

<b>Health and Safety Executive</b>		<b>Operational Circular</b>	
		<b>OC 183/6</b>	
<b>Review Date</b>	14/09/2002	<b>Open Government Status</b>	Fully Open
<b>Version No &amp; Date</b>	1: 14/09/1992	<b>Author Unit/Section</b>	FOD FSU

**Target Audience:**  
All HSE Inspectors

### ABSTRACT OF DECIDED CASE

#### Lee Ting Sang v Chung Chi-Keung and another

Following an accident whilst working in Hong Kong, the applicant had his claim under the Employees' Compensation Ordinance dismissed. The Court of Appeal of Hong Kong upheld that decision. The applicant appealed to the Judicial Committee of the Privy Council which subsequently allowed his appeal after finding that the facts of the case showed that the applicant was working under a contract of service and was therefore an employee.

**Issue:** Contract of employment - "employee".

**Act:** Employees' Compensation Ordinance (Laws of Hong Kong, 1988 rev, c.282), s.2(1).

**Circumstances:** The applicant, Mr Lee, a mason, was working for a sub-contractor, at a construction site, chiselling concrete as instructed by the subcontractor. The applicant used tools supplied by the subcontractor and his work was not supervised but was inspected periodically by the main contractor's foreman. Depending upon the nature of the work he had to do, the applicant was paid either a piece-work rate or a daily rate for working from 8am to 5pm. If he finished his work early he assisted the subcontractor to sharpen tools. He sometimes worked for other contractors but he gave priority to urgent work of the subcontractor telling those for whom he was then working to replace him. During the course of his work at the site he was injured. On his application against both the subcontractor and the main contractor for compensation under the Employees' Compensation Ordinance, the District Judge dismissed the claim holding that the applicant was not an employee within section 2(1) of the Ordinance but an independent contractor. The Court of Appeal of Hong Kong upheld that decision. The applicant appealed.

**Held:** The Judicial Committee of the Privy Council.

The appeal was allowed.

English common law standards had to be applied in determining whether the applicant was working as an employee of the subcontractor or an independent contractor, the fundamental test being whether or not he was performing services as a person in business on his own account and thus as an independent contractor. Determining the applicant's status was a question of fact for the trial judge and an appellate court would not interfere with his finding unless it was unsupported by the evidence or was one which he could not reasonably have reached if he had properly directed himself on the law. In this case the finding was contrary to the established facts and so unreasonable as to constitute an error of law, so that the Board [Judicial Committee of the Privy Council] were justified in reversing the lower court's decisions. The applicant **was working as an employee under a contract of service with the subcontractor** and was entitled under the Ordinance to be compensated by the subcontractor and the main contractor for his injury.

The judgement of their Lordships, extracts of which follow, was delivered by Lord Griffiths:

"The Ordinance is clearly modelled upon the English Workmen's Compensation Acts and provides for compensation to be payable to an employee in respect of an accident arising out of, and in the course of, his employment. An employee is defined in section 2 as "any person who has ..... entered into or works under a contract of service or apprenticeship with an employer in any employment." The definition of employee includes casual workers ..... and also employees who have entered into concurrent contracts of service with 2 or more employers.....

The question is to be answered by applying English common law standards to determine whether the workman was working as an employee or as an independent contractor.

What then is the standard to apply? This has proved to be a most elusive question and despite a plethora of authorities the courts have not been able to devise a single test that will conclusively point to the distinction in all cases. Their Lordships agree with the Court of Appeal when they said that the matter had never been better put than by Cooke J. in **Market Investigations Ltd v Minister of Social Security [1969] 2 QB 173, 184-185:**

"The fundamental test to be applied is this: 'Is the person who has engaged himself to perform these services performing them as a person in business on his own account?' If the answer to that question is 'yes', then the contract is a contract for services. If the answer is 'no', then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of the considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it cannot be regarded as the sole determining factor; and that factors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task.'"

After considering the facts of the case, as well as other reported decisions drawn to the attention of the lower courts, Lord Griffiths concluded on behalf of their Lordships that "the facts of the present case point so clearly to the existence of a contract of service that the finding that the applicant was working as an independent contractor was to quote the words of Viscount Simonds in **Edwards v Bairstow [1956] AC 14,29**, "a view of the facts which could not reasonably be entertained" and is to be regarded as an error of law." His Lordship then went on to say they would allow the appeal.

**Type of case:** Civil.

**References:** Industrial Relations Law Reports (1990) IRLR 236,  
(1990) 2 AC 374.

LIBCAT: This item will have an entry on the HSE Database (LIBCAT).

14 September 1992

(2298/FOD/1992)

Disc No: F0DA1.EDT/J051/5.8.92/KM/DH

(New disc ref:\J:\Editors\CA1\J051Au92.SAM)

**ASI headings**

Court decisions: decided cases: Employees' Compensation Ordinance.

