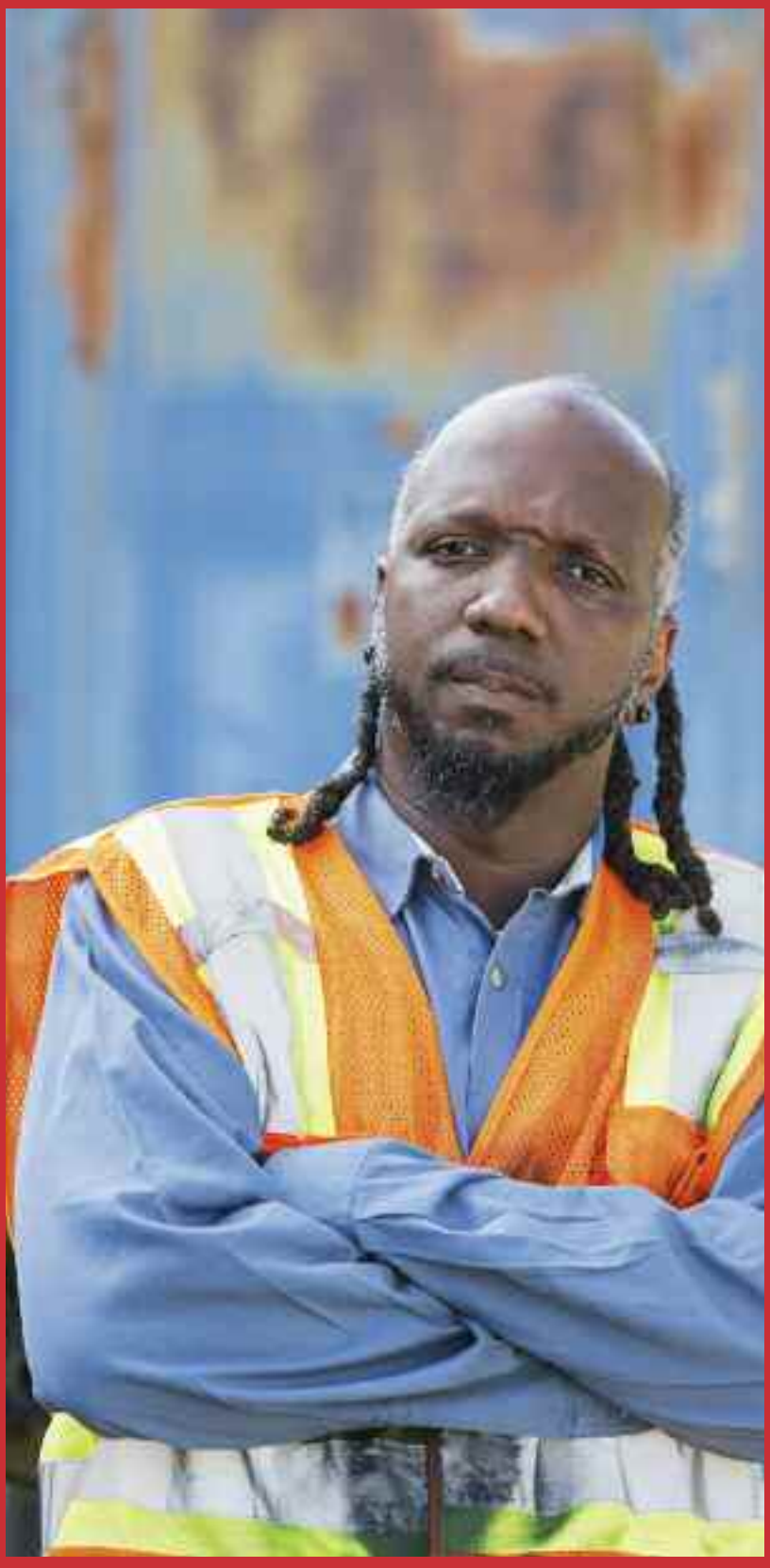
# Labour&European law review

Spring 2018 | issue 141



## Focus on Employment Status



www.thompsonstradeunion.law
www.thompsons.law

THOMPSONS SOLICITORS

STANDING UP FOR YOU

Jo Seery looks at the legal tests for determining who is an employee and who is a worker as distinct from someone who is genuinely self-employed

# Worker or employee?

**EMPLOYMENT STATUS has been in the news a lot recently as new business models emerge and unscrupulous employers seek to convince their workforce that they have no or few employment rights because they are self-employed or have been engaged as independent contractors.**

Employment status is important because it determines what employment rights an individual is entitled to. As can be seen from the box on page 4, there is a hierarchy of rights with employees enjoying the greatest number of employment rights.

