

## Employee area

### Instant case

The law distinguishes between a contract of service (between employer and employee) and a contract for services (between principal and independent contractor). This distinction affects the terms that will be implied in the absence of an express agreement, the liability of the employer to third parties, the applicability of industrial awards, the applicability of statutes which may affect workers' compensation, occupational health and safety, long-service leave, fringe benefits tax, etc.

The terms “employer” and “worker” are used here to mean “employer” and “employee” (in the case of a contract of service) or “principal” and “independent contractor” (in the case of a contract for services).

In the instant case, the employer directed the manner in which the work was to be done; the worker was not allowed to use her/his own discretion in doing an aspect of the work that was not specified beforehand; the worker was an integral part of the employer's business; the worker owned the tools or provided the transport with which she/he performed the work; it is not known whether the employer would make a profit/loss if the work performed by the worker cost less/more than expected; the work was not performed on the employer's premises; it is not known whether the employer supervised or inspected the work; the worker was not in business on her/his own account; the worker was not allowed to employ others to assist with her/his work; the worker was obliged to work only for the employer; the worker was not required to work at specified times; the employer paid the worker by time; the money that the employer paid to the worker was not stated to be a “fee”; the money that the employer paid to the worker was not stated to be “wages” or “salary”; the employer deducted PAYE tax instalments from the worker's pay; the employer paid the worker neither sick pay nor holiday pay; the employer and the worker did not express any intention that the relationship would be one of employer and employee; and the employer and the worker expressed an intention that the relationship would be one of principal and independent contractor.

In my opinion—following *Ferguson v. John Dawson and Partners (Contractors) Ltd*—the worker is an employee.

In *Ferguson v. John Dawson and Partners (Contractors) Ltd*,<sup>1</sup> a 1976 decision of the English Court of Appeal, Ferguson fell off a roof while removing some scaffolding boards. He claimed damages against Dawson (the building contractors) for breach of statutory duty relying on the *Construction (Working Places) Regulations 1966* (UK). This duty would only be owed if Ferguson was an employee of Dawson.

Megaw and Browne LJ held that, despite the fact that both parties labelled Ferguson a “self-employed labour only subcontractor”,<sup>2</sup> the reality of the relationship between them was that of employer/employee.

There are several significant similarities between the instant case and *Ferguson v. Dawson*: the employer directed the manner in which the work was to be done; the worker was not allowed to use her/his own discretion in doing an aspect of the work that was not specified beforehand; the worker was an integral part of the employer's business; the work was not performed on the employer's premises; the worker was not in business on her/his own account; the worker was not allowed to employ others to assist with her/his work; the employer paid the worker by time; the money that the employer paid to the worker was not stated to be a “fee”; the

---

<sup>1</sup>[1976] 1 WLR 1213.

<sup>2</sup>*ibid.* at 1219 per Megaw LJ, at 1225 per Lawton LJ, at 1228 per Browne LJ.

money that the employer paid to the worker was not stated to be “wages” or “salary”; the employer paid the worker neither sick pay nor holiday pay; the employer and the worker did not express any intention that the relationship would be one of employer and employee; and the employer and the worker expressed an intention that the relationship would be one of principal and independent contractor.

However, the instant case is not on all fours with *Ferguson v. Dawson*. In that case the worker neither owned the tools nor provided the transport with which she/he performed the work; the employer would make a profit/loss if the work performed by the worker cost less/more than expected; the employer supervised or inspected the work; the worker was not obliged to work only for the employer; the worker was required to work at specified times; and the employer did not deduct PAYE tax instalments from the worker’s pay.

Nevertheless, I believe that *Ferguson v. Dawson* should be followed.

If *Ready Mixed Concrete (South East) Ltd v. Minister of Pensions and National Insurance* is followed then the worker is an independent contractor.

