contract of service, a man is employed as part of the
business; whereas, under a contract for services, his work, although done for the business, is
not integrated into it but is only accessory to it Stevenson Jordan and Harrison v. MacDonald
and Evans [1952] at 111.
The integration test concentrates on the extent to which the worker can be seen to be part and parcel of the other contracting party’s enterprise. For example, if the worker provides their own tools and equipment that tends to suggest they are not employed. This test was meant to fill the gap left by the control test by overcoming the problem of controlling skilled workers. However, as a stand-alone test, it was also unsatisfactory, for example, if a company is carrying out a refurbishment, completing the rewiring becomes an important part of the process. Any electrician hired thereafter would be seen as an integral part of the business even though they are independent contractors.

The limitations of the integration test led to the development of the economic reality test in *Market Investigations v. Minister of Social Security* [1969] 2 Q.B. 173. The economic reality test essentially assesses whether the worker takes the ultimate risk of loss or chance of profit (*Hall (Inspector of Taxes) v. Lorimer* [1994] 1 W.L.R. 209). The court held that Ms Irving was an employee for the purpose of National Insurance contributions despite a limited discretion as to when she should do the work. After quoting Lord Wright, Lord Denning and the Supreme Court of the USA, Cooke J formulated the integration test:

[…] 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 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 subsequently relied on in *Lee Ting-Sang v. Chong Chi-Keung* [1990] ICR 409 where Cooke J held that the mason did not provide personal services as a person in business on his own account, rather he was an employee of the sub-contractor (*Hall [Inspector of Taxes] v. Lorimer* [1994] IRLR 171). However, without taking into consideration control and integration factors, a stand-alone economic reality test was not sufficient to determine employment status.

Given the limitations of the stand-alone tests, the multiple test is generally relied on by courts because it examines every aspect of the working relationship. The multiple test involves the idea that the court or tribunal should go beyond a single technical test and apply a pragmatic approach, weighing all the factors on one side or the other. It is rather a question of balancing all the factors on conceptual scales and seeing where the greatest collective weight is. In *Ready-Mixed Concrete v. Minister of Pensions* [1968] 2 Q.B. 497, MacKenna J formulated the multiple test. Accordingly, three conditions give rise to a contract of service, namely:

1. employee undertakes to provide work to the employer in return for a wage;
2. employee agrees to be subject to the employer’s control to a sufficient degree; and
3. that other provisions of the contract are consistent with it being a contract of service.

Thus, courts would have to take a pragmatic approach and weigh up all the factors for and against a contract of service (*Smith and Wood, 2003*). Even when the court fails to reach a clear-cut decision, this test is better placed to cope with the changing labour environment compared to its stand-alone predecessors.

Decades later, the mutuality of obligation test emerged. The *mutuality of obligations* test, perhaps the most important and equally most problematic test, assesses whether the relationship implies some sort of mutual promise by the
employer to provide future work and a corresponding one by the employee to accept that work, what Freedland (1976) famously described as a “mutual promise of future performances”. The test looks at the nature of the relationship and whether there is sufficient mutuality for an employment relationship. In Carmichael v. National Power [2000] IRLR 43, Mrs Carmichael and colleagues worked “on a casual as-required basis”. Relying on the decision in Nethermere, Lord Irvine of Lairg said that there would not have been an “irreducible minimum of mutuality of obligation necessary to create a contract of service” because they could choose whether to work or not when called on. Similarly, in Cornwall County Council v. Prater [2006] EWCA Civ 102, the Court of Appeal held that a series of employment contracts gave Prater sufficient service to accrue employment rights. In contrast, the decision in Carmichael focused on an umbrella contract that did not amount to employment, whereas in Prater, the focus was on her status, which amounted to employment. The underlying factor in these cases is mutuality of obligation, and there is a limit to general principles that can be applied.

It is useful to compare how the concept of mutuality has evolved during the past few decades, progressively applying a tighter and tighter stranglehold on the contract of employment and on contracts for the provision of personal work/services at large. This was the original definition in O’Kelly, which the Court of Appeal accepted that there was no obligation for the company to provide further work and no obligation for the applicants to offer their further services. Subsequently, in Carmichael, the House of Lord used mutuality to defeat continuity and the establishment of an “umbrella contract”:

Just as the C.E.G.B. was not promising to offer them any casual work, but merely intimating that it might be offered, so they were not agreeing to attend whenever required.

