

CHAPTER TWO

2.0 THE NATURE OF THE CONTRACT OF EMPLOYMENT

2.1 Introduction

Work remains one of the most important sources of identity, meaning and social affiliation in contemporary life¹. The modern workplace is a locus of seemingly constant change, and as a result people work increasingly under a variety of arrangements. It is important to note that the Employment Act makes reference to an “employee” as to whom the Act applies². In the definition, however, the Act introduces a novel term “contract of employment” which is never defined anywhere in the Act³. This necessitates reliance on common law for the definition of “contract of employment” and remains an important driving force in the development of most employment law principles. In particular, the employment relationship has been traditionally founded on individual contracts of employment, with the result that principles of contract law developed by the courts have a significant impact on how the boundaries of the employment relationship have been defined. This chapter focuses on the nature of the **contract of employment** as distinguished from a **contract for employment**. It has already been stated above that the Employment Act does not define what a contract of employment is, but defines an “employee”. This therefore implies that for us to appreciate sufficiently who an “employee” is, we must first clearly understand what a contract of employment is. It is from this investigation that an understanding as to the scope of the term “employee” can be appreciated thereby

¹ Michael Dehorthy, *When the Working Day is Through: The End of Work as Identity?* (Dublin: Dublin City University Press, 2009), 23

² Section 3 of the Employment Act, Chapter 268 Of the Laws of Zambia

³ Khan Freund, *Labour and the Law* (London: Oxford Press, 1977), 45

establishing whether or not part-time employees are equally within the precincts of the Employment Act and other important labour laws.

2.2 Contract of Employment Explored

Khan, in his understanding of the relationship between an employer and an employee gives an insight as to the nature of the contract of employment though subtly⁴. He states:

The relationship between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. He adds that in its inception, it is an act of submission, in its operation, it is a condition of subordination. However, much the submission and subordination is concealed by the indispensable figment of the legal mind known as the contract of employment.

He emphasises that the hallmark of a contract of employment is the connotation of economic dependence and social subordination. He described a contract of employment as the corner stone of the modern labour law system⁵.

It must be understood that because of the sanctity of the principle of the “freedom to contract”, great scope was given by the common law courts to the parties themselves to define the scope of their employment contract, while this freedom has been circumscribed by modern labour legislation in most jurisdictions, is far from being whittled. The net result of the freedom of the parties to contract is that when assessing or analyzing the legal obligations that arise in the context of working relations, the starting point must invariably be the terms of the contractual arrangement themselves⁶.

⁴ Freund, *Labour and the Law*, 45

⁵ Khan Freund, *Labour and the Law*, 45

⁶ Collins Hugh.,and Keith Ewing, *Labour Law: Text and Materials* (Oxford: Hart Publishing Press, 2005), 70

It has been stressed that given this state of affairs, the courts have constructed a standard model of rules based on the “binary divide” between “employment” and “self-employment”, between subordinated labour referred to as “servant” in the older case law and independent or autonomous work relations which would include work done by those we refer to nowadays as independent contractors⁷. Those who fell within the former category would claim to work under a contract of employment; those who worked under a contract for services are outside the meaning of the term “employee”. The primary basis for such a distinction was that 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”.

Firstly, employment legislation particularly protective legislation excludes from its coverage those who do not work under a contract of employment.⁸ Secondly, certain rights implied into the contract of employment which the employer tacitly assumes and cannot derogate from are not applicable to contracts for employment. Thirdly in the law of tort, the phrase “contract of employment” has been used to fix the scope of vicarious liability of employers for the negligent acts of employees done in the course of employment.⁹ Fourthly, differing obligations arise under the income tax and social security legislation depending on whether one is classified as an employee or not¹⁰. Lastly, employees are preferential creditors in the event that their employer is wound up or put into receivership as was decided in the *Re Sunday Tribune*¹¹. Given these

⁷ Simon Deakin., and Frank Wilkinson, *The Law of the Labour Market* (Oxford: Oxford Press, 2005), 71

⁸ Henry Winfield, *A Text Book of the Law of Tort* (Indiana: Sweet & Maxwell, 1950), 156

⁹ Neville Cox., Val Corbett., and Des Ryan, *Employment Law in Ireland* (Dublin: Clarus press, 2009), 87-106

¹⁰ Marino Michael, *Employment Law* (Dublin: Thomson Round Hall Publisher, 2001), 23

¹¹ 1984 IR 505

factors, the courts must always be militantly alive to the possibility that it may be in the interest of one of the parties, especially the employer, to classify undertakings as “contracts for employment” in a bid to avoid taking on legislative responsibilities.