## Who is an employee?

An employee is defined in section 230 of the Employment Rights Act (ERA) 1996 as "…an individual who has entered into or works under a contract of employment. … A contract of employment is a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing".

*"The statutory definition of an employment contract states it is a "contract of service" as distinct from a "contract for services"*

The statutory definition of an employment contract states it is a "contract *of* service" as distinct from a "contract *for* services". The courts have made clear that in order for there to be a contract of employment it must meet three criteria known as the "irreducible minimum". These are:

- Personal performance
- Control; and
- Mutuality of obligation.

## Personal performance

This is essentially an agreement by the individual to use their skills to perform the work required of them and be paid for it by their employer. However, where an individual has the freedom to choose and pay someone else to do the work instead (known as a right to substitute) the requirement to provide personal service will not be met.

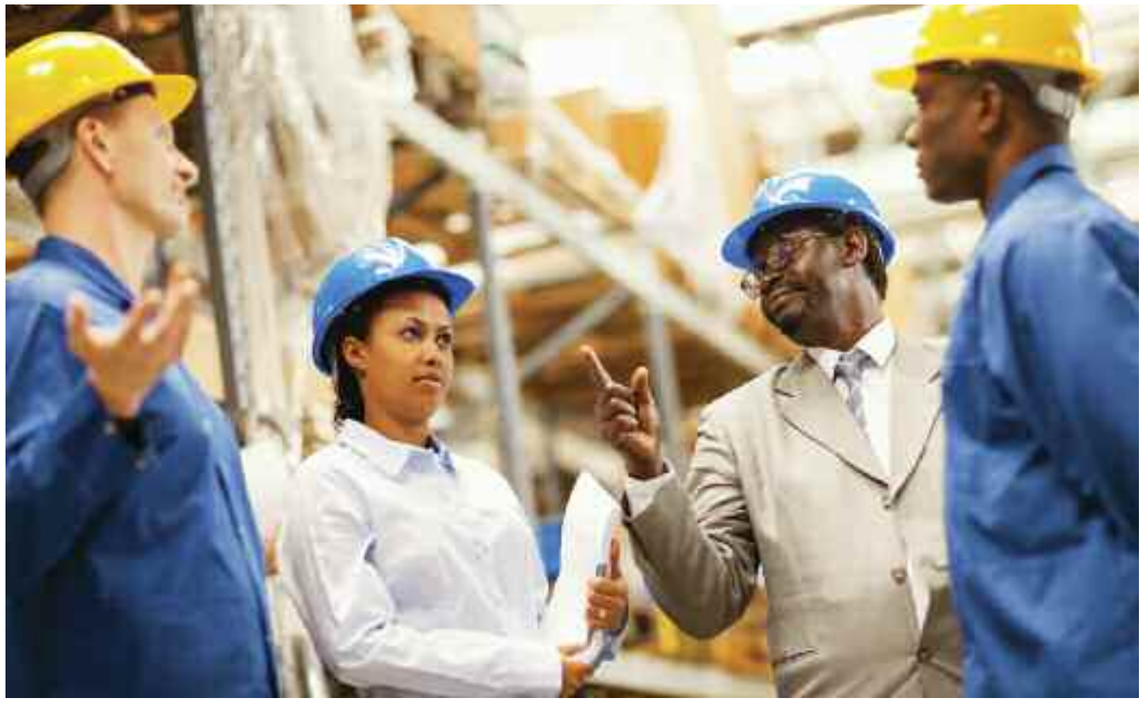
In **Express and Echo Publications Limited -v- Tanton**, the court held that a newspaper delivery driver was an independent contractor and not an employee. His contract provided that if he was "unable or unwilling to perform the services himself" he would have to arrange, at his own expense, for another trained and suitable person to carry out the job. In this case there was evidence that the driver had chosen and paid others to do the driving in the past.