What is interesting is that Lord Irving said that while there was no “umbrella” contract, the Industrial Tribunal correctly concluded that their case “founders on the rock of absence of mutuality”, he also suggested that even in the absence of mutuality, individual contracts could still be contract of employment: “I repeat that no issue arises as to their status when actually working as guides”.

Further progress can be seen in relation to substitution clauses. Following the decision in Ready Mix, it was held in Express and Echo Publications v. Tanton [1999] I.C.R. 693 that the existence of a substitution clause in the contract of employment would indicate a lack of personal service. However, this decision gives the employers an easy way of avoiding legal responsibilities as evidenced in Staffordshire Sentinel Newspaper Ltd v. Potter [2004] I.R.L.R. 752 EAT and Dragonfly Consultancy Ltd v. The Commissioner for Her Majesty’s Revenue and Customs [2008] EWHC 2113 Case law has been used to mitigate this position as evidenced in James v. Redcats [2007] I.C.R. 1006, where it was held that a substitution clause did not defeat the obligation of personal service because it applied only if the worker was unable to work as opposed to simply being unwilling to work.

An alternative argument in some cases could be that the substitution clause is a sham, put in by the employer simply as a means of avoiding the employment relationship Consistent Group Ltd v. Kalwek [2008] EWCA Civ 430. It was held in Autoclenz Ltd v. Belcher [2011] UKSC 41 that commercial cases and law should not be
applicable to workers who are vulnerable in the employment sense in relation to sham contracts. On this matter, Aikens LJ observed:

[...] the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part (Autoclenz Ltd v. Belcher [2011] 92).

Similarly, it was held in Protectacoat Firthglow Ltd v. Szilagyi [2009] EWCA Civ 98 that if the true relationship of the parties is different from what is described in the contractual document, then the court must give effect to the substantive relationship other than what is described in the document.

The EU has also started developing its own autonomous notion of “euro-sham”. It was stated in Allonby [2004] I-873 at 71 that:

[...] the formal classification of a self-employed person under national law does not exclude the possibility that a person must be classified as a worker within the meaning of Article 141(1) EC if his independence is merely notional, thereby disguising an employment relationship within the meaning of that article.

These are important developments, although it is too soon to say what actual impact they may have on future case laws. In terms of domestic influence, Autoclenz seems to have had a positive (though not decisive) influence in Quashie v. Stringfells [2012] UKEAT 0289_11_2604, but has so far proved irrelevant in a number of recent cases such as Tiffin v. Aldridge LLP [2012] EWCA Civ 35.

5. Recommendations for reform

In an age of Internet and mobile communication, working away from the employer’s premises, without fixed days of work or hours, with full autonomy of how to organise the work and special payment arrangements, has challenged the traditional employment relationship. Despite the efforts of the courts, the common law tests tend to “collapse into a maze of casuistry” (Kahn-Freund, 1951). Questions concerning the status of casual or temporary workers can be particularly difficult to resolve. Problems arise where a person is assigned by an employment agency to a particular client. There will be a contract between the employment agency and the worker, and another between the agency and its client, but is the worker engaged under an employment contract with either the agency or its client? In situations where the agency exercises a high degree of control over the worker and where sufficient mutuality is established, the worker may be held to be an employee of the agency, although, where the mutual obligations of the employer (to offer work) and the employee (to accept such work) are expressly excluded, there will be no employment relationship, unless the contract is a sham. A sham employment relationship also represents a major challenge for courts. The employment contract could be intentionally misrepresented to deny rights and benefits to workers (Johnson v. Unisys [2001] UKHL 13). Given the growing divergence between the law and the reality of the employment relationship, the objective should be to update and clarify the law.

Leading academics such as Freedland (2004), (2006); Deakin (2007); Collins (1990) > including prominent judges[12], are calling out for reform in this area. Although some authors have argue that the judiciary has failed to create a coherent approach to defining employment status and the characteristics of emerging forms of self-employment
they rarely make recommendations for reform; according to Mummery LJ in Frank v. Reuters, “this is a difficult task”[13].