2.3 Tests developed to determine the existence of contracts of employment

The Employment Act defines an employee as:

Any person who has entered into or works under a contract of service, whether the contract is express or implied, oral or in writing and whether the remuneration is calculated by time or work done, or is in cash or in kind, but does not include a person employed under a contract of apprenticeship made in accordance with the Apprenticeship Act.”¹²

An employee may also be defined as an individual who has entered into or works under a contract of employment with an employer whether the contract is express or implied, oral or in writing. Mwenda, has noted that a contract of employment or service is an individual contract between the employer and the employee that regulates their symbiotic relationship. She further notes that legally, a contract of employment is an embodiment of rights and duties that are accrued by virtue of contractual relations¹³. What is clear from these definitions is that there is an introduction of the phrase, “contract of employment” which is not defined. Given the lack of precision with which the legislature has defined a contract of employment in some jurisdictions and in others, particularly the Zambian case where no attempt to define the phrase in question legislatively has been made, the challenge, has fallen to the courts to work out the concept. To

¹² Section 3 of the Employment Act, Chapter 268 of the laws of Zambia

¹³ Winnie Sithole Mwenda, *Employment Law in Zambia: Cases and Materials* (Lusaka: The University of Zambia Press, 2011), 4-9

this end, the courts have developed a number of tests to decipher through usually a maze of facts to determine whether a contract of employment exists or not. These tests have undeniably provided an invaluable framework and are helpful as reference points. However, it must be made clear from the outset that the courts have not been able to develop a particularly sound conception distinction between “contracts of employment and contracts for employment or self-employment” as the case may be, and as such cases tend to turn on their overall factual matrix

2.4 The control test theory

The first test that was developed was referred to as the “control test theory”. The control test theory thrived on the “what” and “how” principle. The test established that if the hirer is able to exert a sufficient degree of control regarding not only what must be done but also how the work must be done, then such a relationship is a master and servant relationship implying that there is a contract of employment. It must be emphasized that this was the traditional test and attained prominence in the case of *Collins v Hertfieldshire*¹⁴, Justice Hilbery, pointed out that the distinction between a contract for service and of service can be summarized in this way:

In one case, the master can order or require what is to be done while in the other case cannot only order what is to be done but also how it must be done.

It must be understood that the test was coined in the feudal times when the ownership of the means of production also connoted knowledge possession on the part of the owners of the means of production to operate equipment or the use of materials for production. It is argued that this test is best suited to govern relationships such as that of “a labourer and a farmer”, “a householder and a domestic worker” and a “factory owner and unskilled hand” among other rudimentary relationships. Therefore it was not uncommon for labourers to be hired and be

¹⁴ 1947 KB 598

instructed on not only what work must be done but also and how it must be done. However, modern development have clearly shown that the test has fallen into disuse owing to the fact that a number of people are skilled, they have acquired specialized knowledge and as such they are experts in their own fields of interest. This being the case, the hirer may instruct the hired as to what must be done, however, as to how it must be done, is left to the individual who is hired to exercise his calling or expertise without undue interference. This has been the case in instances of journalists¹⁵ in the *Re Sunday Tribune*, hospitals doctors¹⁶ in the case of *O'friel v St Michael's Hospital*, university lecturers as was demonstrated in the case of *Cahill v DCU*,¹⁷ among other classes of employees. Further, in the case of *Beloff v Pressdram Ltd*, the court noted that the idea of tight inspection and surveillance of employees that is implicit in the control test are somewhat anachronistic in much of contemporary employment¹⁸. In the case of *Cassidy v Ministry of Health*¹⁹, Somervell LJ, pointed out that the control test is not universally correct. He went on to state that there are many contracts of service where the master cannot control the manner in which the work is to be done as in the case of the captain of the ship. He concluded by stating:

One cannot get beyond this: was the contract a contract of service within the meaning which an ordinary person would give under the words?

¹⁵ 1948 IR 508

¹⁶ 1990 IRLM 260

¹⁷ 2007 ELR 113

¹⁸ 1973 1 All ER 241

¹⁹ 1951 2KB 598

The deficiency associated with the test in its failure to provide a watertight panacea to this challenge illuminated the desire to embark on a search for a much more satisfying and whole embracing solution.