However, the fact that a written contract may provide for a right to substitute does not always mean that the individual will fail the test of "personal service". So in **MacFarlane and anor -v- Glasgow City Council**, the contract provided for a gymnastic tutor to arrange for a replacement if she was unable to take a session.

The replacement had to be someone on the list of the council's approved instructors and would be paid directly by the council. The court considered that, as the tutor could only use an approved substitute when she was unable (rather than "unwilling") to take the class, the right to substitute was limited. It was therefore held that she was providing a personal service.

Generally, individuals have very little choice but to accept the terms of the contract offered to them if they want to work. Where there is a dispute about the terms, the courts have made clear that inequality of bargaining power between the parties must be taken into account when deciding whether the terms of the written agreement between them represents their true relationship.

In the important case of **Autoclenz -v- Belcher and ors** (see the feature by Gerard Airey on p7 for more details), the court held that car valeters were employees. It took into account the inequality in bargaining power and determined that the written contractual terms – which stated they were engaged as independent contractors with a right to substitute – bore no relation to the reality of the working relationship and the contract was therefore a "sham".



## Control

This refers to a situation where the employer determines not just what work needs to be done, but also how and when it will be done. Evidence of an employer's control has been held to include situations where the work is:

- Supervised
- Carried out in accordance with the employer's standards, or
- Requires the use of equipment provided by the employer.

Other examples of control include where the employer's permission is required before the individual can take holidays and where they are subject to an employer's performance or disciplinary procedures.

### ➲ Mutuality of obligation

This refers to the obligation on an employer to provide work and a corresponding obligation on the individual to accept and carry out the work offered.

In **Stringfellow Restaurants Ltd -v- Quashie** (weekly LELR 313), the court held that, as a dancer was paid by the customers and not the club, she was not an employee. Although she was rostered to work on particular days and the club deducted a fee and other fines, for example if she was late, she was paid by customers by way of a voucher which she exchanged at the end of the night into cash. As such, the court held the club provided her with an opportunity to dance for customers and earn some money. This was similar to the situation of a caddie who is not obliged to work for the golf club but who provides services for the golfer.

*"short term casual workers are not usually employees because they can choose when to work and the employer has freedom to offer work as and when it is available"*

But what if there is no work available on a particular occasion? In **Wilson -v- Circular Distributors Ltd** the tribunal held that the obligation to provide work meant an obligation to offer work when it was available. If, on occasion, work was not available, that did not necessarily mean that there was no mutuality of obligation.

This case was particular to its facts because the terms of the contract provided that there would be occasions when there would be no work available.

Note that short term casual workers are not usually employees because they can choose when to work and the employer has freedom to offer work as and when it is available.

What is clear from the case law is that an employer cannot simply rely on a term of the contract to claim that there is no mutuality of obligation where that does not reflect the reality of the situation, as in the case of Autoclenz.

| Statutory rights | Employee | Worker |
|---|---|---|
| Dismissal | ✓ | |
| Redundancy | ✓ | |
| Notice | ✓ | |
| Maternity leave | ✓ | |
| Parental leave | ✓ | |
| Fixed term employment | ✓ | |
| Discrimination, harassment, victimisation | ✓ | ✓ |
| National minimum wage | ✓ | ✓ |
| Protected disclosure | ✓ | ✓ |
| Working time | ✓ | ✓ |
| Part Time work | ✓ | ✓ |
| Right to be accompanied | ✓ | ✓ |
| Unlawful deduction from wages | ✓ | ✓ |

## Worker status

A worker is defined in section 230(3) of the ERA as:

"An individual who has entered into or works under…:

a) A contract of employment, or

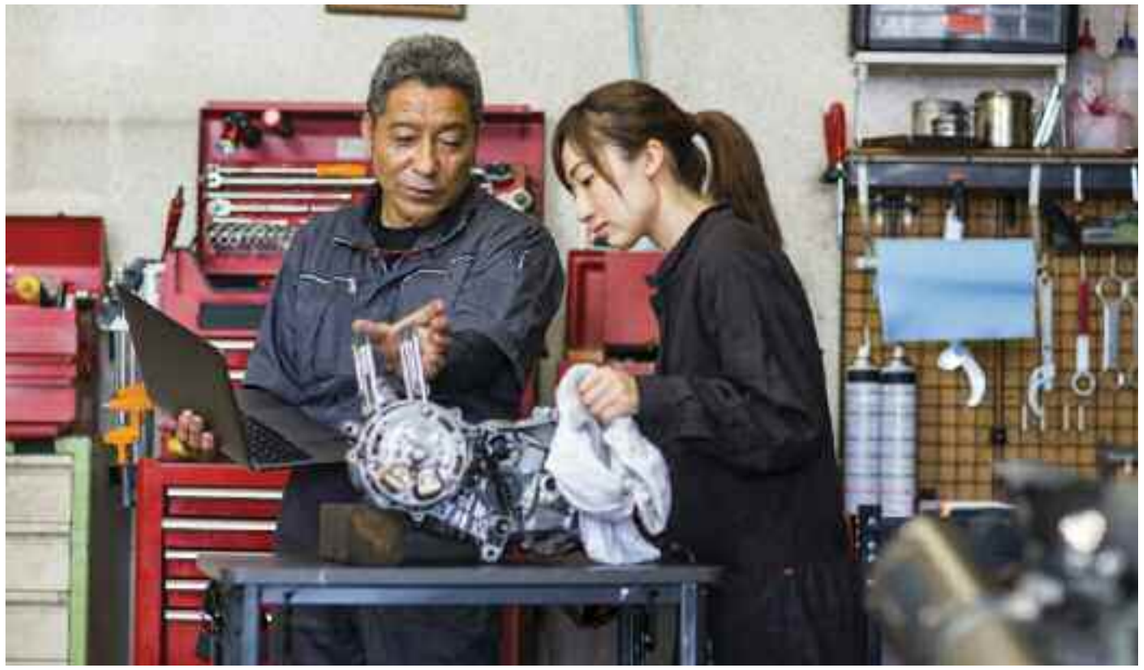
b) Any other contract whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of that contract or that of a client or customer of any profession or business undertaking carried on by the individual…"

The same definition appears in the National Minimum Wage Act, the Working Time Regulations and the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations.

So, a worker is someone who personally provides their labour or services to someone else under a contract which is not necessarily a contract of employment. It therefore covers a wider category than employees. Crucially though, a worker must be distinct from someone who is genuinely in business on their own account.







## When is a worker not genuinely self-employed?

A number of factors may indicate that an individual is genuinely self-employed such as:

- Having business accounts prepared and submitted to HMRC
- Being free to work for others
- Being paid at a rate that includes overheads
- Not being paid when not working.

In **Cotswold Developments Construction Limited -v- Williams**, the court held that, where an individual markets their services as an independent person, this will indicate that they are not integrated into the employer's work and are self-employed.