In *Ready Mixed Concrete (South East) Ltd v. Minister of Pensions and National Insurance*,<sup>3</sup> a 1967 decision of the Queen’s Bench Division of the English High Court, Latimer worked for Ready Mixed as an “owner-driver”. He was paid at mileage rates, and was obliged to buy the truck through a financial organization associated with Ready Mixed. The truck was painted in the company’s colours, and he had to wear a Ready Mixed uniform. Latimer was obliged to meet the costs of maintenance, repair and insurance of the truck (and the attached mixing unit, which belonged to Ready Mixed). The Minister determined that Latimer was employed under a contract of service and therefore an “employed person” under s. 1(2) of the National Insurance Act 1965 (UK), making Ready Mixed liable to make weekly contributions.

MacKenna J examined the contract and held that the rights it conferred, and the duties it imposed, between Latimer and Ready Mixed were not such as to make it a contract of service.

There are several similarities between the instant case and *Ready Mixed v. Minister*: the worker was an integral part of the employer’s business; the worker owned the tools or provided the transport with which she/he performed the work; the work was not performed on the employer’s premises; the worker was not in business on her/his own account; the worker was obliged to work only for the employer; the worker was not required to work at specified times; the money that the employer paid to the worker was not stated to be a “fee”; the money that the employer paid to the worker was not stated to be “wages” or “salary”; the employer paid the worker neither sick pay nor holiday pay; the employer and the worker did not express any intention that the relationship would be one of employer and employee; and the employer and the worker expressed an intention that the relationship would be one of principal and independent contractor.

However, there are several significant differences between the instant case and *Ready Mixed v. Minister*. In that case the employer did not direct the manner in which the work was to be done; the worker was allowed to use her/his own discretion in doing an aspect of the work that was not specified beforehand; the employer would not make a profit/loss if the work performed by the worker cost less/more than expected; the employer neither supervised nor inspected the work; the worker was allowed to employ others to assist with her/his work; the employer did not pay the worker by time; and the employer did not deduct PAYE tax instalments from the worker’s pay. Note also that *Ready Mixed v. Minister* is only a decision of the Queen’s Bench Division of the English High Court and not as good authority as a case decided by the English Court of Appeal—like *Ferguson v. Dawson*.

---

<sup>3</sup>[1968] 2 QB 497.

Consequently, there is nothing in *Ready Mixed v. Minister* to warrant any change in my conclusion.

#### **Instantiation 4**

It may be that the following is true of the instant case: the employer would not make a profit/loss if the work performed by the worker cost less/more than expected; and the employer neither supervised nor inspected the work.

If that is so then in my opinion—following *Ready Mixed Concrete (South East) Ltd v. Minister of Pensions and National Insurance*—the worker is an independent contractor.

Details of *Ready Mixed v. Minister* are summarized above. There are several significant similarities between the instantiated case and *Ready Mixed v. Minister*: the worker was an integral part of the employer's business; the worker owned the tools or provided the transport with which she/he performed the work; the employer would not make a profit/loss if the work performed by the worker cost less/more than expected; the work was not performed on the employer's premises; the employer neither supervised nor inspected the work; the worker was not in business on her/his own account; the worker was obliged to work only for the employer; the worker was not required to work at specified times; the money that the employer paid to the worker was not stated to be a "fee"; the money that the employer paid to the worker was not stated to be "wages" or "salary"; the employer paid the worker neither sick pay nor holiday pay; the employer and the worker did not express any intention that the relationship would be one of employer and employee; and the employer and the worker expressed an intention that the relationship would be one of principal and independent contractor.

However, the instantiated case is not on all fours with *Ready Mixed v. Minister*. In that case the employer did not direct the manner in which the work was to be done; the worker was allowed to use her/his own discretion in doing an aspect of the work that was not specified beforehand; the worker was allowed to employ others to assist with her/his work; the employer did not pay the worker by time; and the employer did not deduct PAYE tax instalments from the worker's pay.

Nevertheless, I believe that *Ready Mixed v. Minister* should be followed.

If *Ferguson v. John Dawson and Partners (Contractors) Ltd* is followed then the worker is an employee.

