Several tests have been developed to identify and categorise different types of workers. The basic division for our purposes is between those who are employed persons and those who are self employed, and the distinction between these categories is that the employed person works under a contract of service, while the self-employed person works under a contract for services[1].

An important criterion for determining whether the relationship between employer and employee exists is the extent to which a person is under the direction and control of the other party with regard to the manner in which the work is done.[2]

It would be improper to use this test, where professional are involved, as it is likely that the employee will be qualified in a particular field, thus making direct control of the employee difficult. For example does a football manager have the right to control how his players play on the pitch, as questioned in *Walker v Crystal Palace Football Club (1909).* Despite this difficulty, a refinement to this test, where the "right to control" has been used a determinant factor.[3] It is clear from these cases the higher the degree of control exercisable by the employer, the more likely that a contract of service exists[4], but "the greater the skill required for an employee's work the less significant is control in determining whether the employee is under a contract of service."[5]

The next and most simple test is one of organisation or integration. In *Stevenson, Jordan and Harrison v MacDonald*, Denning LJ suggested this more up to date test. Under a contract of service, a man is employed as part of the business and his work done is an integral part of the business. This test has particular importance, where the control test falls. Hospital directors may not be qualified to offer direction to the surgeon, but it is clear that the surgeons function is integral to the hospital duties.

Finally, the multiple test is the most useful tool.. In this test, the court will not scrutinise one particular feature of the contract, but will look at all the surrounding features. The court will now look at the power of selection by employer, payment of tax, national insurance, holiday pay and pension, and also the power to suspend or dismiss. The leading case on this is *Ready Mixed Concrete (South East) Ltd v MPNI.* MacKenna J held that there were three conditions necessary to establish that a contract of service existed. The first was that the worker was to provide this own work and skill in the performance of a service for his employer. Also that there must be some element of control by the employer, and finally that the other terms of the contract must not be inconsistent with the existence of a contract of employment. The fact that the driver could, and did employ a substitute driver was crucial in deciding that they were self-employed haulage contractors.

An important feature to a contract of service is the mutuality of obligations, which are bilateral between employer and employee. In *Montgomery v Johnson Underwood Ltd*, it was commented that mutuality of obligations and control were irreducible minimum legal requirements for the existence of a contract of employment, coupled with an

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[1] *Stevenson, Jordan & Harrison [1952]*
[2] Yewens v Noakes
[3] Gibb v United Steel Companies Ltd
[4] Whittaker v MPNI
[5] Beloff v Pressdram

irreducible level of personal service.[6] Although some contracts state that a replacement may be found, it is often that the replacement must be off a list of acceptable persons, in which case the level of control is still present, and would therefore be deemed as an employee.

A practical entrepreneurial/economic reality test has been developed by the courts. Questions are asked, for example, "Is he in business on his own?", or "Does he have any financial responsibility for investment or degree of risk and does he need to hire his own staff, and provide own equipment".[7] The financial surroundings of the venture, and management involved are identified, and if the burden is heavy enough he may be self-employed. In addition to the tests, courts look closely at who has overall responsibility for safety, and this can sometimes de the determinant factor.[8]

An objective test was put forward in *Withers v Flackwell Heath Supporters Club*, the EAT stated the person in question should be asked the simple question, "Are you your own boss?"

Although this was put forward by the EAT, the arrangement and not the form is the determinant factor.[9] This was shown in the case of *Massey v Crown Life Insurance Co.,* where the claimant agreed to work self-employed, although previously was an employee and carrying out the same duties, up until his dismissal. He then claimed that he was an employee, and the court held that the label put on the contract does not apply, but as there was a genuine attempt to change the relationship, the court held that he was self-employed. This may be contrasted with the case of *Ferguson v John Dawson & Partners*, where there was little evidence as to actually what the contract was.

The rule that no single test can, by itself be conclusive, is illustrated by the decision of the EAT in *City and East London FHS Authority v Durcan.* The claimant did not enjoy usual employee benefits such as holiday pay etc, but did use the hospitals equipment and premises. Also, he did have an obligation to treat any patient who attended for treatment. This obligation was a determining factor. Therefore the EAT refused to alter the tribunals decision. This case may be contrasted with *Carmichael v National Power plc*, where there was no mutuality of obligations.

A more problematic area of law for the courts to decide upon has been in the form of atypical workers, such as casual workers, agency workers and home workers. The groups often find it difficult to establish a contract of service and the rights, which accrue under this label.

