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Abstract

There is much at stake in the classification of work relations: on the one hand, the stability of the tax base and the capacity of the state to deliver public goods; on the other, the structure of enterprise and the rights of workers in the 'gig' economy and beyond. Classification decisions, however, are made using legal concepts which many view as artificial and manipulable, to the point where it is hard to discern the considerations which are actually guiding decisions. Decomposing the 'employment' concept reveals something of the implicit 'weighting' of tests and indicators which underlies judicial and administrative determinations. Viewed in this light, statutory reformulations such as the 'ABC' test can play a role in 'reweighting' the classification process, extending the protective coverage of labour laws and resisting fiscal erosion.

Keywords: labour law, tax law, employment status

JEL Codes: J83, K31, K34

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Decoding Employment Status

1. Introduction

What is at stake in the question of employment status? At one level it is about nothing more than the identification of a particular contract-type, named 'service', 'employment' or 'work' according to context. It is up to the parties themselves to determine the terms of their contract and hence, in the final analysis, its legal classification. As the English Court of Appeal put the matter in *Calder* v. *H. Kitson Vickers & Sons (Engineers) Ltd*, 'a man [sic] is without question free under the law to contract to carry out certain work for another without entering into a contract of service. Public policy has nothing to say either way'.[1]

A somewhat different view was expressed by the Supreme Court of California in its recent decision in *Dynamex Operations West, Inc*. v. *Superior Court of Los Angeles County*.[2] According to this court, 'the question whether an individual worker should properly be classified as an employee or, instead, as an independent contractor has considerable significance for workers, businesses, and the public generally'. The court noted the high risk of misclassification of workers given the 'substantial economic incentives that a business may have in mischaracterizing some workers as independent contractors', incentives which include 'the unfair competitive advantage the business may obtain over competitors that properly classify similar workers as employees and that thereby assume the fiscal and other responsibilities and burdens that an employer owes its employees'. Misclassification was also 'depriving federal and state governments of billions of dollars in tax revenue and millions of workers of the labor law protections to which they are entitled'.[3]

If classification is a process with overarching implications for enterprise structure, the tax base, and the effective operation of worker-protective labour laws in today's 'gig economy', it nevertheless remains a juridical act. The economic and political context at any given time frames the classification decision, but it is expressed through the medium of legal discourse, the coherence of which requires the law to maintain a degree of autonomy from competing modes of thought and action.[4] Even a ruling as policy-conscious and conceptually innovative as *Dynamex Operations* proceeds for the most part through a cautious reading of precedents and texts, as the court seeks to justify its decision on the basis of criteria of interpretive fit.

Legal concepts such as 'employee' are abstract and self-referential for a reason. [5] The specialised language of concepts permits social facts to be 'encoded' in a

form which makes them tractable for legal purposes. They can be stored as precedents and activated when needed in the determination of novel cases. They can also be used to aid the material operation of the law not just on an everyday basis but, when faced with a changing external environment, as with the rise of platform work.

It is today's conventional wisdom that we are facing the end, if not of 'work' necessarily (although some do claim this[6]), then at least of 'employment',[7] understood as the category through which labour and fiscal laws construct their context and thereby ensure their mode of operation. This article has a different starting point. Rather than assuming the demise of the contract of employment, it aims to do some 'decoding' of employment status, that is, to take the abstraction of 'employment' and break it down into its component parts, with a view to assessing its continuing usefulness.

2. A closer look at 'indicators', 'tests' and 'weights'

The idea that the employment concept can be decomposed into a list of 'factors' and 'indicators' is a recurring theme in case law, commentary, and administrative practice. Table 1 contains three such lists, based respectively on the American Law Institute's Restatement (Second) of Agency, dating from 1958,[8] the US Inland Revenue Service's employment status guidance, issued in 1987,[9] and the Checking Employment Status for Tax ('CEST') test issued by the UK HMRC in 2017 and updated in 2020. The Restatement is the product of deliberation by academic lawyers and is intended to summarise the state of the case law. Although now several decades old, it continues to be cited as a relevant source on the meaning of the 'control' test.[10] The IRS list is in the form of a legal ruling intended to guide the administration of the federal income tax, which has also been adopted for employment law purposes in a number of states.[11] The CEST list is part of an online tool designed to help employers and workers determine whether earnings are liable to income tax.[12]