Details of *Ferguson v. Dawson* are summarized above. There are several similarities between the instantiated case and *Ferguson v. Dawson*: the employer directed the manner in which the work was to be done; the worker was not allowed to use her/his own discretion in doing an aspect of the work that was not specified beforehand; the worker was an integral part of the employer's business; the work was not performed on the employer's premises; the worker was not in business on her/his own account; the worker was not allowed to employ others to assist with her/his work; the employer paid the worker by time; the money that the employer paid to the worker was not stated to be a "fee"; the money that the employer paid to the worker was not stated to be "wages" or "salary"; the employer paid the worker neither sick pay nor holiday pay; the employer and the worker did not express any intention that the relationship would be one of employer and employee; and the employer and the worker expressed an intention that the relationship would be one of principal and independent contractor.

However, there are several significant differences between the instantiated case and *Ferguson v. Dawson*. In that case the worker neither owned the tools nor provided the transport with which she/he performed the work; the employer would make a profit/loss if the work performed

by the worker cost less/more than expected; the employer supervised or inspected the work; the worker was not obliged to work only for the employer; the worker was required to work at specified times; and the employer did not deduct PAYE tax instalments from the worker's pay.

Despite the fact that *Ferguson v. Dawson* is a decision of the English Court of Appeal (and better authority than a case decided by the Queen's Bench Division of the English High Court—like *Ready Mixed v. Minister*), there is nothing in *Ferguson v. Dawson* to warrant any change in my conclusion.

## Hypothetical 1

Consider the instant case changed so that the following is true: the worker was not obliged to work only for the employer; and the employer did not deduct PAYE tax instalments from the worker's pay.

If that were so then I would be more strongly of the opinion that—following *Ferguson v. John Dawson and Partners (Contractors) Ltd*—the worker is an employee.

Details of *Ferguson v. Dawson* are summarized above. There are several significant similarities between the hypothetical case and *Ferguson v. Dawson*: the employer directed the manner in which the work was to be done; the worker was not allowed to use her/his own discretion in doing an aspect of the work that was not specified beforehand; the worker was an integral part of the employer's business; the work was not performed on the employer's premises; the worker was not in business on her/his own account; the worker was not allowed to employ others to assist with her/his work; the worker was not obliged to work only for the employer; the employer paid the worker by time; the money that the employer paid to the worker was not stated to be a "fee"; the money that the employer paid to the worker was not stated to be "wages" or "salary"; the employer did not deduct PAYE tax instalments from the worker's pay; the employer paid the worker neither sick pay nor holiday pay; the employer and the worker did not express any intention that the relationship would be one of employer and employee; and the employer and the worker expressed an intention that the relationship would be one of principal and independent contractor.

However, the hypothetical case is not on all fours with *Ferguson v. Dawson*. In that case the worker neither owned the tools nor provided the transport with which she/he performed the work; the employer would make a profit/loss if the work performed by the worker cost less/more than expected; the employer supervised or inspected the work; and the worker was required to work at specified times.

Nevertheless, I believe that *Ferguson v. Dawson* should be followed.

If *Ready Mixed Concrete (South East) Ltd v. Minister of Pensions and National Insurance* is followed then the worker is an independent contractor.

Details of *Ready Mixed v. Minister* are summarized above. There are several similarities between the hypothetical case and *Ready Mixed v. Minister*: the worker was an integral part of the employer's business; the worker owned the tools or provided the transport with which she/he performed the work; the work was not performed on the employer's premises; the worker was not in business on her/his own account; the worker was not required to work at specified times; the money that the employer paid to the worker was not stated to be a "fee"; the money that the employer paid to the worker was not stated to be "wages" or "salary"; the employer did not deduct PAYE tax instalments from the worker's pay; the employer paid the worker neither sick pay nor holiday pay; the employer and the worker did not express any intention that the relationship would be one of employer and employee; and the employer and the worker expressed

an intention that the relationship would be one of principal and independent contractor.