2.5 The business integration or organisational test theory

The next test that was developed was known as the business integration test. This was during the 1940s and the test principally was developed to supplant the control test theory and to justify why professionals and skilled workers had a large degree of independence on how they carried out their work²⁰. The control required within an integration test depends on the circumstances of the worker's performance for instance working hours, location of the job and the rate pay. In the case of *Stevenson, Jordan and Harrison v Mc Donald and Evans*²¹, Lord Denning claimed that under a contract of service, a worker is employed as being part of the business or organization and as such more widely integrated within the business, however, under a contract for service, the work done is not integrated within the business. In the same case Lord Denning stressed:

It is easy to recognize a contract of employment when you see it, but often difficult to say wherein the difference lies.

The common thread that seems to run through this test as can be gleaned from above is that under a contract of service, a person is employed as part and parcel of the undertaking, whereas, under a contract for employment or services, his work, although done for the business is not integrated into it but only accessory to it. The touchstone of the test is the demonstration that the more skills are required from the worker, the less important control is in determining whether the worker is under a contract of service or otherwise. The case further demonstrated that the greater

²⁰ Henry Winfield, *A Text Book of the Law of Tort*, (Indiana: Sweet & Maxwell,1950),56

²¹ 1952 1 TRL 101

the integration in the business, the more likely the worker would be an employee of the business. The case in question bordered on a dispute between the two publishing companies where the author's employers sued due to the copyright claiming that the educational text was not produced within the organization and therefore did not belong to the employer. The Court of Appeal held that the material was not produced internally and thus did not belong to the employer. Lord Denning, therefore concluded that if a worker plays a role within an integral part of the organization, he is part of the employer's organization control. However, persuasive this test appears to be, it is a fallacy to think that is infallible. Firstly, the courts have not spelt out clearly what is meant by "integration". The test has been found to be flawed in the sense that it does not envisage the possibility of a person whose services can be so central or an integral part of the business, yet be an independent contractor. The converse is also true, that one can be an employee even when the services being offered by such a one are not meeting the core functions of an organization. These services could still be very essential as they tend to facilitate the realization of the core business of the organization. A university for instance, whose core business would be to provide education would need the services of cleaners, secretaries and other accessories. According to the integration test, since these persons do not form part and parcel of the core business of an organization, they are regarded as independent contractors. This is where the sting of the flaw regarding this particular test lies. It can therefore be clearly seen that while the test applies quite well to professionals on whom the employer does not have direct control, it does not fit so well with others, such as outworkers or sub-contractors who might be highly integral to the employer's business, yet not necessarily being employees. This is particularly the case, given the growth in the use of outsourcing by employers. The failure of this test to provide a watertight determinative test prompted the court to refocus its attention to other solutions. At

this point, it must be mentioned that there was consensus that a single exhaustive test would be unable to unlock the question of “employee” vis-a-vis “independent contractors.”

2.6 The mixed or multiple test theory

To help in distinguishing between an employee and an independent contractor, the courts have developed what is known as the multiple test theory. This test is also known as the enterprise test, and it seeks to establish whether the worker has engaged him or herself to perform the services, performing them as a person in business on his or her own account. The test was outlined in the English case of *Market Investigations Ltd v Minister of Social Security*²², where according to Cooke J;

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 service, if the answer is no, then the contract is a contract of service.

The above quote is actually a fortification of the consistency in the manner in which contracts of employment are extricated from contracts for employment. The fundamental aspect that aids in the process of disentangling the two phrases is the determination of whether or not a person in question is in a business on his own account. If answered affirmatively, then such a person would not be covered under the protective labour legislation.

