

### ARE YOUR SELF-EMPLOYED WORKERS ACTUALLY YOUR EMPLOYEES?

It is common knowledge that Employees are at the top of the tree when it comes to the level of protection provided by Employment Law. The main claim is the right to claim Unfair Dismissal if the Contract of Employment ends for any reason once the employee has one year's service.

A "worker" is more broadly defined to encompass anyone who works under a Contract whereby he or she undertakes to perform work personally. A worker does not qualify for the right to claim Unfair Dismissal but he or she does qualify for other legal protection such as the right to be paid the National Minimum Wage and to receive paid holiday under the Working Time Regulations. Independent contractors, who often work on a self-employed basis, have the least protection which gives the business the maximum amount of flexibility.

In the case of *Autoclenz Limited -v- Belcher & others*, 20 people were engaged as valets cleaning vehicles. They were recruited through advertisements asking for self-employed people and signed Contracts describing themselves as "sub-contractors". The Contracts specifically stated that each valet could substitute a suitably qualified person to undertake his or job. In other words, they were not personally obligated to do the job. The valets paid tax and National Insurance contributions on a self-employed basis and HM Revenue & Customs were already satisfied that this was a relationship of self-employment.

Notwithstanding the written Contract, a number of the valets presented claims to the Employment Tribunal seeking a declaration that they were Employees or at worst workers and owed holiday pay and arrears of pay under the National Minimum Wage Regulations.

### Does the Contract do what it says on the tin?

The Court of Appeal said that it is necessary to consider whether the words of any written Contract represent the true intentions or the expectations of the parties. Furthermore, the words in the Contract can be compared with the intentions of the parties during the entire working relationship.

In this case, Autoclenz expected each individual valet to turn up every day and do the work provided rather than any substitute. So irrespective of the written Contract the Court confirmed that the individuals were subject to the necessary mutuality of obligation to be workers and to the necessary degree of control to be employees.

### Conclusions

There are three key points to draw from this case:-

- \* The Employment Tribunal will put aside written terms in Contracts if those terms are superseded by what actually happens in practice.
- \* Cases such as these can open retrospective claims in respect of wages, holiday pay and other rights.

**Jayne Harrison, Sophie Attfield, Peter Lawson, Paul Brill and Colm O'Rourke**

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- \* Do your written terms with sub-contractors or independent contractors reflect the true relationship today?

### When to start consulting?

The European Court of Justice has recently examined the issue of when the duty to consult with employee representatives is triggered in a large scale redundancy affecting 20 or more employees. The Collective Redundancies Directive states that consultations should begin when an employer is "contemplating" redundancies.

The ECJ has stated that the consultation process must be started once a strategic or commercial decision has been taken. The fact that all necessary information may not be available should not delay the start of consultation with the representatives. If a parent company takes the strategic decision then the subsidiary must promptly commence the consultation.

Don't forget that collective consultation obligations also apply when an employer wishes to change the terms and conditions of 20 or more employees.

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### *Meet the Team*



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