

Gig economy judgments and employment status for Recruitment International

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Categories

- Employees
- Workers
- Self-employed

Status issues

- Income tax and NIC status – determined by HMRC and tax tribunals
- Various categories of employment right – determined by employment tribunals and civil courts

Employment Right Act 1996,

- **s230(1)** Employee = *"an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment"*
- **s230(2)** Contract of employment = *"a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing"*

Employment Right Act 1996,

- **s230(3)** Worker = *“an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment, or 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 the contract that of a client or customer of any profession or business undertaking carried on by the individual.”*

- “Multi-factorial” approach – ie consider the situation in the round
- Key factors
 - An agreement to provide the employee’s own work or skill in the performance of service for the employer (**personal service**) in return for a wage or remuneration
 - There is control of the employee by the employer (**control**)
 - There is an obligation on the employer to provide work and the obligation on the individual to accept that work (**mutuality of obligation**)
- Other factors
 - Degree of integration in the business;
 - Who provides any equipment;
 - Whether the individual can affect their return by their effort or skill

- In a typical arrangement between individual, agency and hirer:
 - *"It will be an exceptional case where a contract of employment can be spelt out in the relationship between the agency and worker."*
(James v Greenwich Council UKEAT 0006/06/1812)
 - agency does not usually have the day to day control
 - individual not normally carrying out work directly for benefit of the agency
 - usually no obligation on agency to find work or on worker to accept it (let alone personally do it)

- For contracts between individual and hirer,
 - *“The issue then is whether the way in which the contract is in fact performed is consistent with the agency arrangements or whether it is only consistent with an implied contract between the worker and the end user and would be inconsistent with there being no such contract.” (Ibid)*
 - Key test – is it necessary imply a contract of employment in order to give business reality to what is happening in practice

Examples of statutory rights

Right	Employees	Workers
Protection from unlawful deductions	Yes	Yes
Paid annual leave / rest breaks / maximum working weeks (WTR rights)	Yes	Yes
Minimum wage	Yes	Yes
Statutory sick pay	Yes	Sometimes
Unfair dismissal protection	Yes	No
Written particulars of employment	Yes	No
Itemised pay statement	Yes	No
TUPE protections	Yes	No

Autoclenz Ltd v Belcher and others [2011] IRLR 820 (SC)

- Claimant car valeters had detailed signed written agreements stating they were sub-contractors, purporting to allow them to appoint substitutes and expressly stating that there was no mutuality of obligation between them and Autoclenz
- HMRC was satisfied that the valeters were self-employed
- ET said in practice they were expected to turn up for work unless they had given appropriate notice and did not even know about the right of substitution. They had mutuality of obligation and were workers.
- Supreme Court held were employees. The express contractual provisions did not reflect the actual legal obligations of the parties.

Aslam and others v Uber BV and others ET/2202550/15

Background

- Uber had a complicated business structure and contractual arrangements with its drivers, whom it regarded as self-employed.
- It sought to present itself as a technology platform facilitating the provision of taxi services. It said it acted as agent for the drivers, who each had a contract to provide taxi services with each customer.
- A number of drivers brought claims for unlawful deductions from wages by failing to pay minimum wage and a failure to provide paid leave, asserting that they were workers.

Aslam and others v Uber BV and others ET/2202550/15

Employment Tribunal findings

- Drivers had no commitment to work but went "on-duty" when signed into app
- Drivers supplied own vehicles and were responsible for all running costs
- Drivers had 10 seconds to accept a booking, before the app deemed them unavailable and located another driver.
- If a driver failed to accept bookings, their access to the app could be suspended or blocked.
- If a driver falls below a set average rating on Uber's system it could withdraw their access to the app.

Aslam and others v Uber BV and others ET/2202550/15

Employment Tribunal findings

- Once a driver accepted a booking, Uber placed the driver and passenger in direct contact, but only through the app.
- Drivers weren't told the destination until collecting the passenger.
- The app provided detailed directions, which the drivers were expected to follow unless the passenger chose a different route.

Aslam and others v Uber BV and others ET/2202550/15

Employment Tribunal findings

- At the end of the trip, Uber's servers calculated a recommended fare, based on GPS data from the drivers' phones. The drivers couldn't agree a higher fare. The passengers paid the fare direct to Uber, via the app.
- UBV paid drivers weekly in respect of the fares they have earned, minus a "service fee" of 20% to 25% for the use of the app.
- Uber took the risk in some matters (eg instances of fraud by passengers) and dealt with any fare complaints, often without requesting any comment from drivers.

Aslam and others v Uber BV and others ET/2202550/15

Employment Tribunal decision

- All drivers were Uber's workers whose working time was when they had turned on the app and were ready and willing to accept fares.
- Uber's "fictions" and "twisted language" in the contractual documentation showed the remarkable lengths it had gone to.
- It was unreal to deny that Uber was in business as a supplier of transportation services. It was an essential feature of Uber's business to maintain a pool of drivers whom it can call on as and when a demand for driving services arises.

Dewhurst v Citysprint UK Limited ET/220512/2016

Background

- Claimant works as a cycle courier for CitySprint, typically working 4 days per week from 9:30 to 6:30.
- Logs on to Company's electronic tracking system at the start of a working day and remains logged in until day ends.
- System tracks her movements and helps a Controller, who is in radio and phone contact with her through the day, to assign jobs to her.
- Like Uber CitySprint's use detailed recruitment process and documents to try to show couriers are self-employed (in this case, a 'tender document').

Dewhurst v Citysprint UK Limited ET/220512/2016

Tribunal decision

- Like Uber, CitySprint's contractual documents did not accurately reflect reality.
- Merely calling its contract a tender document raised the suspicion that it may have been generated by an “armies of lawyers”, and therefore was not an accurate reflection of the working relationship.
- Ms Dewhurst was held to be integrated into CitySprint's business, expected to work when she said she would, subject to Citysprint's directions and paid based on its calculations.
- She was therefore a worker for CitySprint.

Coming up...

- Claims vs:-
 - Deliveroo
 - Addison Lee
 - Excel
 - eCourier
- Office of Tax Simplification published a focus paper exploring the tax issues and implications of the gig economy
- Taylor Review of modern employment practices for BEIS
- Work and Pensions Committee inquiry to consider how UK welfare system can support the increasing number of self-employed and gig economy workers

Practical protection for agencies

- Ensure your contracts reflect the kinds of arrangement that the tribunals have indicated do not support an employment relationship between you and the individual:-
 - the day to day control is with the hirer, not you
 - the individual does not carry out work directly for your benefit
 - there is no obligation on you to find work or on the individual to accept it
 - you don't have to provide a particular individual to the hirer but can use different individuals to fulfil the service.
- Ensure your working practices are accurately reflected by your contractual documents
- Don't try to use complication contractual documents to obscure the reality



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