# What is an Employee?

## An Investigator's Guide

# Why does it matter for us?

1. Is the injured person (or the person at risk) an employee?

2. Was the person injured by an employee – if not there may be no "employer" to enforce against;

3. Self-employed may be expected to exercise particular care in the practice of their skilled trade or profession;

4. "Workers" comprise another category – more of them later.

Always easy to distinguish?

# Meaning of work and at work – setting the stage

- S52(1) of the Health and Safety at Work etc. Act - For the purposes of this Part—
- (a)"work" means work as an employee or as a self-employed person; **[helpful?]**
- (b)an employee is at work throughout the time when he is in the course of his employment, but not otherwise; **[helpful?]**

- **"course of employment"** -
  - Walking from bike shed to workshop?
  - Climbing stairs to canteen for break? Paid break?
  - A question of fact – don't give up just because the person not actually working.

**AIMS TODAY –**

- show you the Courts' approach;
- leave you with a working guide.

If uncertain and charges merited - explain and use alternatives.

# IMPORTANT POINT

**In enforcement (H and S) work we are NOT concerned with the extent of an individual's employment rights. However some of those features may be helpful when considering whether someone is an employee for "HSWA" purposes.**

- See Annex 1 – an HMG Guide – Broadly useful but not always entirely practical. [https://www.gov.uk/employment-status]

# Section 230 of the Employment Rights Act 1996 - Employees, workers etc.

- (1) In this Act *"employee"* means an individual who has entered into or works under (or, where the employment has ceased, worked under) **a contract of employment**.
- (2) In this Act *"contract of employment"* means a **contract of service** or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.
- (3) In this Act *"worker"*(except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked 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 the contract that of a client or customer of any profession or business undertaking carried on by the individual**; [Of practical use to you?]**

It is well established that there is no single test that determines if an individual is an employee.

However, there are some key issues which are central to the question – **personal service**..... **control**..... **integration**..... and ..... **mutuality of obligation**.

These 4 issues will help – but may not decide the issue.

- The Courts will look to **the reality** of a worker's position – so should we - and that means looking beyond what might be in writing or the job title – how employer describes the person is not determinative.

- Munkman (well respected textbook) says –

  "…an employee is someone who works under a contract **of service**, in contrast to an independent contractor who works under a contract **for service**." (Munkman on Employer's Liability, 16th ed., page 123, para 4.12).

  **This gives some - but not always much - help. We must look into whether X was offering independent specialist skills, or putting themselves into Y's service.**

# "….contract OF service…" vs "…contract FOR services…"

- In *Stevenson Jordan and Harrison Ltd v MacDonald and Evans* [1952] 1 TLR 101 CA it was held –

> "…under a contract **of** service, a man is employed as **part of the business**, and his work is done as an **integral part** of the business; whereas under a **contract for services**, his work, although done for the business, is **not integrated** into it but is only **accessory** to it."
>
> (per Denning LJ at 111).

- Distribution facility – FLT driver part of business – FLT mechanic ( there to do specialist work for few days) – **may** not be an employee – may be "self-employed" for tax purposes.
- Locum worker in hostel?
- **Again – helpful to an extent but far from decisive.**

# “Badges of Employment”

- Through case law the characteristics of an (employee’s) contract **of service** - the so called “badges” of employment - have developed.

- Might well help when planning to question witnesses, correspond with defending legal team or shaping PACE questions.

# BADGE - The "Control Test"

- This test looks at whether an employer can control both what the worker does and how he does it. It is a relatively loose concept, but helps in some cases.

- In *Chadwick v Pioneer Private Telephone Co Ltd* [1941] 1 All ER 522 the Court said -

  "A contract of service implies an obligation to serve, and it comprises some degree of control by the master."

  (Per Stable J. at 523 D).

- **This is, of course, very old fashioned language but it does give an indication of where the "control" test springs from. Might help in some cases where one party clearly dictates how job should be done.**

- This was further developed in the case of *Ready Mixed Concrete (SE) Ltd v Minister of Pension and National Insurance* [1968] 2 QB 497 –

  "A contract of service exists if these **three conditions** are fulfilled.