Table 1

Restatement (Second) of Agency (1958)	**IRS Guidance on Employment Status (1987)**	**HMRC CEST Test (2017, updated 2020)**
(a) the extent of control which, by the agreement, the master may exercise over the details of the work (b) whether or not the one employed is engaged in a distinct occupation or business; (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is a part of the regular business of the employer; (i) whether or not the parties believe they are creating the relation of master and servant; and (j) whether the principal is or is not in business	1. Instructions 2. Training 3. Integration 4. Services rendered personally 5. Hiring, supervision, and paying assistants 6. Continuing relationship 7. Set hours of work 8. Full time required 9. Doing work on employer's premises 10. Order or sequence set 11. Oral or written reports 12. Payment by hour, week, month 13. Payment of business and/or traveling expenses 14. Furnishing of tools and materials 15. Significant investment 16. Realisation of profit or loss 17. Working for more than one firm at a time	1. About you and the work Does the worker provide their services through a limited company, partnership or unincorporated association? 2. Workers' duties Will the worker be an 'Office Holder'? 3. Substitutes and helpers Do you have the right to reject a substitute? Would the worker have to pay their substitute? 4. Working arrangements Does your organisation have the right to move the worker from the task they originally agreed to do? Does your organisation have the right to decide how the work is done? Does your organisation have the right to decide the worker's working hours? Does your organisation have the right to decide where the worker does the work? 5. Worker's financial risk Will the worker have to buy equipment before your organisation pays them? Will the worker have to buy materials before your organisation pays them? Will the worker have to fund any other costs before your organisation pays them? How will the worker be paid for this work? If your organisation was not happy with the work, would the worker have to put it right?

	18. Making service available to general public 19. Right to discharge 20. Right to terminate	6. Worker's involvement Will you provide the worker with paid-for corporate benefits? Will the worker have any management responsibilities for your organisation? How would the worker introduce themselves to your consumers or suppliers? 7. Worker's contracts Does your organisation know who will be doing this work? Does this contract stop the worker from doing similar work for other organisations? Is the worker required to ask permission to work for other organisations? Are there any ownership rights relating to this contract? Has the worker had a previous contract with your organisation? Is the current contract the first in a series of contracts agreed with your organisation? Will this work take up the majority of the worker's available working time? Has the worker done any self-employed work of a similar nature for other clients in the last 12 months?

Indicators of employment according to the Restatement (Second) of Agency, IRS Guidance on Employment Status, and HMRC Employment Status Guidance.

Sources: American Law Institute; Rev. Rul. 87-41, 1987-1 CB 296 -- IRC Sec. 3121; HMRC website https://www.gov.uk/government/collections/employed-or-self-employed

The Restatement lists ten 'matters of fact' which, 'among others' not listed, are to be 'considered' in 'determining whether one acting for another is a servant or an independent contractor'. The IRS ruling contains twenty guidelines 'set forth for determining the employment status of a taxpayer'. The CEST list is described as 'detailed guidance to help work out if someone is employed or self-employed'. It consists of just over 20 factors listed in the form of questions and grouped into seven categories.

There is considerable overlap between the three lists, although the CEST list reflects the development of some idiosyncratic features of the English case law, including the emphasis placed on the power of 'substitution' as an indication of self-employment.[13] The 'mutuality of obligation' test[14] is referred to obliquely in the suggestion that labour hired through a series of casual or irregular contracts may, for that reason, fail to quality as 'employment'.

While there is general agreement across common law jurisdictions on the relevance of individual indicators for judging employment status, it is also accepted that there is considerable difficulty in applying them in any consistent way to the multiplicity of fact situations coming before courts and tribunals. The factors are, according to the US Federal Court of Appeals for the Sixth Circuit, 'far too easy to manipulate… to suit a preconceived result'.[15] English judges, while not so self-critical, openly admit that their tests are impressionistic: 'the process involves painting a picture in each individual case'. [16] Lists of indicators may be also of limited assistance given that the weight accorded to any one factor cannot be ascertained in the abstract: it is 'quite impossible in a field where a very large number of factors have to be weighed, to gain any real assistance by looking at the facts of another case and comparing them one by one to see what facts are common, what are different and what particular weight is given by another Tribunal to the common facts'.[17]

