Employment

A matter of intent

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consider the complexities of sham employment terms & the true nature of the contractual relationship

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IN BRIEF

- Post *Autoclenz ltd v Belcher and Others* advisers should analyse not just the contractual terms of an agreement but the reality of the relationship, it now being confirmed that the employment tribunal is required not just to look at the contract but to examine the true nature of the parties' relationship.

The question of whether a person doing a job of work is an employee (and, as such, able to benefit from the breadth of protection afforded to such status by employment law) or merely a worker, or some other status (for example an independent contractor, who is self-employed) is a vexed one.

Courts at senior levels have laid down various guidelines, which have been subjected to scrutiny and analysis by the lower courts. However, recent authority has now confirmed that the courts should search for the true intention of the parties and not be bound by the strict wording of the contract if this does not reflect reality. The Court of Appeal (Smith, Sedley and Aikens LJJ) handed down its judgment in the case of *Autoclenz ltd v Belcher and Others* [2009] EWCA Civ 1046, [2009] All ER (D) 134 (Oct) last month.

- Autoclenz was a company that cleaned cars ready for auction.
- Valeters, such as Mr Belcher, the lead claimant, were provided with all of the necessary cleaning equipment.
- The valeters were paid for piece work, paid their own tax and National Insurance, and had signed agreements stating that they were self-employed, a status accepted by the Inland Revenue in 2004.

However, Mr Belcher and others brought a claim for unpaid wages and holiday pay under the National Minimum Wages Act 1998 and the Working Time Regulations 1998 (SI 1998/1833).

Workers but not employees?

The employment tribunal that originally heard the claim found that, despite the apparent status of the 20 car valeters as self-employed, they were in fact employees of Autoclenz, and in any event were at the very least "workers" within the meaning of s 230 of the Employment Rights Act 1996.

The Employment Appeal Tribunal (EAT) upheld this finding in part by agreeing with the employment tribunal that the valeters were workers, but overturned the finding that the valeters were employees.

The Court of Appeal on the further appeal of Autoclenz found that the valeters were workers.

The Court (Smith LJ giving the judgment) proposed the following order of consideration for tribunals faced with this type of case:

a) The employment judge should make findings as to the true contractual terms;
b) Once this is done the tribunal should determine whether the claimant is a "worker" within the meaning of s 230(3) and ask:
   i) Is the individual contractually obliged to carry out work or perform services himself?
   ii) If so is this work done for the other party in the capacity of client or customer? If so then the claimant is not a worker and is self employed.
c) If a "worker" is the Claimant an employee?

When assessing limb (a) of the above test, the employment judge will normally take any written terms as accurately reflecting what the parties agree, particularly where there is a signed document confirming acceptance of those terms. However, it is often the case that one party will dispute the accuracy of such terms and whether they reflect the true "employment" relationship.

The correct approach

The correct approach when faced with this difference is to regard the written documents as a starting point but then ask whether the parties ever intended to envisage that the written terms would be carried out as written, and to look at the true circumstances, applying the familiar "irreducible minima" derived from the well-known case of *Ready Mixed Concrete (South East) Limited v Ministry of Pensions* [1968] 2 QB 497, [1968] 1 All ER 433.

In the *Autoclenz* case, the employment tribunal noted with regard to the written terms and conditions, the lack of negotiation of terms; the fact that control as to how work

was done was retained by Autoclenz; the rates at which the claimants were paid and that the materials they used were required to use were equally dictated by Autoclenz. It was also found that the claimants had no control over their hours, no real economic interest in the way the work was organised, and were subject to the control of Autoclenz which provided and sent the invoices.

The agreement between Autoclenz and the claimants also contained a substitution clause, which was found not to be a genuine aspect of the agreement. The employment judge concluded that clauses in the contract stating that there was no obligation to offer or accept work: "were unrealistic possibilities that were not truly within the contemplation of the parties when they entered into their agreements".

Reflective language

This reflects the language of Elias P in *Consistent Group Ltd v Kalwak* [2007] IRLR 560, [2007] All ER (D) 319 (May) where he concluded that: "if the reality of the situation is that no one seriously expects that a worker will seek to provide a substitute, or refuse the work offered, the fact that the contract expressly provides for these unrealistic possibilities will not alter the true nature of the relationship. But if these clauses genuinely reflect what might realistically be expected to occur, the fact that the rights conferred have not in fact been exercised will not render the right meaningless".

By the time that *Autoclenz* reached the EAT the decision in *Consistent* had been overturned by the Court of Appeal ([2008] EWCA Civ 430). HHJ Peter Clark in the EAT hearing of *Autoclenz* referred to the Court of Appeal decision in *Consistent*: "It is not the function of the court or an employment tribunal to recast the parties' bargain. If a term solemnly agreed in writing is to be rejected in favour of a different one that can only be done by a clear finding that the real agreement was to that different effect and the term in the contract was included by them so as to present a misleadingly different impression."

HHJ Peter Clark considered that the correct test was that, before a tribunal could find that a term was a sham, it had to be shown that both parties intended the contract to paint a false picture of their respective obligations: a joint intention to mislead.

On the facts of *Autoclenz* this was not the case and so the claimants could not be employees. However, they were in any event "workers" as the limited substitution clause did not undermine their claim that they were contractually bound to provide a personal service.

Common intent?

In *Protectacoat v Szilagyi* [2009] EWCA Civ 98 it was considered that the paragraphs in *Consistent* which HHJ Peter Clark had relied upon in *Autoclenz* were strictly speaking obiter dicta, and his position was overturned.

Further the Court of Appeal in *Protectacoat* found that where one party was relying on the term of a contract and the other was not there was no need to show a common intention to mislead: it is enough that the written term did not represent the parties' intentions or expectations.

> **"Courts should search for the true intention of the parties and not be bound by the wording of the contract if this does not reflect reality"**

Legal obligations

The Court of Appeal in *Autoclenz* clarified that where there is a dispute as to the genuineness of a written term in a contract, the focus of the enquiry must be to discover the actual legal obligations of the parties. To achieve this, the tribunal will have to examine all the relevant evidence. This naturally includes the written term itself, read in the context of the whole agreement, as well as evidence of how the parties conducted themselves in practice and their expectations of each other.

However, the mere fact that the parties conducted themselves in a particular way does not necessarily mean that that conduct does accurately reflect the legal rights and obligations of the parties to each other. An example given by the Court of Appeal was that if there exists a written term permitting substitution, but over the course of the contract a particular claimant had never sought to provide such a substitute, it does not of itself necessarily mean that the substitution clause is not genuine. Advisers must therefore be wary of misconstruing non-exercise of a right, eg to substitute, with the non-existence of that right. However, where a right of substitution has never been used across an entire company this would likely permit an inference to be drawn that no one ever intended that it should be effected.

In affirming this Smith LJ noted that: "It matters not how many times an employer proclaims that he is engaging a man as a self-employed contractor; if he then imposes requirements on that man which are the obligations of an employee and the employee goes along with them, the true nature of the contractual relationship is that of employer and employee."

It is therefore essential that advisers carefully analyse not just the contractual terms of an agreement but the reality of the relationship, it now being confirmed that the employment tribunal is required not just to look at the contract but to examine the true nature of the parties' relationship. Only after carefully considering the evidence of the "self-employed" person can advice properly be given as to whether a contract for services can be challenged, potentially giving that person the rights of an employee or worker. NLJ

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