  (i) The servant agrees that, in consideration of a wage or other remuneration, **he will provide his own work and skill** in the performance of some service for his master, [this case is 50 years old – more antique language – employee gives labour]

  (ii) He agrees, expressly or impliedly, that **in the performance of that service he will be subject to the other's control** in a sufficient degree to make that other master, **[ = will do what he is told]**

  (iii) The **other provisions of the contract are consistent** with its being a contract of service. **[helpful?]**

- **This attempt to define a contract of service probably did not completely hold water in 1968 and it does not do so now. However it does provide us with some pegs – eg; was it open to Y to tell how X should conduct himself/herself and the manner in which X should do his/her job?**

INTO THE 21ST CENTURY

**The Supreme Court in *Autoclenz Limited v Belcher and others* [2011] UKSC 41 added a gloss to the three conditions in *Ready Mixed Concrete* – [Note – Concrete case still relied upon]**

Para 19

"i) As Stephenson LJ put it in *Nethermere (St Neots) Ltd v Gardiner*

[1984] ICR 612 at 623, "There must … be an **irreducible minimum of obligation** on each side to create a contract of service". **[Sound helpful?]**

ii) If a **genuine right of substitution exists**, this negates an obligation to perform work personally and is **inconsistent with employee status**: *Express & Echo Publications Ltd v Tanton* [1999] ICR 693, per Peter Gibson LJ at p 699G. **[So – one worker calls and says I can't make it but I'm sending a suitably experienced substitute]**

iii) If a contractual right, as for example **a right to substitute**, exists, it does not matter that it is not used."

**We might ask – if X decided to send along a substitute, instead of coming themselves, would Y have accepted that? Has it happened in the past?**

- BADGE - The "**irreducible minimum of obligation"** referred to by Lord Clarke was, according to Munkman, explained in the case of *Stevedoring & Haulage Services Ltd v Fuller* [2011] IRLR 627 (at para 6) as being –

  "…a 'mutual obligation'…to offer work, on the employer's side and to accept it, on the employee's" (Munkman at p125, para 4.16).

- Consider – daily casual workers at a distribution depot – waiting to see if there's work.
  - Not employees when in the queue waiting to see if there's a day's work.
  - Once they're engaged for the day – can be an "employee" by this test.

- In *Lane v Shire Roofing Co (Oxford) Ltd* [1995] IRLR 493, (often relied on in the Courts) the Court of Appeal recognised the uncertainty of the 'control test' –

  "…**the control test may not be decisive** – for instance, in the case of skilled employees, with discretion to decide how their work should be done. In such cases the question is broadened to **whose business was it?** Was the workman carrying out his own business, or was he carrying out that of his employers?" (Per Henry LJ)

- Consider – a beautician or tattoo parlour.
  - owned by one person but others work there too.
  - employed or self-employed?

# BADGE - The 'Fundamental test'

- This 'test', can be linked back to Mackenna J's **third condition** in *Ready Mixed Concrete* -

> "(iii) The **other provisions of the contract are consistent** with its being a contract of service..."
>
> (MacKenna J at 515)

- Not really helpful as a practical guide – it does however give a Judge considerable discretion, and a jury considerable scope.

- Whether a worker is an employee, under a contract of employment, was confirmed by the House of Lords as being a **question of fact** (ie; not law) in *Carmichael v National Power* [1999] ICR 1226.

- **So – the Judge/Coroner cannot properly exclude the issue from the jury room, provided there is sufficient (ie; prima facie) evidence to support the argument that the individual is an employee.**

## "Workers"

## Bates van Winkelhof v Clyde & Co LLP [2014] ICR 730 (SC).

> "As already seen, employment law distinguishes between three types of people: those employed under a contract of employment; those self-employed people who are in business on their own account and undertake work for their clients or customers; and an **intermediate class of workers who are self-employed but do not fall within the second class. ……."**

Baroness Hale at [31]

NB: The recent run of cases featuring Uber, Deliveroo, Pimlico Plumbers, Hermes etc – all about employment rights but……

- What case can give **practical guidance** to a health and safety investigator?