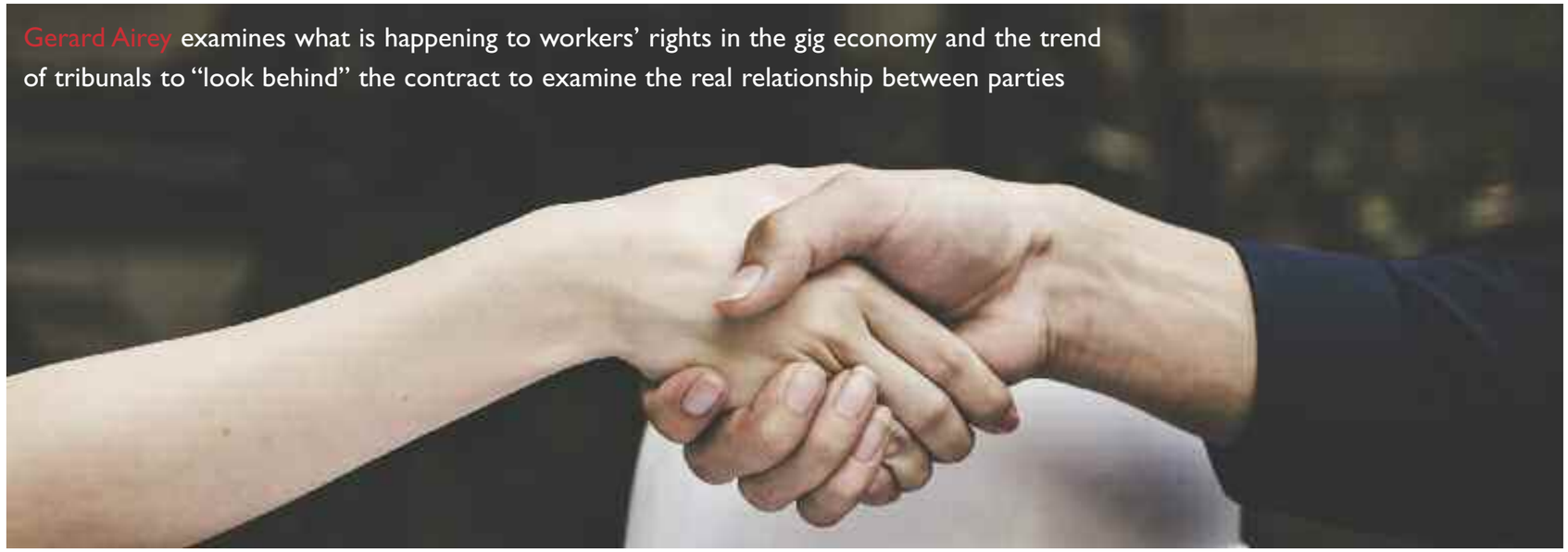
The fact that a person is described in contractual documents as self-employed does not necessarily mean that they are, however. In **Pimlico Plumbers Ltd -v- Smith** (see weekly LELR 512 and feature by Gerard Airey p8), the court held that plumbers who were described as self-employed were in fact workers, as other elements of the contract were inconsistent with being self-employed. In particular, the contract stated that they had to work a minimum number of hours and were prevented from working as plumbers in any part of Greater London for three months after termination of the contract. The plumbers were also required to rent and drive vans with the Pimlico Plumbers logo on it.

## Conclusion

**Given that there is no single checklist of factors that can be used to decide if someone is an employee or worker, the position we take is that the burden should be on the employer to prove that the individual is genuinely self-employed.**

**As such, a better definition of a worker would be:**
**"A worker is a person who is employed. A person is employed for the purposes of this Act if he or she is engaged by another party under a contract, arrangement or other relationship, to perform personally any work or services for that other party, save where that other party proves that those services are provided to him or her under a commercial business contract or arrangement as client or customer of any professional or business undertaking carried on by that individual".**

# Working in the gig economy



Gerard Airey examines what is happening to workers' rights in the gig economy and the trend of tribunals to "look behind" the contract to examine the real relationship between parties

**WORKERS, EMPLOYEES and people working on their own account all have a different status, and therefore different rights under the law, as Jo Seery explains in her article (p2).**

Despite the law attempting to define what this different status entails, it has turned out to be quite complex and made even more tricky with the rise of the so-called gig economy.

> *Gig economy has become a buzzword, used as a short-hand by journalists to explain precarious employment and by unscrupulous employers to explain away offering poor working practices*

Gig economy has become a buzzword, used as a short-hand by journalists to explain precarious employment and by unscrupulous employers to explain away offering poor working practices to those who would otherwise be employees. It has been described as: "a labour market characterized by the prevalence of short-term contracts or freelance work as opposed to permanent jobs". This applies to many sectors but is a particular issue for people working in construction and transportation services.

A good example is private sector companies that carry out public sector contracts, such as the notorious Carillion plc, now in liquidation leaving potentially thousands of individuals without work. The background to this is as follows: the government invites tenders for public sector building works, such as schools, hospitals and train lines etc. Companies such as Carillion submit their bid and then the government announces who has won the contract. Let's call the successful bidder Company 1.