First and foremost, the 2010 revision of the 1986 EC Equal Treatment Directive[14] for Self-employed Persons was an attempt by the EU to reform the often-challenged position of self-employed workers. The report of the European Parliament on atypical Contracts, Secured Professional Paths, Flexicurity and New Forms of Social Dialogue[15] also represents another move by the Parliament’s Employment and Social Affairs Committee to ensure protection for those on atypical employment contracts. However, different mechanisms must be incorporated to provide clearer tests for distinguishing between employed and self-employed. One of the proposals is to import the doctrine of good faith into the tests (Teubner, 1998). This move received support from Mark Freedland who argued that issues of unfairness in contractual formation and performance should be scrutinised in diffusing the binary divide (Freedland, 2006). This move is also supported by Douglas Brodie who advocates for the introduction of the implied term of mutual trust and confidence when scrutinising the employment relationship (Brodie, 2011, 1998). However, there is reluctance on English contract law adopting such concepts for a thorough analysis of the employer’s motive (Davies and Freedland, 1983). Thus, a test of mutual trust and confidence could help to fill the gaps left by the mutuality of obligation and control tests.

Second, the courts have scantily explored what amounts to self-employment. The multiple test asks whether there is inconsistency between the ways one has worked in relation to the employee status. As a result, courts have to inquire whether the employer is right to deny employment rights on grounds of self-employment status. This results in an examination of the features of employment rather than the actual characteristics of employment. Although self-employment is not a nominal subject for employment law, a more complete characterisation of the problem, and broader focus on the self-employed concept, would likely improve the testing process. The facts in Consistent Group Ltd v. Kalwak [2008] EWCA Civ 430 provide clear evidence of poor working conditions and insecurity suffered by those classified as self-employed (Tom, 2011). If the real intentions of the contract are looked into, or the good faith aspect explored, decisions in such cases could have been decided differently (Leighton and Wynn, 2011). Thus, it is recommended that courts focus on the characteristics rather than the features of employment.

Third, for a better understanding of the employment relationship, it is suggested that courts recognise the influence of psychological and economic factors (Rousseau and Schalk, 2000). This is important because such factors may have stirred the decision to litigate. This makes it critically important to differentiate between voluntary and involuntary work patterns. For example, a worker may consent to loss of employment rights for higher pay or flexibility. In regards to psychological factors, a temporary worker from an agency who has worked for a client for over a year may be confused over the real employer if trained by an employee from the agency, but on the client’s premises.

Fourth, quadrilateral forms of relationships between the client and the agency, between the agency and the umbrella company and between the umbrella company and the temporary worker, are crying-out for clarification. This is because there is no contract between the temporary worker and the client, and there is a possibility of there being no contract between the temporary worker and the agency. It is rather difficult to analyse the relationship between the umbrella company and client, and whether it
involves a secondment. This problem was witnessed in *Evans v. Parasol* [2011] I.C.R. 37 where an interim manager claimed against both the agency and umbrella company leading EAT to conclude that a proper analysis could not be achieved due to facts being unclear. As a recommendation, the creation of an implied contract between the agency worker and the end user could clarify this issue.

Fifth, those with ambiguous employment relationships are often left unaware of what they really are. This is evidenced in *O’Kelly* where the Court of Appeal found that a long serving casual waiter was not an employee. The Court’s emphasis on the narrow legalistic test of “obligation” failed to recognise economic, social and psychological factors. For those deemed not to be employees, like Mr O’Kelly, the courts failed to explore whether in truth they can be seen as entrepreneurs. This lack of contextual analysis can partly be blamed for the countless labels of self-employment. Furthermore, research indicates that some freelancers and casual workers are often imposed on such statuses in a culture of “take it or leave it” (McKeown, 2005). Thus, it is recommended that courts employ a contextual analysis that takes into consideration economic and psychological factors.