The case was noted with approval by Barr in the case of *O' Coindealbhain v Mooney*²³. What must be understood more importantly is that the question as to whether one is an “employee” or not is a mixed question of fact and law in terms of extrication. Later, the courts in the case of

²² 1968 QBD 173

²³ 1990 1 IR 422

*Park v Wilson and Clyde Company Ltd*²⁴ and repeated by Lord Thankerton in the case of *Short v W. Henderson Ltd*²⁵, laid down four indicia of the contract of service and these were: (a) The master's right to the selection of his workers; (b) The payment of wages; (c) The right of the master to control the mode of performing or doing the work by the servant; and (d) The power to suspend or discipline the worker. The case of *Short v W. Henderson Ltd*²⁶ seems to have created a base upon which a much more refined multiple test theory had to be anchored and so in the case of *Ready Mixed Concrete (South-East) v Minister of Pension and National Insurance*²⁷, Mc Kenna J, adopted an open ended approach to the question of determining "employee" status and laid down the following requirements: (a) that the servant agrees that in consideration for a wage or other remuneration, he will provide his own work and skill in the performance of some service for the master; (b) he agrees expressly or impliedly that in the performance of services, he will be subject to the control of the master in a sufficient degree so as to make the other the master, and (c) the other provisions are consistent with there being a contract of employment.

The servant must be obliged to provide his work and skill. Freedom to do the job through another or by delegation is inconsistent with a contract of employment, although a limited or occasional power of delegation may not be so. In the case of *Ready Mixed Concrete (South-East) v Minister of Pension and National Insurance*²⁸, the question was whether an owner driver of a vehicle used exclusively for the delivery of the company's concrete was under a contract of employment. The

²⁴ 1928 SC, 1211,159

²⁵ 1946 TLR 427

²⁶ 1946 TLR 427

²⁷ 1968 2QB 497

²⁸ 1968 2QB 497

worker had 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 the company's colours and he wore a company uniform. He was equally obliged to carry out the orders of the company 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.

Courts look at every term to determine what applies to a contract of employment and which ones apply to contracts for employment. The leading Irish authority in this area which throws light on the question of status is the Supreme Court decision in *Henry Denny & Sons v Minister for Social Welfare*²⁹. In this case a worker was hired as an in-house demonstrator, demonstrating and marketing the Company's products in super markets. She was placed on the panel from which the demonstrators were picked or selected by the company. Her written contract described her as an "independent contractor", and purported to make her responsible for her own tax affairs. The demonstrations were not carried under the supervision of the company, but the demonstrator was required to follow reasonable directions given by the supermarket and she had been provided with written instruction as to how she was to carry out her work. She was supplied with the materials by the company for performing the demonstrations 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. A question arose as to whether she qualified as an insurable person under the Social Welfare Acts, 1993-1997. 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 the High Court, where Carrol, J also held that the worker was pensionable. The Company then appealed to the Supreme Court. Keane J,

²⁹ 1998 IR 34

dismissing the appeal, referred to the English decision of *Market Investigations v Minister of Social Security*³⁰, 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 one is or is not in business on his own account, nor could strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. Keane, J made the following remarks:

*While each case must be determined in the light of its particular facts and circumstances, in general a person would 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 the 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 own account can be more readily drawn where he or she provides the necessary premise or equipment or some other form of investment, where he or she employs others to assist in the business and whether the profit which he or she derives from the business is dependent on the efficiency with which it is conducted by him or her*³¹.

The remarks of the court in the quotation above demonstrate the myriad of factors that must be considered in the light of the facts of each case. It must therefore be understood firmly that no single factor is exhaustively decisive of the distinction between a contract of employment and a contract for employment. It is for this reason that factors must be considered as a whole and not in isolation of each other. The court continued to stress that in order to find where the right of control resides one must first look to the express terms of the contract, if they deal fully with the matter, one must look no further. If the contract does not provide as to which party shall have control, the question must be addressed in the ordinary way by implication. It must be understood that there is no variance between the economic reality test and the mixed or multiple

³⁰ 1968 QBD 173

³¹ 1968 QBD 173

test theory. Both approaches tend to focus on the right to assign performance to another and the risk of financial performance of the worker regarding losses and profits which negate the contract of service.

2.7 Analysis

What is clear from the tests discussed above is that the question of determining whether one is an employee or not is by no means an easy task. The complexity of the labour market and its ever fluid outlook compounds the challenge that courts have had to deal with in orchestrating a much more comprehensive test. This ever growing and unbridled need for a “one size fits all” test is evidenced in the readiness with which the courts abandoned tests that seem to harbor deficiencies in approaching the question. This was the case with the control test and the integration test before the multiple tests was arrived at as a much more satisfying test.

