Think Ahead ACCA

Technical factsheet

Employment status: workers

This factsheet is part of a suite of employment factsheets and a pro forma contract and statement of terms and conditions that are updated regularly. These are:

The contract of employment
The standard statement of terms and conditions
Working time
Age discrimination
Dealing with sickness
Managing performance
Disciplinary, dismissal and grievance procedures
Unlawful discrimination
Redundancy
Settlement offers
Family-friendly rights
Employment status: workers

Determining a person's employment status has been a contentious legal issue since the middle of the 20th century, and there is a great deal of legal precedent around the various definitions and tests for status. Although the current cases have tended to focus on employment rights, there is a large body of case law around tax, and the principles applied are not always entirely consistent, which adds to the difficulty. The sheer variety of arrangements that can be made between a business and those who provide their services to it adds to the challenge of establishing general principles that will apply to every set of facts.

STATUS CATEGORIES

Currently there are only three categories of employment status for the purpose of establishing employment rights: employee, worker and self-employed. The tax authorities only recognise two categories; whereas genuinely self-employed persons are permitted to pay their tax on a self-assessment basis, employed persons (encompassing both employees and workers) will have their tax deducted by their employer at source. When examining a relationship in order to determine status, tribunals will tend to adopt a multifactorial analysis in order to reach a conclusion. The key features taken into account, along with the legal implications of each category, are summarised below.

Employees

An employee is a person who works under a contract of service. Key aspects of this kind of employment are the concepts of 'mutuality of obligation' and personal service. The former involves an employee having some minimum obligation to the employer in terms of time. This means that an employee commits that they will be available for work for a certain minimum number of hours or days within a week or a month. In return, the employer has an obligation to pay for that time, whether or not they have any work for the employee to do, subject to any contractual lay-off or short-time working arrangements. The relationship is assumed to continue until terminated by either party by resignation or dismissal. However, it is also possible for an employment relationship to be fixed term; mutuality of obligation will exist for the length of the term, eg six months or a year, but employment will end once that period expires.

The concept of personal service involves the employee providing their work personally and not being permitted to substitute someone else to perform the duties allocated by their employer.

Employees have the right to the full range of statutory employment rights, not only paid annual leave and minimum wage, but also statutory sick pay, pension, all the family-friendly rights set out in *Technical factsheet: Family-friendly rights*, access to claims for redundancy (see *Technical factsheet: Redundancy*) and the right to claim unfair dismissal if qualified to do so. Tax and national insurance are deducted at source by the employer.

Workers

The similarity between workers and employees is that workers also provide their services personally and cannot substitute, and their tax is generally deducted at source. However, a key difference is the absence of mutuality; the employer is not obliged to provide any work, or continuous work, to the worker, and the worker is not obliged to perform work requested by the employer.

Workers are typically direct casuals, often known also as ‘zero-hour’ contractors, or are engaged through a third-party agency. Such people have traditionally been taken on by employers only when they are required and therefore often by businesses subject to seasonal fluctuations in the need for staff, eg agricultural growers and retailers. Also, in all types of business, staff have routinely been engaged in this way through agencies to deal with short-term need caused by peaks in demand or annual holidays, or by shortage of permanent staff. There is no assumption that the work will continue day to day or week to week, and the employer is able to simply dispense with the worker’s services as the work levels reduce, or if they are not satisfactory.

All workers, whether directly engaged or through a third party, do not enjoy the same access to a full range of employment rights as employees. However, they do have health and safety and discrimination protection (see *Technical factsheet: Unlawful discrimination*), and are covered by both the Working Time Regulations and National Minimum Wage Regulations, which give them important and valuable rights to minimum and living wage, paid annual holiday and to breaks. They may also qualify for pension rights under auto-enrolment.

Self-employed

Self-employment is a status that is defined as being ‘in business on one’s own account’ and gives rise to a contract for services. A self-employed contractor is working in their own business, providing services to a client, not to an employer. Since the relationship is a commercial one, no employment rights are granted to the contractor. In particular, contractors do not have access to paid holiday or to the minimum wage, although the self-employed contractor can expect basic workplace health and safety protection and in many cases is covered by unlawful discrimination provisions.

It is important to consider the nature of self-employment in the context of examining worker status, since many companies engage ‘self-employed’ contractors who then dispute this classification and argue that they are workers. This is discussed further below.