From these judicial statements and others it is clear that simply summing the individual indicators to arrive at an overall 'negative' or 'positive' score would not be a good way to assess employment status. This is because of the two linked issues of 'weighting' and 'clustering'. Weighting is an issue because the factors are not all of equal importance; some matter more than others, depending on the context of a particular fact situation. Clustering is an issue because the factors are not independent of one another. They are grouped together by reference to a number of 'tests' which occupy an intermediate level between the individual fact-specific indicators, on the one hand, and the highly abstract 'employee' concept on the other: these are conventionally known as the 'control', 'integration, 'economic reality' and 'mutuality of obligation' tests.[18]
Weighting and clustering are linked as issues because the way in which the individual indicators are grouped together influences the relative weight which a

court or tribunal is likely to accord to any one of them. Thus the importance to be attached, for example, to the 'giving and taking orders' indicator is likely to be depend on how it relates to other indicators in the 'control' category, and, by extension, to the weight placed on 'control' as distinct from the other intermediate level tests.

3. The exclusionary role of the 'mutuality of obligation' test: the DTI (1999) study

An empirical study carried out in 1999 for the Department of Trade and Industry ('DTI'), the government department with the principal responsibility for labour legislation at that point, illustrates the relationship between 'tests' and 'indicators.'[19] The study clustered indicators by reference to the four tests in the way set out in Table 2.

Table 2

Test	**Factor**
Control	duty to obey orders discretion on hours of work supervision of mode of working
Integration	disciplinary/grievance procedure inclusion in occupational benefit schemes
Economic reality	method of payment freedom to hire others providing own equipment investing in own business method of payment of tax and NI coverage of sick pay, holiday pay
Mutuality of obligation	duration of employment regularity of employment right to refuse work custom in the trade

Tests and indicators for identifying employment status in DTI report, *The Employment Status of Workers in Non-Standard Employment* (1999). Source: Burchell et al., 1999.

The DTI study made the point that the four 'tests' were distinct from each other in part because they had emerged and crystallised at different stages in the historical development of labour and fiscal laws. Thus the control test was 'the most traditional, with roots going back to at least the nineteenth century',[20] while the integration and economic reality tests dated from the middle decades of the twentieth century when the vertically integrated enterprise was the norm and solidaristic forms of risk-sharing, through social insurance the welfare state, were

at their peak.[21] The 'mutuality of obligation' test, dating from the late 1970s, came to prominence in part as a reaction to the increasing protection given to employees at that point through laws on unfair dismissal and the resulting pressure to distinguish more clearly between 'standard' and 'non-standard' work. The differentiating effect of the mutuality test was 'particularly significant for workers employed in non-standard forms of work, since it may mean that individuals who do not have a business of their own and hence are not genuinely in business on their own account, but who lack a regular and stable employment relationship with a particular employer, are effectively left in a "grey zone" between employment and self-employment'.[22] The study noted that while each of the tests retained some relevance, the mutuality test had largely eclipsed the others at least in employment protection cases, to the extent that the 'economic reality' test was no longer being applied by employment tribunals.

The purpose of the DTI study was not to offer advice to parties or to assist in predicting the outcome of cases, but to estimate empirically the proportions of the national working population employed in the different legal categories of 'employee', 'independent contractor' and 'worker'. The stimulus for the study was the statutory utilisation of the 'worker' category to mitigate the narrowing of status brought about by the courts' strict reading of the mutuality of obligation test in the preceding two decades. The National Minimum Wage Act 1998 and Working Time Regulations 1999 extended protection to workers who, while 'self-employed' or independent contractors according to the mutuality test, were nonetheless in a relationship of economic dependence with an employer.[23] As it later became known, this category of the 'limb (b) worker' was defined by reference to a contract under which '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 business undertaking carried on by the individual'.[24]

The DTI study used a survey instrument which incorporated a two-step approach to the determination of employment status. At the first stage, respondents were asked a number of questions designed to establish whether their employment status was in some way ambiguous. Those who defined themselves as an employee and were paid a salary or wage, held a permanent job, and had no 'non-standard' aspect to their working arrangements (this category included work which was seasonal, fixed-term, agency-based, casual or zero-hours) were classified as 'clearly employees'. Those who reported that they were a director or partner in their own business and/or employed others were classified as 'clearly self-employed'. On this basis, 64% of the total sample were 'clearly employees', and 5% were 'clearly self-employed', leaving just over 30% whose status was 'ambiguous'.