While approaches to these questions might have revealed stark difficulties, what can be learned is that the multiple test theory has rolled out a much more encompassing test and as such has given the court sufficient latitude to consider all necessary factors in arriving at the conclusion. The discussion has demonstrated that when considering the question of employee status in the modern society with the multiple test theory in mind, regard and special attention must be paid to the fact that an individual has agreed in exchange for a wage or any other remuneration, to offer his services. This implies the provision of his work and skill in the performance of some services for the master. What is important here is the aspect of consideration being furnished by the employer for the services rendered. The contract of employment by is no means a gratuitous one. But much more importantly and distinguishingly so, in this factor, is the connotation of personal service.

The idea of personal service is at the very core of the definition of the contract of employment. This, therefore, requires that the employee personally executes the work. It has been suggested that the boundary of labour law should be fixed by this requirement that the work should be performed personally as opposed to contracts that permit or expect the contractor to use substitutes or employ others to do the work. The extent to which a party can delegate or subcontract work has been watchword factor examined many times in case law. In the case of *Henry Denny & Sons v Minister for Social Welfare*³², the Supreme Court of Ireland noted that the inference that the person is engaged in business on his or her own account can be more readily drawn where the employee is able to employ others to assist in the business. A contract of employment is therefore personal in nature.

What becomes clear here is that, delegation is inimical or inconsistent with a contract of employment. The existence of the liberty on the part of the worker to employ others as substitutes vitiates the presence of a contract of employment. We have also noted that this test also reinstates the aspect of control albeit differently in that under the now obsolete “control test”, the aspect of control was the only exhaustive and determinative factor that fell for consideration in telling apart an employee from an independent contractor. Under the multiple test however, it is simply one of the factors to consider.

The aspect of control under the multiple test provides that the servant must expressly or impliedly agree that in the performance of his services for the master, he will be subject to the control of the master in a sufficient degree of control so as to make the other the master. This particular requirement is in recognition of the common law principles pertaining to the

³² 1998 IR 34

employment relationship between the master and the servant. Khan described the employment relationship in direct reference to the employee as a relationship of submission and subordination³³. The employer is expected to exert an appreciable modicum of control over an employee. This does not necessarily have to do with how the work should be done, but it may relate to the expected time of carrying out the work and at designated place or places, the power of the employer to effect disciplinary measures such as charging one for misconduct, warnings, suspensions and ultimately firing. This type of control evidences strongly the existence of a contract of employment.

The other factor in the multiple test theory is that the other terms of the contract must be consistent with there being a contract of employment. This factor is what radically sets the multiple test apart from the other two tests already looked at. This element exhibits concession on the part of the courts that no one factor must be regarded as a sole test in determining the employee status. This test has therefore broken the confines or the boundaries that the other two tests supposedly introduced in the extrication of the relationship in question. The scope of the court's discretion is wide and its latitude vast in cases of this nature.

One of the elements implicit in the multiple test that usually comes to the fore when the exercise of extricating the employer and employee relationship arises, has to do with profit and loss, also known as opportunity and risk factor. What this factor as earlier touched on necessitates, is the finding that one is in a contract for employment if one bears the risk of financial loss owing to management ineptitude in the business and conversely the extent to which a person has the opportunity to benefit from the work over and above or exceeding the salary or wage is equally

³³ Freund, *Labour and the Law*, 45

indicative of one's status. The extent to which a person has the opportunity to benefit from the work over and above a salary or wage, or, conversely the extent of exposure to financial risk becomes one of the crucial elements in the determination of work relationships. In the case of *Henry Denny & Sons v Minister for Social Welfare*³⁴, the Supreme Court of Ireland held that it is easier to infer that a person is engaged in business on his or her own account where the profits that he or she derives from the business are dependent on the efficiency with which it is conducted by him or her. It is, however, important to distinguish opportunities for profit making from contractual provisions relating to profit sharing or commission payments. These are appreciably common terms of employment that would not necessarily counter or negate a contract of employment. This is essentially because contractual provisions relating to bonuses or commissions are a usual sight in some employment contracts and as such compatible with contracts of employment

The aspect of the supply of equipment and material can as matter of fact provide indicia of guidance and an invigorating approach to the question of employment contract. Generally, employers will be required to supply employees with the equipment and materials necessary to perform the work. Where a worker provides his or own materials and equipment for the work to be performed, this in itself will point to the contract for service. Therefore individuals who risk their own money by buying assets for the job and bearing the running costs and paying for overheads and large quantities of materials are almost certainly independent contractors or self-employed. Employees are not expected to risk their own capital. The point to note is that the provision of equipment and other materials tilt the balance towards contract for employment. In

³⁴ 1998 IR 34

the case of *Mc Auliffe v Minister for Social Welfare*³⁵, 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 employer although not at the same time as carrying goods for the appellant. The court had no difficulties in arriving at the conclusion that the said contract was a contract for employment. By contrast, in the case of *Henry Denny & Sons v Minister for Social Welfare*³⁶, the shop demonstrator was supplied by the company with a demonstration stand, uniform, and products necessary for performing or carrying out demonstration and as such was classified by the court as an employee.