IMPLICATIONS FOR BUSINESSES

Cases about employment status tend to relate either to tax and/or to employment rights. Employers need to be aware of the implications of misclassification; a worker who has been incorrectly labelled as ‘self-employed’ will usually be seeking back payment of minimum wage and backdated paid annual leave. In some cases, such as *Autoclenz,* discussed below, self-employed staff were recategorised as employees, which gave rise to even more rights, including access to redundancy pay and unfair dismissal protection. These cases will then attract the attention of HMRC, which will seek the balance of PAYE and NI backdated by as much as six years. IR35, also briefly mentioned below, is a fruitful source of discussions about the nature of self-employment, and causes more headaches for businesses using contractors working through personal service companies. In several recent cases, employers have felt the full force of failing to categorise workers correctly. An employer dismissed someone they believed to be a contractor for refusing to install an intrusive app on her personal phone, and did so without any dismissal procedure being carried out. Another sought to argue that a member of their ‘bank’ staff was not included in the need for consultation prior to the sale of a business. The worker in question had been working the same two night shifts for 20 years and was clearly a part-time employee. In both cases, damages were awarded on the basis of the rights that ought to have been accorded to them as employees.

EMPLOYER CATEGORISATION

In recent years, some employers have chosen to engage certain members of their workforce as ‘self-employed’, the acceptance of which is a condition of the job. This has been very common in the so-called ‘gig economy’. This term is used to describe a relatively new way of working, which involves workers taking on short-term, on-demand jobs on a ‘gig’ basis. The companies work through apps to accommodate quick-demand services in, for example, taxi rides and food delivery. Given the changes to lifestyle that are ongoing, it is clear that more and more businesses are going to adopt these structures to satisfy demand. Typically, such cases involve delivery drivers or chauffeurs used by companies such as Uber, Deliveroo, Addison Lee and CitySprint. Those working in this way are often

low skilled and highly dependent on the employer, yet the employer purports to categorise them as self-employed even though they are tightly controlled and may well have been working consistently for the same company for a considerable period. These 'contractors' have typically been paid for work done, with no employment rights of any kind.

In 2011, the landmark Supreme Court decision of *Autoclenz v Belcher*, involving car valets, established that labelling a relationship as self-employed was not definitive, and the court or tribunal had to establish the substantive nature of the relationship by looking at the facts, and in particular the way in which the parties had conducted themselves.

In this case:

- There was a clear contract that stated that the valets were self-employed.
- They were treated as self-employed for tax purposes.
- The contract stated that there was no obligation for Autoclenz to provide work, nor for the valets to work.
- In practice, they worked regular hours for a full week and were expected to do so.
- Deductions were made for materials and for insurance.
- They were closely supervised.
- The contract contained a substitution clause but this was never used in practice.

The court held that because they worked continuously and under the control of the employer day in and day out, the valets were employees, with very significant financial implications for the employer. The reasoning was that the substantive reality of the relationship was not reflected in the documentation, and the terms were included to prevent the employer having those responsibilities. The inequality of bargaining power was such that the valets had no choice but to accept the terms, which in no way reflected the reality of the situation.

In May 2020, the European Court of Justice delivered a preliminary ruling in *B v Yodel Delivery Network Ltd*, where a delivery driver was found to be self-employed, primarily because of the level of discretion he had to work for other clients, to determine his own hours of work and routes, and to decide how many parcels to accept from Yodel on any day. In the case, B's ability to substitute and to set his own workload and working day was more consistent with self-employment than with being a worker. In addition to this, the court was

convinced that B could have used the substitution clause provided in the Yodel contract in practice, and subcontract the work out to a suitable substitute, even though he had never chosen to do so.

By contrast, the Supreme Court delivered its judgment in *Uber BV v Aslam* on 19 February 2021, deciding that the claimant Uber drivers were workers, not self-employed contractors. In deciding this case unanimously, the six judges adopted the approach that has been taken in previous cases: the essence of the intended distinction must be between, on the one hand, workers whose degree of dependence is essentially that of employees, and, on the other, contractors who have a sufficiently arm's-length and independent position to be treated as being able to look after themselves. Critical issues here were the level of subordination to which the drivers were subject, their level of integration into the business, and the fact that in practice they were not able to market their services to others, all of which tended to indicate a high level of control over their working conditions and remuneration. The terms and conditions of their work were set by Uber and were non-negotiable, and they were subject to a comprehensive code of conduct and escalating levels of sanctions for non-availability or cancellation of booked rides. This level of control would also make them vulnerable to exploitation, and the judges considered that this was precisely the kind of working relationship that the statutory protections, such as minimum wage, were designed to address. In summary, it was common ground that the drivers were free to choose when, how much and where (within the territory covered by the licence) to work. However, the factors set out above made it clear that when they were working they were properly considered to be 'workers', and showed that the service is 'very tightly defined and controlled by Uber'. This decision cannot be appealed further, so is the final word on this case.