Some workers are employed under a casual basis, or on short-term periodic contracts.. As previously discussed, implied into the contract of employment is mutuality of obligations, therefore an obligation to provide and accept work, without which a contract of employment cannot exist. There have been attempts to pay national insurance and tax as an employee would for the actual periods worked so that they

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[6] MacFarlane v Glasgow City Council
[7] Market Investigations Ltd v Minister of Social Security
[8] Lane v Shire Roofing Co (Oxford)
[9] Tyne and Clyde Warehouses Ltd v Hamerton

may be classed as employees, but to no avail.[10] In particular, where the terms which casual work is offered/accepted expressly negate mutuality of obligations, there can be no implied obligation or overarching contract.

An attempt to treat such workers under a 'global contract' has been put forward but with limited success. A global contract cannot exist unless there is a irreducible minimum of obligations to offer ad accept work existing between the parties.[11] An attempt to bring this obligation into existence by adding all the separate contracts together has been made, but this was rejected.[12]

An important case that holds mutuality of obligations as an important determinative factor, is the case of *Carmichael v National Power plc*, the court said that where one person is not obliged to offer work and the other person not obliged to accept it. Therefore there is a lack of the irreducible minimum obligation.

A positive case for home workers and potentially all casual workers is the case of *Airfix Footwear Ltd v Cope,* quite simply as the home worker had accepted hours for over a long period, a course of dealing was implied and she was held to be an employee. Again, with home workers, mutuality of obligations is present in the case of *Nethermere (St. Neot) Ltd v Taverna and Gardiner*, where the worker and the employer were obliged to provide a reasonable amount of work, but the workers could vary the hours and the amount of garments they took.

Finally, with agency workers, it was question who, if any were the employer, the agency, or the client company. In *Wickens v Champion Employment*, it was held that the agency was not bound to make bookings, and the workers not bound to accept, therefore no mutuality of obligations.

In *McMeechan v Secretary of State for Employment*, the general terms of the contracts did not give rise to a contract of employment, but a singular specific engagement gave rise to the contract, therefore the Court of Appeal held that he was an employee.

It is possible for the client company to employ the worker specifically (transmute), particularly if the workers were under some form of control.[13] If there is no contract whatsoever between the worker and the client, the relationship of employee and employer cannot exist.[14]

As per the scenario, there are two possible claimants. Karim shall be dealt with first, then Lisa. Karim is in a situation where he needs to prove that he was an employee so that he can claim unfair dismissal.

As discussed above, if the worker has made a financial risk, then it will be likely that he is self-employed; to determine this we may look at the economic reality test. This test asks whether the worker is working for himself or is working for another. If the worker takes the risk of making profits or losses then he is not likely to be held to be

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[10] *Stevedoring & Haulage Services Ltd v Fuller*
[11] *Clark v Oxfordshire Health Authority*
[12] *Hellyer Bros Ltd v McLeod*
[13] *Motorola Ltd v Davidson*
[14] *Hewlett Packard v O'Murphy*

an employee. Therefore, the fact that Karim invests and takes a share of the profits does not help in his claim.

The organisation test offers little help, although it is clear from his role as deputy manager that he is integral to the organisation of the business. We should then look at control. As expressed by Jordan, Karim would only be responsible for the running of the café if Jordan was away, therefore, taking Jordan's place as manager, and presumably complete control of decisions. Jordan controls Karim duties whilst he is working, and Karim seems to be the junior partner.

Jordan expresses that only he has the power to hire and fire staff, therefore Karim loses that right, thus not being treated as the employer. As shown in *Market Investigations Ltd v Minister of Social Security*, the right to hire own staff is a primary function of an employer, but Karim does not have this right.

We may also look at the reverse rule in *Ready Mix Concrete*, where the worker may delegate, but in this scenario, Karim is delegated to. In the above case, the worker was held to be self-employed, as he had the opportunity to profit and the risk of loss, this is all applicable to Karim.

If a contract of service exists, it may help, but as Karim is obviously the junior partner and the mere fact, he receives a share of the profits does not necessarily mean he is a partner. Other relevant considerations need to be taken into account.[15]

Firstly, the largest problem Lisa faces is an express condition that she does not have to have work provided, and she does not have to carry out the work. This lack of mutual obligation goes against Lisa. As described in *O'Kelly v Trust House Forte plc*, the lack of mutual obligation, and more importantly no promise to provide work by the employer. Karim or Jordan controls Lisa, and she is integral to the business. She cannot profit other than by wages. There mutuality of obligations is vital.

One avenue could be that Lisa could try, is course of dealings. As stated, although the work was casual, she did indeed accept the work as it was offered. Therefore a mutual obligation could be implied, and therefore provide Lisa with a remedy.[16]

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[15] *Glasgow v Independent Printing Co*
[16] *Nethermere (St. Neot) Ltd v Taverna and Gardiner*