The second stage questions were designed to see which indicators of employee status were associated with ambiguity. To this end, the survey instrument included a set of questions designed to replicate the effect of the different legal tests. Of the self-reporting employees with ambiguous status, fully 50% 'failed' the mutuality test and so were at risk of being classified as self-employed. By contrast, 30% of this group 'failed' the integration test and only 10% 'failed' the control and economic reality tests. In other words, for workers in the 'grey zone', the four tests produced divergent results, with the mutuality indicators pointing in different directions to the others, and much more strongly associated with ambiguity.

The study then sought to estimate the number of self-reporting employees who, in addition to being at risk of being excluded from employment status, were also unlikely to be classified as limb (b) workers under the expanded statutory test. To do this, it sought to identify respondents who 'failed' the economic reality test and had worked for more than one employer in the previous six months. This produced a figure of around 6% of the number of self-reporting employees. In addition, it was found that 2% of the total sample were self-reporting 'independent contractors' who would have been classified as limb (b) workers according to their answers to the second-stage questions. Overall, , the DTI study was able to show that the use of the 'worker' concept amounted to an extension of the coverage of protective legislation to around 92% of the total labour force, compared to the 87% who self-reported as employees.[25]

4. Automating the classification process: the HMRC's CEST test

In the DTI study, clusters of indicators were identified on a priori basis, using the case law of the higher appellate courts and legal textbooks as guides. A different empirical approach would be to infer the existence of clusters from an analysis of how courts and tribunals in general actually decide cases. Statistical coding of legal texts can be used to identify patterns in data which are 'latent' in the sense of not being immediately visible from a reading of the original materials.[26] The process of coding, one of the techniques of statistical legal analysis sometimes called 'leximetrics', uses individual indicators to build up a composite picture of a legal rule. In composing an 'index' out of the individual parts, this methodology requires some consideration to be given to the question of how far to attach differential 'weights' to the individual indicators. If no differentiation is made, the assumption is that each indicator is of equal importance to the others.

Alternatively, weights can be inferred from statistical techniques such as principal component analysis or factor analysis. These techniques are used to see if particular individual indicators are more important than others in predicting a given outcome or result, as well as how far certain indicators group together in

clusters.[27] Thus they could in principle be used to identify how far an individual factor such as 'substitution' is more important in practice than others in determining employment status decisions. They could also be used to test how far the clustering of factors in a 'test', such as 'mutuality of obligation', is correlated with outcomes.

This may be how the CEST online tool works, but that is far from clear. To get the relevant guidance, the user inputs data online by answering 'yes' or' no' to a series of questions. There are separate questions for workers and employers, and two slightly distinct versions of the test, one for determining the correct legal classification of off-payroll working ('IR35'),[28] the other for ascertaining employment status in general. On the basis of the answers submitted, the platform delivers an automated response, indicating that there is either 'employment' or not as the case may be. This determination can then be used by the parties to structure their fiscal arrangements. If the work is 'within IR35', or otherwise governed by employment status, income tax must be deducted at source and class 1 and 2 national insurance contributions paid.[29] The website states that HMRC will stand by the determination thereby arrived at unless the information provided was materially inaccurate.[30]

It is not clear whether the CEST tool arrives at a determination by simply summing the answers and arriving at an overall score which is 'positive' or 'negative' for employment status. If it were to proceed that way, it would be treating each indicator as equally weighted with, and independent of, all the others. This would seem to be incompatible with the clear judicial guidance to the effect that the test is 'impressionistic', suggesting some form of clustering, and that the 'weighing' of indicators is an important part of the process of arriving at a result. However, there is nothing on the HMRC website to suggest whether, or how, such 'weighing' or 'clustering' has been carried out.