At the time of writing, in most of the cases to reach the appeal courts (with the notable exception of the Yodel case discussed above, and the Deliveroo case discussed below), the court has held that the individual is a worker and is entitled to the appropriate employment rights. Some key elements that appear in some or all of the cases are as follows:

- the general sense of the workers being in a subordinate position, with poor bargaining power
- the imposition of onerous contractual terms, either seeking to prevent the worker challenging their employment status, or requiring them to indemnify the employer

for tax payable in the event that they are successful in doing so

- an obligation to accept assignments while ‘logged on’ to the employer’s systems, and a minimum requirement to provide work while doing so
- penalties exacted for breaching the conditions that required gigs to be accepted, and not to be cancelled once accepted
- a general expectation that workers will be available regularly and are prepared to work long hours
- an obligation not to cancel assignments once accepted
- workers having no control over the setting of fares or other charges
- formal policies and procedures with which the workers must comply; so, for example, Uber had an interview and recruitment scheme for drivers, and Addison Lee imposed a formal code of conduct for drivers
- a high level of control over workers, instructing them as to how to carry out their work and controlling them in the performance of their duties – for example, setting out routes to take and time expected to carry out tasks
- a requirement to use company branding, to wear company uniform provided and/or to have the company logo on their means of transport
- subjecting drivers to a passenger-led rating system, or client feedback, in what amounts to a form of performance management scheme and/or disciplinary procedure
- complaints made by service users and by workers handled centrally by the employer
- a power to amend drivers’ terms unilaterally retained by the employer
- the employer preventing the worker from working for another similar business. For example, while with Addison Lee, the drivers did not work for any other minicab businesses; indeed, the contract they signed precluded them from carrying out taxi work for any other company
- the fact that equipment is often provided by the employer; for example, all but one of the 3,800 drivers for Addison Lee in London hire their vehicle, with company branding, through a company associated with Addison Lee, therefore having to work 25 to 30 hours a week to cover the hire costs.

SELF-EMPLOYMENT v WORKER STATUS

A key feature in these cases has been the definition of self-employment, and it is worth looking at this in some detail. There are a number of features that point to self-employed status. If the tribunal considers that a contractor genuinely has the ability to substitute another person to perform the services under the contract, this tends to be definitive in establishing self-employment and means that the person will not be entitled to workers' rights. This is evident from the 2023 Deliveroo case in the Supreme Court and was also decisive in two cases in 2021, namely *Stuart Delivery Ltd v Augustine 2021* and *Stojsavljevic v DPD UK 2021*. In Deliveroo, there was provision for substitution in the contract, and in practice some of the delivery drivers used others to complete their agreed deliveries; Deliveroo was aware of this and acquiesced.

Although the existence of substitution is definitive in showing that somebody is self-employed, the reverse is not true. Even if substitution is not provided for, or does not take place in practice, it is not essential in proving that a person is self-employed. There are many other factors that can point to self-employed status and give a general sense that the person is 'in business'. None is definitive but the more of them that are present, the more likely the person is to be self-employed, although every case has to be determined on its facts. The 2018 case of *Jensal Software Ltd v HMRC* reiterated the importance of control, which is always a very important factor: to what extent does the 'client' tell the contractor what to do and how to do it?

Thus, the genuine contractor may:

- be engaged to perform a task rather than time-based work
- control hours and/or times of work, and notify the client of, for example, holidays, rather than asking permission to take them
- have discretion about how to perform the services, and take responsibility for them and for their quality and completion
- provide their own tools and equipment
- not be closely supervised
- have some element of commercial risk

- pay for their own general training
- work for more than one client either consecutively or concurrently, and not be engaged by a single client continuously over a long period.
- not receive the benefits of employment, such as holiday or sick pay
- not be managed within the framework of employment policies such as disciplinary policy or performance management
- not be paid when they are not working, and not be paid a retainer
- have only a short notice period attached to their contract, or no notice at all
- finance their own insurance, marketing, licences and other regulatory requirements such as DBS checks
- Use the services of, for example, a PR agency, in order to advertise their business on social media or elsewhere.

OTHER CONTRACTORS

It is also worth noting that not all workers who are misclassified as self-employed are necessarily gig workers, and not all are forced into accepting that status. Sometimes the business will take on a person as a 'self-employed contractor', and since this is beneficial for both parties from the tax point of view, it may be freely agreed between them. The arrangement will be that the 'contractor' is responsible for their own tax, and they are working for the business as their 'client'. However, if the tax authorities do not accept that the individual is self-employed, based on some or all of the factors laid out above, it will be the 'client' who will be liable to make up the tax shortfall, and any other liabilities such as paid holiday. All businesses should be very wary of taking on consultants or contractors in a direct contractual relationship, since misclassification may have significant financial implications.