However, there are several significant differences between the hypothetical case and *Ready Mixed v. Minister*. In that case the employer did not direct the manner in which the work was to be done; the worker was allowed to use her/his own discretion in doing an aspect of the work that was not specified beforehand; the employer would not make a profit/loss if the work performed by the worker cost less/more than expected; the employer neither supervised nor inspected the work; the worker was allowed to employ others to assist with her/his work; the worker was obliged to work only for the employer; and the employer did not pay the worker by time. Note also that *Ready Mixed v. Minister* is only a decision of the Queen's Bench Division of the English High Court and not as good authority as a case decided by the English Court of Appeal—like *Ferguson v. Dawson*.

Consequently, there is nothing in *Ready Mixed v. Minister* to warrant any change in my conclusion.

## Hypothetical 2

Consider the instant case changed so that the following is true: the worker was allowed to use her/his own discretion in doing an aspect of the work that was not specified beforehand; and the employer did not deduct PAYE tax instalments from the worker's pay.

If that were so then my opinion would be that—following *Ready Mixed Concrete (South East) Ltd v. Minister of Pensions and National Insurance*—the worker is an independent contractor.

Details of *Ready Mixed v. Minister* are summarized above. There are several significant similarities between the hypothetical case and *Ready Mixed v. Minister*: the worker was allowed to use her/his own discretion in doing an aspect of the work that was not specified beforehand; the worker was an integral part of the employer's business; the worker owned the tools or provided the transport with which she/he performed the work; the work was not performed on the employer's premises; the worker was not in business on her/his own account; the worker was obliged to work only for the employer; the worker was not required to work at specified times; the money that the employer paid to the worker was not stated to be a "fee"; the money that the employer paid to the worker was not stated to be "wages" or "salary"; the employer did not deduct PAYE tax instalments from the worker's pay; the employer paid the worker neither sick pay nor holiday pay; the employer and the worker did not express any intention that the relationship would be one of employer and employee; and the employer and the worker expressed an intention that the relationship would be one of principal and independent contractor.

However, the hypothetical case is not on all fours with *Ready Mixed v. Minister*. In that case the employer did not direct the manner in which the work was to be done; the employer would not make a profit/loss if the work performed by the worker cost less/more than expected; the employer neither supervised nor inspected the work; the worker was allowed to employ others to assist with her/his work; and the employer did not pay the worker by time.

Nevertheless, I believe that *Ready Mixed v. Minister* should be followed.

If *Ferguson v. John Dawson and Partners (Contractors) Ltd* is followed then the worker is an employee.

Details of *Ferguson v. Dawson* are summarized above. There are several similarities between the hypothetical case and *Ferguson v. Dawson*: the employer directed the manner in which the work was to be done; the worker was an integral part of the employer's business; the work was not performed on the employer's premises; the worker was not in business on her/his own account; the worker was not allowed to employ others to assist with her/his work; the employer

paid the worker by time; the money that the employer paid to the worker was not stated to be a “fee”; the money that the employer paid to the worker was not stated to be “wages” or “salary”; the employer did not deduct PAYE tax instalments from the worker’s pay; the employer paid the worker neither sick pay nor holiday pay; the employer and the worker did not express any intention that the relationship would be one of employer and employee; and the employer and the worker expressed an intention that the relationship would be one of principal and independent contractor.

However, there are several significant differences between the hypothetical case and *Ferguson v. Dawson*. In that case the worker was not allowed to use her/his own discretion in doing an aspect of the work that was not specified beforehand; the worker neither owned the tools nor provided the transport with which she/he performed the work; the employer would make a profit/loss if the work performed by the worker cost less/more than expected; the employer supervised or inspected the work; the worker was not obliged to work only for the employer; and the worker was required to work at specified times.

Despite the fact that *Ferguson v. Dawson* is a decision of the English Court of Appeal (and better authority than a case decided by the Queen’s Bench Division of the English High Court—like *Ready Mixed v. Minister*), there is nothing in *Ferguson v. Dawson* to warrant any change in my conclusion.