In practice, the CEST tool has proved highly controversial. The online publication ContractorCalculator issued a series of freedom of information ('FOI') requests in 2017 and 2018 in an attempt to ascertain how it worked.[31] In an FOI response in April 2018 HMRC stated that 'the CEST rules were developed in a workshop, from which the only documented output is the agreed set of rules used by the CEST, and which are already in the public domain'. HMRC had not retained a list of the court cases, settled cases or documents used in the testing procedure, but did report that it had 'a very similar list of cases and test results… produced after CEST's development'.[32]

Subsequently HMRC published on its website a more complete FOI response document, which was last updated in September 2018. This document states that CEST 'was rigorously tested during development in conjunction with HMRC's

lawyers against live and settled cases and reflects employment status case law'. It lists 24 tax cases which CEST was tested against. In two of these, the test reached a different result to the tribunal. It notes that these were first instance decisions and as such 'do not set a binding precedent'. Of one, it states that 'the judgment… acknowledged that the case was finely balanced'; of the other, it reports that 'commentators expressed surprise at the results'.[33] Neither judgment was appealed, although the FOI response states that 'HMRC would expect to contest similar cases in future, and the CEST results reflect that position'.[34]

A retest analysis carried out by ContractorCalculator claimed that the true error rate in CEST was higher than HMRC had reported, and that in approaching half the sample the test arrived at a result that was either 'wrong' or 'right for the wrong reason'. In particular, it was suggested that the test put undue weight on 'substitution' as a key indicator of status, recording as 'employees' contractors who reported that they could not substitute another person to do the job, but would have been self-employed under the 'control' and 'mutuality of obligation' tests.[35]

A closer look at the 'substitution' factor highlights the limits inherent in any attempt to reduce employment status to a single binary (yes/no) question. The relevant question in CEST asks: 'do you [the employer] have the right to reject a substitute'? According to case law, if the answer to this is 'no', there is strong evidence of self-employment, since a contractor who does not commit to provide their own personal service or services is highly unlikely to be employed under a contract of employment or service. However, it does not follow that if the answer is 'yes', the contractor is an employee. This is because it is entirely possible that a specialist contractor or freelance agrees to provide a service or product which is based on their own personal skills, capabilities or judgment, and so cannot substitute another to do the work, but remains sufficiently autonomous in the way the work is carried out to be correctly classified as self-employed.

In other words, there is no equivalence between the two binary options contained in the question. A 'no' is clear evidence of self-employment, but 'yes' is not clear evidence of anything. 'Substitution' is precisely the kind of indicator whose 'weighting' in the overall evaluation of status will vary from case to case and which can often only be judged alongside other indicators to which it is related, in this case other factors forming part of the 'mutuality of obligation' cluster. Viewing it in isolation is highly likely to give skewed answers.

The problem is exacerbated when it is borne in mind that the 'errors' made by CEST, in the two cases it failed to predict accurately, disadvantaged the taxpayer. It is hardly surprising then that ContractorCalculator should argue that the test is 'heavily biased towards pushing people into being incorrectly taxed as a "deemed employee"'.[36]

The controversy over CEST prompts a number of reflections on the composition of the employment status tests. The first is that the tendency to break down the overall classification (employee/independent contractor) into individual indicators is liable to mislead if the intermediate categories (control, integration, economic reality, mutuality of obligation) are not taken into account. It is through the intermediate tests that the individual indicators are linked to one another and accorded differential 'weights' according to the facts of particular cases. The classification process may be 'impressionistic', but it is not arbitrary.

The second reflection is that given the distinct genealogy of the different tests, which of them the court ends up applying is going to have far-reaching implications for the practical consequences of employment status decisions. If 'economic reality' were to be generally applied as the test of status, the reach of employment and fiscal laws would be considerably extended. Not only would workers employed on zero hours contracts and others in the 'gig' economy be brought within the scope of protection and taxation; contractors who cannot show that they are economically independent to the point of operating a continuing business or enterprise of their own will tend to fall within IR35. Conversely, the continuing use of the mutuality test is going to fragment the application of labour laws and narrow the tax base.