Following on from this, the employment appeal tribunal case of *Pimlico Plumbers v Smith* resulted in the Court of Appeal finding that a 'self-employed' plumber who was engaged directly by the company should be regarded as a worker. In this case:

- The contract stated that Gary Smith was self-employed.
- Smith had been working for Pimlico Plumbers for around six years when his contract was terminated after he had a heart attack.
- He was required to work a minimum of 40 hours per week.
- He was subject to company rules about procedures and good practice, including

about his appearance.

- He was required to wear uniform and drive Pimlico Plumbers vans, for which he paid a hire charge.
- He was not allowed to take Pimlico Plumbers clients as private clients and, if he did, this would lead to dismissal.
- He did not get paid unless Pimlico Plumbers got paid for any engagement that he performed.
- He did not work for other clients, although some of his colleagues did.
- He could swap jobs with other plumbers, but the court said this was more akin to workers swapping shifts than to real substitution.

The court found that, if the arrangement was looked at as a whole, Smith was an integral part of Pimlico Plumbers and was clearly subordinate to the business. The company was much more akin to an employer than a client, and again the label did not reflect the reality of the arrangement.

In order to avoid this risk, the normal practice is for the client business to engage with the contractor through their own company as an intermediary (often known as a personal service company, or PSC), and as long as the client qualifies as a small or medium-sized company under the Companies Act 2006, it will be the PSC, and its contractor owner, that takes any risk in relation to unpaid tax. The distinction between directly employed contractors and those taken on via an intermediary has been underlined by the recent case involving Gary Lineker, where HMRC unsuccessfully invoked IR35. Since Lineker was working through a general partnership that has no separate legal identity, he was working directly for the BBC and not through an intermediary, and HMRC's argument failed.

An additional problem for employers is presented by the 2017 European Court of Justice case of *King v The Sash Window Workshop Ltd and another*. This case involved a misclassified worker who had been directly engaged by the company but had always been treated as self-employed. He had not been given the opportunity to take paid holiday throughout the 13 years that he had worked for the company. The court concluded that he was in fact a worker. It also stated that where an employer has not made a facility available for workers to be able to take their paid annual leave, any leave not taken carries over to

the next leave year indefinitely until the individual is permitted to take their accrued paid leave, or the contract terminates, when they will be entitled to be paid in lieu of taking all of it. The net effect of this was to require the employer to make a large lump-sum payment to the worker for all his accrued holiday for those 13 years. This contrasts with the situation where the worker has been unable to take paid leave because of long-term sickness, where the accrual is limited to 18 months and to 20 days per annum. Exactly the same result was reached recently in relation to the Pimlico Plumbers case above, and the company was required to pay Smith outstanding holiday pay for the whole period he had been working for it.

SUMMARY

Employers cannot presume that categorising or labelling staff as ‘self-employed’ will limit those workers’ employment rights or determine their tax position. The established authority of Autoclenz, in which the ‘self-employed’ contractors were found to be employees, and the recent run of gig-economy cases in which individuals who are ostensibly self-employed have been found to be workers, illustrate this principle very well. Along with the King case above, these cases serve as a reminder to review self-employed arrangements with a critical eye to determine if those relationships might be vulnerable to being recategorised, with all the implications for tax liability and employment rights that this entails.

PROPOSED REFORM

The new government has announced that it proposes to consult on simplifying employment status in the UK. It appears that the plan may well be to introduce a simpler, two-tier system where the categories are either ‘worker’ or ‘self-employed’. It is not clear how this will impact on employment rights or the tax system, and we have no information about when this is likely to happen. It will undoubtedly be a complex reform with significant implications and will require wide consultation; the factsheets will be updated as soon as more information is available.

In relation to workers, there are current proposals for reform of zero-hour contracts contained within the Employment Rights Bill. It was originally intended to ban zero-hour contracts entirely but this has been watered down in favour of providing workers with more rights and protections.

The idea behind these changes is to address concerns about one-sided flexibility and ensure a baseline of job security for workers. In particular, it is planned that zero-hour contractors will have the right to request a contract that reflects the hours they regularly work over a specified reference period (likely 12 weeks). If their request is refused, the employer must provide justification. There will be anti-avoidance provisions designed to prevent employers terminating engagements in order to evade these protections. Zero-hour workers will also have the right to reasonable notice of shifts and shift cancellations, with workers having a right to compensation for shifts cancelled or curtailed at short notice.

It has recently been announced that there is an intention to extend these protections to cover agency workers; the idea is to prevent employers from using agency work to circumvent the protections for zero-hour workers. This will undoubtedly complicate matters considerably, given the tripartite nature of the relationship. There is also an intention to provide statutory sick pay to all workers, including those on zero-hour contracts, from day one. As soon as these provisions are finalised, the factsheets will be updated accordingly.

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