



## BRIEFING

### Employment Status in the Gig Economy

The independent and ongoing Taylor review into modern employment law practices is mandated to examine the rights of the self-employed in the so called 'gig' economy. The context to the review is that, according to the UK government, "15% of those working in the UK's labour market are now self-employed". Furthermore "there has been a rise in the number of people doing gig work – short term casual work that is increasingly sought by people through mobile phone apps when they want to work".

Workers in the gig economy are typically engaged as self-employed contractors. Recent litigation, which has put a spotlight on this area, has centred on self-employed individuals claiming that they are not really self-employed but in fact should be treated in law as having employee or worker status (worker status being a half-way house between an employee and a self-employed contractor).

#### Why does this issue matter?

Two reasons:

- **Employment rights.** Employees have employment rights, self-employed contractors (generally speaking) do not. There is a vast range of employment rights. Some important ones include the right not to be unfairly dismissed, the right to raise a grievance and family friendly rights such as maternity and paternity leave. Workers have fewer rights than employees but importantly do have the right to be paid the national minimum wage, holiday and statutory sick pay. Incorrectly treating an individual as self-employed could result in a claim for backdated pay and potentially for unfair dismissal on termination.
- **Tax.** Under the pay as you earn (PAYE) system an employer is responsible for deducting tax from employees at source as well as making its own employer national insurance contributions. By contrast, a self-employed individual will be responsible for their own tax. If an individual is wrongly treated as self-employed there is likely to be a shortfall in the overall tax paid. The mechanics of the PAYE system mean that HMRC may look to an employer if there is a shortfall (even if the tax is ultimately "owed" by the employee).



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## How to tell if a person is an employee, a worker or self-employed contractor

Every working relationship is different and often it is obvious whether a person is employed or self-employed. This area results in disputes because in borderline cases it is hard to tell which labels are correct. However, there are certain key aspects and rules of thumb which Tribunals will use to make an assessment:

- **Personal service** – If an individual genuinely has a right to provide a substitute to do a job in their place then it will be difficult to establish employment or worker status.
- **Control** – The more control an employer has, the more likely an individual is to be considered an employee or worker. Key points to look for are:
  - Does the individual have set working hours?
  - Do they take directions from an employer?
  - Are they subject to the employer policies and procedures, for instance a dress code?
  - Are they integrated into an employer's business?
  - Does the individual use their own equipment or the company's?
- **Mutuality of obligation** – If it is accepted between the parties that there is an obligation to provide work or an obligation to do the work the individual is more likely to be an employee.
- **Degree of financial risk** – A self-employed individual may take a higher degree of financial risk.

This list is not exhaustive and no single factor is determinative. A worker is defined in law as an employee or someone engaged under 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. There is a lower pass mark to establish worker status than employee status.

### What has happened recently?

Recently, there have been a number of cases in this area. The mood appears to be Claimant friendly and individuals have been successful in establishing worker status in the following situations:

- *Aslam and Others v Uber BV (ET/2202550/15)* – Two taxi drivers operating via the Uber App were deemed workers for purposes of national minimum wage and working time rights. One element that the Tribunal highlighted in this case was that the relationship between Uber and the drivers could not in reality be said to be one of two independent parties dealing at arm's length.
- *Dewhurst v Citysprint UK Ltd (ET/2202512/16)* – Here the Claimant worked as a bicycle courier undertaking jobs throughout central London. The Claimant had been presented with a document entitled "confirmation of tender to supply courier services" which explicitly described her as a self-employed contractor. She was, in theory, under this contract able to reject jobs or provide a substitute. However, the Tribunal found that the conditions on her providing a substitute were so prescriptive it could only be filled by another of the company's couriers. Furthermore she was expected to work when she said she would, to smile and to wear a uniform. The Claimant was integrated into the company's business and was a worker, not a contractor.



- *Pimlico Plumbers Ltd and Mullins v Smith EWCA Civ 51 [2017]* – The Court of Appeal found that a plumber who was registered for VAT, submitted invoices and filed tax returns on the basis that he was a self-employed was nevertheless a worker. There was no right of substitution. Similarly, in practice, the employer operated a significant degree of control to the extent that it was open to the Tribunal which first heard the case to conclude that the company was not a customer or client of the plumber.

### What to do in practice

In practice any business engaging an individual who it considers self-employed should check the following:

- **The contractual arrangement.** A Tribunal will look beyond a contractual label and examine the reality of the situation as in the cases above. Nevertheless, the contract does offer some protection:
  - It is the starting point in the Tribunal's analysis and may tip the balance in a borderline case.
  - If the parties have documented their relationship as that of a client and self-employed contractor, an individual is less likely to challenge this situation than if there is no document or a poorly drafted one.
  - A tax indemnity can be included, the effect of which is that if HMRC do pursue the employer for non-payment of PAYE, the employer can call on the indemnity as against the individual.
- **Monitor the position.** An individual may begin as self-employed but over time could become a worker or employee if their working pattern or the nature of the work changes. It is prudent for companies who engage self-employed contractors to review their status periodically.
- **Review the position before termination.** Employment litigation will most frequently occur on termination. Before terminating a contractor, particularly a long-standing one, it is sensible to undertake a risk assessment.

**Julian Taylor Solicitors ©  
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This briefing contains a summary of various aspects of employment law. It is not intended to provide legal advice for specific cases. No liability is accepted for reliance on any of the information in this briefing. If advice is required please contact the firm.

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