5. A structural break in employment and tax law? The 'ABC' test

It might be thought that there is no straightforward way around the 'mutuality of obligation' test in English law. The statutory drafting which gave rise to the 'limb (b) worker concept' took the mutuality test as its starting point, and allowed for a circumvention only in respect of the basic labour standards of wages and hours; unfair dismissal law and other employment protection standards remain subject to the employee test. The growing use of the mutuality test in tax cases suggests that its influence is increasing rather than receding. However, history suggests that something can be done about mutuality. Statutory interventions akin to 'structural breaks' have frequently had the effect of diverting the path of the common law.[37]

The US 'ABC' test is a good example of the potential for redefinition, having been adopted in a statutory form in a number of US states, and taken up by courts interpreting pre-existing statutory formulae in others. The test was defined in the *Dynamex Operations* case as follows:

> This standard, whose objective is to create a simpler, clearer test for determining whether the worker is an employee or an independent contractor, presumes a worker hired by an entity is an employee and places

> the burden on hirer to establish that the worker is an independent contractor. Under the ABC standard, the worker is an employee unless the hiring entity establishes each of three designated factors: (a) that the worker is free from control and direction over the performance of the work, both under the contract and in fact; (b) that the work provided is outside the usual course of the business for which the work is performed; and (c) that the worker is customarily engaged in an independently established trade, occupation or business.[38]

For present purposes, what is most relevant about the test is the way that it implicitly 'reweights' the different factors. The formal contract agreed by the parties, a critical part of the mutuality test which prompted an exponential increase in the use of boilerplate to deflect employee status, is downgraded in the ABC test to a subsidiary factor in the 'A' or 'control' part of the test. Not only is the contract just one aspect of control; the way the arrangement works out 'in fact' is here given equal weight to the contract. This is not the approach taken in English law, which allows the way the arrangements works out in practice to influence the mutuality test only at the margins, if it can be shown, for example, that conduct gave rise to a contractual variation, or provides a basis for designating a contract term as a 'sham'.[39]

The test also achieves a reorientation of the focus of the court or tribunal back on to the economic reality test. Thus both the 'B' part and the 'C' parts of the test focus on the organisational context of the relationship, in the sense that they direct attention to whether the hiring entity or the provider of labour, respectively, are operating a trade or business. This approach makes it much more likely that work carried out by freelancers or contractors in 'gig' economy will be classified as employment, except in the cases where the provider can show that their work is being carried out within the framework of their own continuing business activity.

The 'ABC' test also demonstrates the importance of the burden of proof. In the context of this particular test, placing the burden of disproving employee status on the entity involves a reweighting in favour of the economic reality indicators over those, such as control or contract, which might favour a finding of independent contractor status for 'gig' workers.[40]

6. Conclusion

The determination of employment status involves judgments which are often complex and impressionistic, but they are rarely arbitrary. When we decompose or 'decode' the notion of employment we can see that it is layered into 'tests' and 'indicators'. Through the tests, the indicators are 'weighted' and 'clustered' in various ways.. This is an evolutionary process involving elements of information

retention (through precedents) and error correction (through legislation, litigation and appeal).

To say that the idea of employment status contains a conceptual element is not to downplay its normative, indeed political, content. Determinations of employment status have huge political significance since they directly affect the employment rights of millions of workers as well as the stability of the state's fiscal base and hence its capacity to supply public goods. The point is, however, that political aims will not be delivered unless the role of legal form in the process of classification is understood. The legal system's autonomy from the political and economic sphere, no matter how limited or qualified it may be seem to be, creates possibilities as well as constraints for policy makers.

If conceptual reasoning matters, statutory drafting can be critical to determining the success or failure of a legislative initiative. Conceptual forms evolve in ways which may sometimes seem to be impervious to legislative correction, but the path of the common law can be altered or diverted. For these reasons, the experience of the US 'ABC' test may well merit the attention of British lawmakers.

Notes

1 [1988] ICR 232, 251.

2 416 P.3d 1 (Cal. 2018). The issue at stake in *Dynamex Operations* was the application of a statutory wage order. On the subsequent development of Californian law, including the role of the controversial Proposition 22 in asserting the 'independent contractor' status of drivers and couriers, see C. Said, 'Lawsuit seeks to overturn Prop. 22, measure that keeps gig workers from becoming employees', *San Francisco Chronicle*, 12 January 2021, https://www.sfchronicle.com (accessed 8 April 2021).