- In R v Pola (Shah Nawaz) [2009] EWCA Crim. 655 the Court of Appeal held that a casual worker who had been working on the building of a house extension was sufficiently controlled by his employer to qualify as an employee under s. 53 of the Health and Safety at Work etc. Act 1974 **– Annex 2 - the full decision.**

- Employer tried to argue these were entirely casual workers – did not **have to** turn up – the employer did not **have to** provide work – the individuals could simply leave if they wanted to – no "mutuality" - they were not protected by s2 HSWA, said the employer.

- The Court, in *Pola*, said the principles to be considered were -
  - "…. before the jury could be sure that the defendant was an employer there first had to be **evidence of a contract.** This required evidence of what has been described as "**mutual obligations**", in other words, evidence that both the defendant and a worker owed each other obligations. That would be sufficient only to establish **a** contract. **[Advice -if worker to be paid = contract for practical purposes]**

- Secondly, the prosecution had to prove that the nature of the contract was one of employment, in other words, that in return for payment the worker placed himself under an **obligation to work**…..(during the day for which he was paid).

- **[Well – pretty clear that if a person works that day he or she expects payment].**

- Thirdly, if the worker was under an obligation to the defendant to work, it was necessary to prove that the contract was one of employment and not for services. For that purpose the prosecution would have to prove that the worker was under the **control of the defendant**." (at para 5). **[Relatively simple – workers who are taken on for the day are highly likely to be under close control – there is someone in charge]**

Notice the circularity involved in the judgement – but with commonsense in the mix this can be a very useful guide.

- The Court in *Pola*, said that casual workers, despite being under no obligation to work every working day, and choosing if/when they turn up for work, **can still be under a contract of employment during the time that they turn up, are taken on and are actually working** (*Pola*, at para 6).

- The workers that did turn up for work on any particular day were under an obligation to **remain at work** for the day they were paid (*Pola*, at para 25). Unrealistic to suggest otherwise.

- If casual workers, when at work, are under a contract – the question of **control** can arise – to differentiate the type of contract - a contract of service from one for services. In this respect the Court in *Pola* referred back to the decision in *Ready Mix Concrete*.

- In determining the type of a contract, the Court in *Pola* accepted Elias J's remarks in *Stephenson v Delphi Diesel Systems Limited* [2003] ICR 471 – a good explanation -

- "The significance of **mutuality** is that it determines whether there is a contract in existence at all. The significance of **control** is that it determines whether, if there is a contract in place, it can properly be classified as a **contract of service**, rather than some other kind of contract.

- The question of mutuality of obligation, however, poses no difficulties **during the period when the individual is actually working. For the period of such employment a contract must, in our view, clearly exist**. For that duration the individual clearly undertakes to work and the employer in turn undertakes to pay for the work done. **This is so, even if the contract is terminable on either side at will.** Unless and until the power to terminate is exercised, these mutual obligations (to work on the one hand and to be paid on the other) will continue to exist and will provide the fundamental mutual obligations.

- The issue whether the employed person is required to accept work if offered, or whether the employer is obliged to offer work as available is **irrelevant** to the question **whether a contract exists** at all during the period when the work is actually being performed. **The only question then is whether there is sufficient control** to give rise to a conclusion that the contractual relationship which does exist is one of a contract of service or not." (Paras 11 – 14).

# Pimlico Plumbers [2017] EWCA Civ. 51- “Worker”

- S was a plumber, carrying out plumbing work for P. He complained that, following a heart attack, he was unfairly or wrongfully dismissed and claimed entitlement to pay during medical suspension, holiday pay and arrears of pay.

- PP relied on a written term in the contractual documents that S was an independent contractor to the company, in business on his own account, and the fact that S was VAT registered and filed his accounts as a self-employed person.