Sixth, there have been a failure to address problems surrounding the proper classification of employees and self-employed. Apart from the definition of a worker under section 230(3) of ERA, both types of statuses have never been fully defined in legislation. The “worker” concept is critical to the extension of some basic employment rights to some types of self-employed workers, such as the freelance operators in *Hall (HM Inspector of Taxes) v. Lorimer* [1994] IRLR 171 Davidov takes Freedland’s argument that the logic of the intermediate “worker” was to afford protection to all types of workers irrespective of the status (Davidov, 2005); thus, the section should be read in a purposive manner. However, in *Community Dental Centres Ltd v. Sultan-Darman* [2010] I.R.L.R. 1024, the EAT found that a substitution clause defeated a worker’s status. Casual workers are in venerable position, as they are dependent on a single employer, thus substitution clauses leave them in a uncertain position over their status (Deakin and Morris, 2009). This led academics such as Mark Freedland to propose personal employment contracts for all workers irrespective of their status (Deakin, 2007). Thus, it is recommended that the UK learns from their Australian counterparts who outlawed unfair terms such as substitution clauses under the Fair Work Act, 2009.

Last but not least, right of working directors to have access to employment rights was recognised in the 1961 case of *Lee v. Lee’s Air Farming* [1961] A.C. 12. According to the logic in *Salomon v. A. Salomon and Co. Ltd* [1897] AC 22, a director can contract with the company to become its employee due to the doctrine of corporate personality. Employment status can neither be safely ignored in the context of a company director nor classified under the shareholding status (Mummery, 1997; Leighton and Wynn, 2011). In such cases, risk taking and investment, important factors under the control test, are largely ignored (Clark v. Clark Construction Initiatives Ltd [2009] I.C.R. 718 and Howell, 2008). For example, in *Secretary of State for BERR v. Neufeld* [2009] EWCA Civ 280, a shareholder with a 90 per cent stake had complete control of the company, with large loans and guarantees, but those factors were classified as “irrelevant considerations”, thus making him an employee. These decisions favour entrepreneurial activity, thus clarity between the jurisprudence of company law and employment law in needed. In *Ashby v. Monterey Designs Ltd* [2009] WL 4872688, it was held that shareholding entitlements are not fundamentally important but only part of the
backdrop. However, in shareholding employee cases, courts tend to strain traditional employment tests to avoid a clash with company law, leaving concepts of control and subordination meaningless. These systematic flaws are hindering the rational development of entrepreneurial labour principles.

6. Conclusion
This paper has shown that divergence between law and realities of employment still puzzle modern law reformers and judges alike. The control test set the tone in distinguishing between employed and self-employed. However, it was not until Ready Mix that courts became willing to depart from stand-alone tests. The mutual obligation test contributed to the need to consider a multiplicity of factors when determining employee status, which ultimately led to the multiple test. The seemingly myopic legislative reformers have remained in the shadows of judges who brought to light all the relevant tools for understanding this binary divide. However, the analysis has shown that to avoid abuse of employment rights and bring clarity on the matter, legislators must step in and produce a definition for self-employment. Similarly, even those in the judiciary must consider the injustice sometimes suffered by self-employed workers through mechanisms such as unfair substitution clauses. It is recommended that they should consider introducing good faith principles, recognise psychological and economical factors and provide much needed clarity on the position of controlling shareholders in employment capacities. Overall, the problems of yesteryear, coupled with a growth in atypical work, continue to challenge modern employment relationships, with rulings in cases such as Autoclenz demonstrating a continuing struggle to clarify matters of employment status in an ever-changing business landscape. Unless the legislature is willing to firmly step in and seek to bring an end to this age-old issue, the problem will persist.

Notes
2. Section 94 ERA 1996.
6. EC directive 91/533.
7. Section 230(1) ERA 1996.
8. See Equality Act 2010 section 83 Interpretation and exceptions.
11. The court, by a majority, found that a merchant clothier who was yet to serve an apprenticeship himself was employing skilled artisans.
12. Court of Appeal in Dacas v. Brook Street Bureau (UK) Ltd [2004] IRLR 358. There, Sedley LJ (with Mummery LJ in agreement) said, obiter, that it was “not credible” at para. 71, that the agency worker was not employed by either party.

References

Allonby [2004] I-873.
Dragonfly Consultancy Ltd v. The Commissioner for Her Majesty’s Revenue and Customs [2008] EWHC 2113.
Challenges posed by the binary divide


Mummery, P. (1997), Buchan and Ivey v. Secretary of State for Employment (1997) IRLR 80: “It is not the purpose of the Employment Rights Act 1996 to provide compensation to an individual businessman or entrepreneur whose own incorporated business ventures have been unsuccessful”.


Stevenson Jordan and Harrison v. MacDonald and Evans [1952] at 111.


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