3 416 P.3d 1, 2. On the critical importance of wage labour and the rise of the 'employee' for the stability of taxation, see A. Jensen, 'Employment structure and the rise of the modern tax system' NBER Working Paper No. 25502, January 2019: https://www.nber.org/papers/w25502 (accessed 12 March 2020).

4 N. Luhmann, *Law as a Social System*, trans. K. Ziegert, eds. F. Kastner, R. Nobles, D. Schiff and R. Ziegert (Oxford: OUP, 2004).

5 S. Deakin, 'Juridical ontology: the evolution of legal form' (2015) 40 *Historische Sozialforschung* 170-84; Z. Adams, *Labour and the Wage* (Oxford: OUP, 2020), ch. 1.

6 J. Rifkin, *The End of Work: The Decline of the Global Labor Force and the Dawn of the Post-Market Era* (New York: Putnam, 1995).

7 K. Stone and H. Arthurs (eds.) *Rethinking Workplace Regulation: Beyond the Standard Contract of Employment* (New York: Russell Sage Foundation, 2013).

8 § 220(2).

9 Rev. Rul. 87-41, 1987-1 CB 296 -- IRC Sec. 3121.

10 For a recent review of the US case law, see R. Sprague, 'Using the ABC test to classify workers: end of the platform-based business model or status quo ante?' (January 27, 2020). 11 *William & Mary Business Law Review* (2020, Forthcoming). Available at SSRN: https://ssrn.com/abstract=3526353, at p. 6.

11 See Sprague, 'Using the ABC test', at p. 9.

12 https://www.gov.uk/guidance/check-employment-status-for-tax (last consulted 12 March 2020). The relevant statutory test refers to 'employment under a contract of service': Income Tax (Earnings and Pensions) Act 2003, s. 4(1)(a).

13 The recent rise of 'substitution' as a factor owes much to the innovation of the 'limb (b) worker' category, since it can have the effect of denying both employee and worker status. See S. Deakin and G. Morris, *Labour Law* 6th. ed. (Oxford: Hart) [3.21].

14 On 'mutuality of obligation', see Deakin and Morris, *Labour Law* [3.29]. The growing use of the mutuality test to decide tax cases is the subject of considerable controversy in the debate over the 'IR35' rules on off-payroll working. See below, section 4.

15 *Imars* v. *Contractors Mfg. Servs. Inc.* 1998 WL 598778, cited in Sprague, 'The ABC test', at p. 9.

16 *Hall* v. *Lorimer* [1992] 1 WLR 933, 994.

17 *Walls* v. *Sinnett* (1987) 60 TC 150, 164. Also relevant here is the tendency of the appellate courts to defer to Employment Tribunals on employment status determinations raising 'questions of fact', following *O'Kelly* v. *Trusthouse Forte plc* [1983] IRLR 369.

18 Deakin and Morris, *Labour Law* [3.26]-[3.29].

19 B. Burchell, S. Deakin and S. Honey, *The Employment Status of Workers in Non-Standard Forms of Employment* (London: DTI, 1999).

20 Burchell et al., *Employment Status*, at p. 5. The control test received one of its most influential formulations in the judgment of Bramwell LJ in *Yewens* v. *Noakes* (1880) 6 QBD 530, a tax case. There are relatively few earlier cases in which the test was relied on; they include *Sadler* v. *Henlock* (1855) 4 E. & B. 570, a vicarious liability case, and *R.* v. *Negus* (1873) LR 2 CCR 34, a criminal law case. Control is more closely related to the forms of industrial subordination which emerged in manufacturing industry in the course of the nineteenth century than with any true relation to medieval relations of master and servant. See S. Deakin and F. Wilkinson, *The Law of the Labour Market: Industrialization, Employment, and Legal Evolution* (Oxford: OUP, 2005), pp. 90-95.

21 Burchell et al., *Employment Status*, at pp. 5-6. On 'integration', see *Stevenson, Jordan & Harrison* v. *McDonald & Evans* [1952] 1 TLR 101, and on 'economic reality', *Market Investigations Ltd* v. *Minister for Social Security* [1969] 1 QB 173. On the political and industrial context of these decisions, see Deakin and Wilkinson, *The Law of the Labour Market*, p. 95.