Rather than employing individuals to carry out the work, Company 1 outsources different bits of the work to other smaller companies, for example to fit the pipes. The smaller company is Company 2. Company 2 may, in turn, enter into an arrangement with another company to source individuals to carry out the work – Company 3.

Company 3 will often engage people directly to carry out the work. Often (although not always) those engaged by Company 3 will be required to work on a self-employed basis. Company 3 might also require the person doing the work for them to use a payroll company, in order to get paid, and charge the individual a fee for the services of the payroll company. The payroll company would be Company 4 in this hierarchy.

The effect of all this contracting and sub-contracting is that the individual with the qualifications, experience and skills to do the work is number 5 in the structure and therefore the last to be paid.

As the person at the end of the chain, the person actually doing the work is forced to work on a self-employed basis with the result that they are not entitled to any employment or worker rights, even though they are carrying out the work personally and would in most interpretations be deemed a worker at the very least.

## Inequality of bargaining power

Fortunately, courts and tribunals are now becoming wise to the issue that employees are being forced to agree to terms that do not reflect the reality of the relationships involved due to inequality of bargaining power.

In **Consistent Group Ltd -v- Kalwak**, for instance, the Employment Appeal Tribunal (EAT) stated: "The concern to which tribunals must be alive is that armies of lawyers will simply place substitution clauses, or clauses denying any obligation to accept or provide work, in employment contracts, as a matter of form, even where such terms do not begin to reflect the real relationship."

The Supreme Court recognised this issue in the case of **Autoclenz -v- Belcher and ors**, which involved 20 car valeters whose contracts stated that they were sub-contractors; that they could provide a substitute to perform the work if they could not work; that the company did not have to provide work, nor did the valeters have to accept the offer of work. In other words, there was no mutuality of obligation. The valeters also had to pay their own tax and national insurance.

The Supreme Court, however, agreed with the tribunal that: "The claimants entered into contracts under which they provided personal service, where there were mutual obligations, namely the provision of work in return for money, that these obligations placed the contracts within the employment field and that the degree of control exercised by Autoclenz in the way that those contracts were performed placed them in the category of contracts of employment."

> *The effect of all this contracting and sub-contracting is that the individual with the qualifications, experience and skills to do the work is the last to be paid*

The decision in Autoclenz was a significant victory for workers engaged in contractual relationships that do not reflect the reality of the relationships between the parties and a blow to employers trying to evade providing employment rights through sham contracts.

➲

A further victory followed in the Court of Appeal case of **Pimlico Plumbers Limited -v- Smith** (weekly LELR 512). Mr Smith was a plumber carrying out work for Pimlico. The contractual documentation stated that he was an independent contractor, in business on his own account. He was VAT registered and filed his accounts as a self-employed person.

Mr Smith could turn down jobs depending on the nature of the work and the distance he had to travel. He also had discretion to negotiate on the price of work with a customer. He had to complete a minimum of 40 hours per week but there was no obligation on Pimlico to provide him with work on any particular day. In the last few weeks of the relationship Mr Smith worked an average of 20 hours each week.

The important question, according to the Court of Appeal, was whether Pimlico was a client or customer of Mr Smith's business, or whether it should be "regarded as a principal". In other words, that Mr Smith was part of the operations and subordinate to Pimlico. Regardless of the wording of the contractual document, the court found that the terms of the contract were inconsistent with Mr Smith being self-employed and he was deemed to be a worker.

*"where an employer refuses to allow a worker to take their paid European holiday entitlement, the worker is able to bring a claim for the employer's failure"*

This issue has come into sharper focus again in recent months following the EAT decision in the case of **Uber BV -v- Aslam** (weekly LELR 553), in which it agreed with the tribunal that, although the relationship between the parties was presented in the written documentation as being one of agency/self-employed, the correct focus should be on what happened in reality between them.

## Look behind the contract

The trend of these cases shows that there is a growing movement by tribunals to look behind the wording of the written documentation/contracts and instead focus on how the relationship works in reality. This is a positive step forward for people working on contracts that are not in reality what they claim to be, as it means that individuals should be able to enforce the employment rights to which they are actually entitled.