The next element which the court would consider is payment of tax. In contracts of employment, the tax burden borne by the employee is carried out by the employer. What this implies is that in a master and servant relationship, the employer deducts income tax and remits it to the tax authorities, conversely in contracts for employment, since an individual runs business on one's own account, the responsibility to pay tax is personally carried out.

Lastly, one other factor which must be considered although not in isolation but in the construction of the contract as a whole is what is known as party "categorisation". In some contracts parties themselves may use particular labels, most commonly that one is an "employee"³⁷ or "independent contractor"³⁸. Given a plethora of employers' statutory obligations attached to a contract of employment, it is not unusual to find employers abuse the liberty by inappropriately assigning otherwise eligible "employees" as "independent contractors" in order

³⁵ 1995 2 IR

³⁶ 1998 1R 34

³⁷ A person working under a contract of employment

³⁸ A person in business on his own account hence responsible for his own profits and losses

to blatantly circumvent the statutory obligations or responsibilities. The courts therefore must be militantly alive to such naked machinations by employers and courts have already demonstrated its hostility to such categorisations which do not correspond with reality on the ground. In *Henry Denny & Sons v Minister for Social Welfare*³⁹, the company in its appeal argued that the appeals officer 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 as an “independent contractor” and nothing in the agreement should be construed as creating a “master/servant relationship” or “principal and agent⁴⁰”. Murphy, J was satisfied that the appeal officer had been correct in his conclusion as he was required to consider the facts or the realities of the situation on the ground to enable him to reach a decision. The court noted that 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 the relationship. It is important to note that a statement in a contract to the effect that a person is an “independent contractor” is not a contractual obligation but merely a statement which might or might not be reflective of the actual legal relationship between the parties.

2.8 Conclusion

In giving a synopsis of this chapter, it is important to remind ourselves of where we started from. The underlying essence of this chapter in establishing the distinction between a contract of employment and contract for employment was firstly to properly delineate the boundaries for the application or coverage of protective labour legislation. We stated quite succinctly in the beginning that the distinction between a contract of employment and a contract for employment

³⁹ 1998 IR 34

⁴⁰ 1998 IR 34

is inescapable as far reaching implications flow from this distinction or classification of employee. Firstly, employment legislation particularly protective legislation excludes from its coverage those who do not work under a contract of employment. Secondly, certain rights implied into the contract of employment which the employer tacitly assumes and cannot derogate from are not applicable to contracts for employment. Thirdly in the law of tort, the phrase contract of employment has been used to fix the scope of vicarious liability of employers for the negligent acts of employees done in the course of employment. Fourthly, differing obligations arise under the income tax and social security legislation depending on whether one is classified as an employee or not, and lastly, employees are preferential creditors in the event that their employer is wound up or put into receivership. The sober allocation of the above connotations of a contract of employment could not have been done in gloss but in having established or conducted an in depth investigation regarding the correlation between a contract of employment and for employment. Having established the nature of the contract of employment, we can safely venture to state boldly that, what precludes one from being covered by the protective labour legislation is not by any categorisation or label but it is only where it is established that one is under a contract for employment. Can we then conclude that part-time employees are employees within the meaning of the Employment Act? Understandably, the temptation is high to venture into such a conclusion. However, it is important to note that we have so far only looked at the nature of the contract of employment. It is therefore prudent that such a conclusion comes after analyzing the nature of part-time employment too. If there is an inescapable nexus between a contract of employment and part-time employment in nature, then they are employees and properly covered under the labour laws. If however, the synonym between contract for employment and part-time employment emerges and the differences be only in nomenclature,

then they are independent contractors and such outside the scope of protective labour legislation.

Such a conclusion is reserved for the subsequent chapter.