22 Burchell et al., *Employment Status*, at p. 8; *Airfix Footwear Ltd* v. *Cope* [1978] ICR 1210; *O'Kelly* v. *Trusthouse Forte plc* [1983] IRLR 369; *Carmichael* v. *National Power plc* [2000] IRLR 43. Mutuality is a test 'whose origins are contentious and whose effects are potentially highly confusing': Deakin and Morris, *Labour Law* [3.29].

23 National Minimum Wage Act 1998, s. 54(3); Working Time Regulations, SI 1998/1833, reg. 2(1).

24 Employment Rights Act 1996, s. 230(3)(b), on which see now the judgment of the UK Supreme Court in *Uber BV* v. *Aslam* [2021] UKSC 5.

25 Burchell et al., *Employment Status*, at p. 86.

26 See S. Deakin, 'The use of quantitative methods in labour law research: an assessment and reformulation' (2018) 27 *Social and Legal Studies* 456-474. A further possibility is the use of machine learning algorithms: see B. Alarie, A. Niblett and A. Yoon, 'Using machine learning to predict outcomes in tax law (December 15, 2017). Available at SSRN: https://ssrn.com/abstract=2855977 or http://dx.doi.org/10.2139/ssrn.2855977. The techniques involved in applying machine learning are still at early stage. For discussion of their potential, see C. Markou and S. Deakin, 'Ex machina lex: the limits of legal computability' (June 21, 2019). Available at SSRN: https://ssrn.com/abstract=3407856 or http://dx.doi.org/10.2139/ssrn.340785, forthcoming in S. Deakin and C. Markou (eds.) *Is Law Computable? Critical Perspectives on Law and Artificial Intelligence* (Oxford: Hart, 2020).

27 See Z. Adams, P. Bastani, L. Bishop and S. Deakin, 'The CBR-LRI dataset: methods, properties and potential of leximetric coding of labour laws' (2017) 33 *International Journal of Comparative Labour Law and Industrial Relations* 59-91.

28 On IR35, see M. Ford, 'The fissured worker: personal service companies and employment rights' (2020) 49 *ILJ* 35-85.

29 When IR35 was first introduced the obligation to pay incomes tax and national insurance contributions for work 'within IR35' fell on the contractor. Over time, initially with respect to public sector organisations and more recently to larger private sector ones as well, the obligation has been shifted to the ultimate employer or hirer of labour. See Ford, 'The fissured worker'.

30 See https://www.gov.uk/guidance/check-employment-status-for-tax (last consulted 12 March 2020).

31 'CEST exposed as hopelessly unreliable using HMRC's own test data obtained via FOI', 1 August 2018, https://www.contractorcalculator.co.uk/cest_exposed_hopelessly_unreliable_hmrcs_foi_543610_news.aspx, (accessed 12 March 2020). One of the criticisms made in this article is that the CEST list pays insufficient regard to the mutuality test given its increasing use to in the fiscal case law.

32 https://www.contractorcalculator.co.uk/docs/20180219-HMRCFOIRequest-CC.pdf, 16 February 2018 (accessed 12 March 2020).

33 These two decisions were, respectively, *Novasoft Ltd* v. *Revenue & Customs* [2010] UKFTT 150 (TC) and *Castle Construction (Chesterfield) Ltd* v. *Revenue & Customs* [2008] UKSPC SPC00723.

34 'CEST tool tested against tax cases' https://www.gov.uk/government/publications/cest-tool-tested-against-tax-cases/test-results-produced-after-cests-development, September 2018 (accessed 12 March 2020).

35 'CEST exposed as hopelessly unreliable' https://www.contractorcalculator.co.uk/.

36 'CEST exposed as hopelessly unreliable' https://www.contractorcalculator.co.uk/.

37 Deakin and Wilkinson, *The Law of the Labour Market*, ch. 2.

38 416 P.3d 1, 58. See Sprague, 'Using the ABC test', for discussion of the significance of this judgment and statutory adoption of the ABC test for 'gig' work.

39 Deakin and Morris, *Labour Law* [3.29].

40 How far a simple reversal of the burden of proof would work without the additional changes made by moving to the ABC test is not clear. The reverse burden rule set out in s. 28 of the National Minimum Wage Act 1998 has not prevented a substantial case law developing around employment status determinations under that legislation.

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