Employment Law: Self Employed or Worker?

Many of you will have seen the recent reports on the UK Supreme Court Uber Case (Uber V Aslam and others). The affect of this decision on the status of workers cannot be underestimated.

Legal

In UK Employment law, those offering services, do so in one of three situations, the genuinely employed, the genuinely self employed or workers. The simple position in law is that employees are entitled to all employment rights, and the genuinely self employed none (other than some basic non discrimination rights in services). The middle category of worker is a category who, on the face of it, should probably be employees, but cannot quite get over that hurdle, the best example being agency workers. Workers, in law, are entitled to basic employment rights, such as the national minimum wage, holiday pay, and non-discrimination rights. They are not entitled to claim unfair dismissal.

Prior to the Uber case, the test for self employment was led by the contract between the parties. Various questions were asked: What do the terms say? Do they reflect the reality of the relationship? Is the contract an attempt to avoid worker rights or can it be seen as a genuine self employed contract?

Other non contractual tests are also applied to determine true status, such as control, integration into the business, and the economic reality of the situation. The Uber set up is well known,

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customers download an app, then order the taxi, and the driver is allocated by the app to them. At the time of the original employment tribunal hearing (but no longer), the drivers did not see the job until it was allocated. The customer then got a specific notification, naming the driver, giving licence plate details etc.

Uber's defence was that there was no mutuality of obligations, that the drivers weren't required to accept work, and when they did accept work, it was a limited and defined job. They also took the view, that the case was about unpaid wages in respect of the workers in the case only.

The Supreme Court found overwhelmingly in favour of the individuals, finding that they were workers for employment rights purposes, but more importantly, that they were workers for the duration that they were working, in other words, whenever they turned the app on to be able to take a fare, it was deemed working time. This meant that they were entitled to be paid the National Minimum Wage for that full duration, and accrued holiday rights on that basis. Other work rights such as non-discrimination, whistleblowing etc, also flow from this.

Whilst finding worker status in the individuals, the Supreme Court also set out further how that status should be determined, and narrowed the test. In simple terms, if a situation should be a worker one, then it will, and any contract, even if negotiated in good faith, that seeks to avoid that status will not be valid. The simple position is that a worker/employer negotiation can rarely be equal, and therefore calling a status self employed, and contracted on that basis, will in most cases fail, and worker status will apply. Parliament legislates to give individuals rights to offset unequal relationships, and an attempt to avoid those rights will not work.

This decision is obviously fundamental in the gig economy industry, and it is difficult to see how those who engage workers in that area can avoid worker status. It also has massive implications, in my view, in the following areas:

1) On call self employed organised services eg plumbers, electricians etc, who do not run their own business but work through another organisation that provides them with the work;

2) Construction Workers, who are often engaged on long term projects, and have to be available at short notice, to be placed on site, but do so on a self employed or limited time worker basis;

3) IR35 and off payroll individuals, who are placed in an organisation, but through their own service company, but are treated for tax purposes, like an employee. The Public Sector has been following that model for several years, and from April, the private sector will do the same. Companies that hire individuals through IR35, can almost certainly expect those individuals to have worker status.

4) Agency Workers – An agency arrangement used to circumvent status, will almost now certainly fail on that basis. Genuine agency arrangements ie short term and limited, will probably still survive the test, but long term placements at an end user, by an agency, are clearly on the analogy of the Uber case, and attempt to avoid worker status, and will likely fail in avoiding it.

The simple position in the past is that business was able to rely on the contractual position, that will be much more difficult now, and in many cases impossible, to the point where engaging individuals as workers will be the only option.

As far as Uber (and potentially others) are concerned, the sheer scale of the arrears that they owe the 40,000 drivers they engage will be vast!

Please always take advice on any staff related issues.

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