Indeed, there are now major risks for employers trying to evade giving individuals their employment rights by forcing them onto self-employed contracts following the decision of the Court of Justice of the European Union (CJEU) in **King -v- Sash Window Workshop Limited** (weekly LELR 555).

Mr King worked for Sash Windows on a "self-employed commission-only" contract from 1 June 1999 until 6 October 2012 when he retired. When this relationship ended he claimed payment for European holiday he had accrued but not taken; holiday taken between 1999 and 2012 which had not been paid; and European holiday he had not been allowed to take throughout the time he worked for the company.

The CJEU held that, where an employer refuses to allow a worker to take their paid European holiday entitlement, the worker is able to bring a claim for the employer's failure. The motive of either party is irrelevant.

The effect of this decision is that workers cannot be prevented from pursuing a claim just because the leave year has ended and the right to take paid European holiday will exist until it is taken or paid in lieu on termination of the relationship. The decision is extremely important to individuals who think they are working in a bogus self-employment situation. If a person is told they are self-employed and therefore not entitled to paid holiday but later are found to be a worker, then they can claim all of the European holiday pay which they did not receive.

This is an area of law that is constantly developing. Positively, it is developing in favour of individuals who are currently deprived of legal rights even though the description of their status in their contract does not reflect what is happening in reality.





Stephen Cavalier, chief executive of Thompsons Solicitors, assesses the proposals put forward in a number of recent reports on worker/employee status and comes up with some of his own

# What about the workers?

**THE WORLD of work has changed over the last few decades. For many thousands who work for a living, legal protection has not kept up with changes to the way work is organised, structured and paid.**

Too many organisations deny that they are employers so that they can avoid paying the proper level of tax and national insurance. And they pass on all the risk to the individual who is carrying out the work.

We see this exploitation in organisations that argue that their workforce is self-employed; they refuse to provide guaranteed minimum hours; and leave individual workers vulnerable to peaks and troughs in demand, with late cancellations of shifts and no certainty of paid work.

As Jo Seery explains (p2), the various legal definitions of "employee", "worker" and "self-employed" have come under increasing pressure. There have always been employers who have tried to get around the law, but this has now become the fundamental basis of the model of too many businesses, denying rights and protections to thousands of working people.

Trade unions have won a number of successes in courts and tribunals establishing employee or worker status for individuals and groups of workers providing services, such as car valeters, cab services, plumbers and others. But the picture is patchy and inconsistent and there have been defeats too – couriers delivering take-away food denied the right to seek union recognition on the grounds they did not meet the definition of "worker".

There has rightly been political pressure for action. But so far, despite a number of reviews, nothing has been done.

## Taylor review

The Taylor Review of Modern Working Practices, which was commissioned by the government and reported in July 2017, set out "seven steps towards fair and decent work". Although it called for clarity in the law, its proposals fell far short of that goal.

For instance, the report agreed that the definitions of "employee" and "worker"

➲ were unclear, but its response was to propose adding yet a further category of "dependent contractor" who would have even fewer rights than those defined as workers. This was widely and rightly derided, not least because it would add complexity, weaken protection and result in confusion and avoidance.

There were, however, some more positive proposals on employment status in the report: notably extending to "workers" the entitlement to receive written particulars of the terms of their employment and shifting the burden of proof so that, where an individual brings a claim that they are an employee or a worker, there should be a presumption that they are. That way, the onus would be on the employer to prove that they are not.

This is a welcome recognition not just of the imbalance of power between employers and individual workers, but also the imbalance of information – the employer has control over not just the work that is provided, but also over the terms on which it is provided, how it is structured and organised, making it difficult for individual workers to prove their case.

In February 2018, the government issued its response to the report, a so-called 'Good Work' plan. The response offers few reasons to be optimistic and there is no detailed commitment to resolve the fundamental issue of defining whether someone is an "employee", a "worker" or "self-employed". The government acknowledges the importance of all workers having defined rights from day one, but fails to say what those rights should be.

*"There has rightly been political pressure for action. But so far, despite a number of reviews, nothing has been done"*

The main feature of the government's response is yet more consultation. It therefore remains to be seen whether ministers are truly committed to listening to trade unions and other representatives of working people, and to act on their concerns to give security to the millions of people in precarious employment situations.