- S accepted that while working for PP he believed the arrangement was that he was self-employed. The original contractual agreement between them, signed in 2005, in fact described S as a "sub-contracted employee" and stated that the terms of the agreement were as detailed in the company manual. That agreement was replaced by a more detailed agreement dated September 2009

Throughout, S had worked solely for PP. He rejected particular jobs, taking into account the nature of the job and how far he had to travel; decided his own working hours; and was unsupervised in relation to the plumbing work, exercising his own discretion as to the work needed for a particular customer and whether to negotiate on price.

PP had no obligation to provide S with work on any particular day, and if there was no work for him he was not paid

- The Court of Appeal held – S, carrying out plumbing and maintenance work on behalf of a plumbing company, was a "worker" within the meaning of the Employment Rights Act 1996 s.230(3)(b), not a (true) self-employed contractor.

- The Supreme Court in June 2018 upheld the Court of Appeal's decision – S was a worker.

- So – a "worker" may be in a category other than "employee" or "self-employed contractor" – and the "worker" may have employment rights but not be an employee.

- The case of the BBC Presenter – see http://www.bbc.co.uk/news/uk-england-43074584

## R. (on the application of Independent Workers Union of Great Britain) v Central Arbitration Committee [2018] EWHC 3342 (Admin)
## "Deliveroo Judgement" – 5 Dec 18

- The claimant trade union applied for judicial review of the Central Arbitration Committee's ("CAC") decision that it should not be recognised by the interested party delivery company (Deliveroo) for collective bargaining purposes in respect of a group of delivery drivers (called "Riders"). Q- were they "workers"….

- The CAC considered the question of the Riders' status by reference to a contract introduced in 2017. Under the terms of that contract, as found by the CAC, Riders had a **(genuine)** right to "substitute" themselves, namely to engage another to do the work, before and after accepting a particular job.

- The CAC therefore found that it could not be said that Riders undertook to do "personally" any work for another party, and that that was fatal to the union's claim. It held that the Riders in the proposed bargaining unit were not workers within the meaning of s.196 and therefore were not eligible to be the subject of a recognition claim (see paras 24, 33, 36-37)

# UBER BV v Aslam [2018] EWCA Civ 2748 - 19 Dec 18

- Companies in the "Uber" group appealed against the Employment Appeal Tribunal's decision that Uber London Ltd employed the drivers as "workers", for the purposes of the Employment Rights Act 1996 s.230(3)(b), the Working Time Regulations 1998 and the National Minimum Wage Act 1998
- Held - Uber **did employ** drivers as "workers" for the purposes of the Employment Rights Act 1996 s.230(3)(b). The characterisation of the relationship between the drivers and Uber in the written documentation **did not properly reflect the reality of the arrangement, and the parties' actual agreement had to be determined by examining all the circumstances. [So – look to the reality]**
- Any driver who had the app switched on, was within the territory in which he was authorised to work, and was able and willing to accept assignments, was working for Uber under a "worker" contract with Uber. Any supposed contract between driver and passenger was a pure fiction, bearing no relation to the real relationships between the parties.

- **Correct test for determining whether an individual was a "worker"** - It was clear from the decision in *Autoclenz Ltd v Belcher [2011] UKSC 41, [2011] 4 All E.R. 745, [2011] 7 WLUK 790* that, in an employment context, the written documentation might not reflect the reality of the relationship. The parties' actual agreement had to be determined by examining all the circumstances, of which the written agreement was only a part (see paras 49-50, 54, 65-66, 73 of judgment).
- The passenger had no contract to compel the driver to pick them up. The contract at the point of accepting the request had to be with Uber. (paras 80-86).
- the drivers were providing services to Uber, not the other way round (paras 87-88).
- Drivers were working when they were waiting for a booking and at Uber's disposal as part of the pool of drivers it required to be available within the territory at any one time (paras 99-104).

# Conclusion

1. Is there a contract – is the person paid?
2. Is the worker providing specialist services?
3. Is there control? By whom?
4. **What is the reality**?

Many examples of the Courts upholding the commonsense of the situation.

If in doubt….take legal advice.

# Questions?

Thank You