## Future of Work

The "Future of Work Commission", co-chaired by Tom Watson MP and Helen Mountfield QC and published in December 2017, explored similar themes to Taylor.

The Commission called for a "new, future-proof legal framework" and a "response beyond a contractual approach to status". It reported that: "whether a person is an employee, an agency worker or a contractor should make no difference to their entitlement to labour law protection."

It also called for "a new single status definition of worker" which "reflects the primary components of economic dependency between the parties" with employees and other workers having the same level of statutory protection from day one. These are all positive and welcome proposals.

## Select Committees' report

The issue was also examined jointly by the House of Commons Select Committees on Work and Pensions and Business, Energy and Industrial Strategy which issued a report in November 2017.

The report welcomes some aspects of the Taylor review, but not others. For instance, the Committees agree that there is "an urgent and overwhelming case for increased clarity on employment status"; that "receiving a statement of employment terms and rights on day one of a new job" should apply to all employees and workers; and that there should be implementation of a model of "worker status by default for companies with substantial dependent workforces".

Their solution on employment status is to propose "primary legislation reflecting the case law that has already been built up". The draft legislation attached to the report proposes amending the definition of "employee" by listing a number of factors that it says relate to whether the employer "retains the potential to control to a substantial degree how the individual's work will be carried out" and also requires a tribunal to consider "whether the contract places an obligation on the individual to perform work personally".

It proposes a revised definition of "worker", which omits the requirement to perform services "personally", and a provision that would mean that in any tribunal case when "any question arises as to whether an individual is a worker, it shall be presumed that the individual is a worker unless the contrary is proved".

These recommendations are undoubtedly well-intentioned, but they are also problematic. The presumption of "worker" status is welcome where the question is whether the individual has the rights that attach to worker status or not. However, as drafted, the clause would also mean that there is a presumption that a person is a "worker" rather than an "employee" where that is the issue in dispute and would therefore have the lower level of rights.

More fundamentally, the approach on "employee" status is misguided. It provides a list of factors that is neither exhaustive nor determinative. It would create more complexity and confusion. And it is likely that those employers who seek to get around the law would use the list as a checklist of the steps they need to take to make sure that workers are denied protection.

## Thompsons' proposals

So, what should be done?

There is a consensus across the three reports that:

- Rights should be extended to workers
- The definition of worker status should be simplified
- The burden should be on the employer to disprove worker status.

Thompsons proposes that government should address these areas of agreement by:

- Using section 23 of the Employment Relations Act 1999 to extend to "workers" rights which are currently limited to "employees" (a power that the Secretary of State already has). This should be used to extend to all workers the right to a written statement of particulars and should also be used to extend all other statutory rights and protections to all workers.
- Simplifying the definition of worker, so that all workers are protected unless they are genuinely in business on their own account. This would be achieved by the definition that Jo Seery suggests on page 5 in which she analyses the current definitions in more detail.
- Reversing the burden of proof so that it is for the employer to prove that someone is not a worker.

  This would mean that anyone who provides work or services personally for an employer would be a worker, unless the employer can prove that the individual is genuinely doing so as part of a business of their own. This should be reinforced by making it clear that an employer cannot defeat this presumption merely by pointing to a substitution clause that says that the worker can, in certain circumstances, arrange for someone to carry out the work in their place. This abuse of substitution clauses is routinely used to defeat claims of employee or worker status where the truth is that the expectation and the reality is that the individual will carry out the work themselves.
- Introducing penalties for employers who use avoidance tactics such as a requirement that the individual sets up a personal service company in order to be engaged.

Thompsons believes that these proposals provide a fair approach that widens protection, provides a mechanism to tackle exploitation and creates a level playing field for workers and good employers. We therefore call on the government to adopt this approach.

*"Thompsons believes that these proposals provide a fair approach that widens protection, provides a mechanism to tackle exploitation and creates a level playing field"*

Contributors to this edition: Gerard Airey, Stephen Cavalier, Jo Seery
Editor: Alison Clarke
Design & production: www.rexclusive.co.uk