

## UK Supreme Court: "Sub-Contractors" Were in Fact Employees

The UK Supreme Court (SC) recently held in *Autoclenz Ltd v Belcher and Others* that a group of 20 car valeters who were engaged under contracts stating that they were self-employed were in fact employees for the purposes of the National Minimum Wage Regulations 1999 (NMWR) and the Working Time Regulations 1998 (WTR). The SC held that written terms which do not reflect the parties' actual agreement, and which are inconsistent with conduct in practice, may be disregarded in assessing employment and worker status.

This is an important decision which highlights the way the courts consider working practices where they are inconsistent with express contractual terms and whether self employed contractors can claim statutory rights as workers or employees.

### The Facts

The 20 individual valeters provided car-cleaning services at the site of British Car Auctions, with whom Autoclenz Ltd had contracted. The valeters' contracts with Autoclenz stipulated that they were sub-contractors providing their services as self-employed independent contractors. The contracts specifically excluded an employment relationship and required the valeters to account to HMRC for tax.

The contracts also contained a substitution clause which purported to provide that the valeters could send a substitute to perform the work in their place. The agreement also specifically stated that the relationship between Autoclenz and the valeters was one of client-contractor and not employer-employee.

The valeters asserted that they were not in fact independent contractors but workers or employees under NMWR and WTR, and therefore entitled to receive the national minimum wage and paid holiday.

The SC upheld the original decision of the Employment Tribunal that the relationship was not one of client-contractor but that, contrary to the express agreed terms, the valeters were in fact employees working under a contract of employment. The key factors which the SC took into account were:

- the valeters were required to carry out work personally and could not in practice send a substitute (despite the substitution clause);
- they had no real control over the way in which they worked or how many hours they worked;
- they had no say in the terms of their contracts, which were devised entirely by Autoclenz, as were their rates of pay;
- they had no real economic interest in the business; there was nothing they could do to make their supposed businesses more profitable;
- they could not source their own materials;
- they were subject to the direction and control of Autoclenz employees and were fully integrated into Autoclenz's business; and
- their invoices were prepared by Autoclenz.

## Implications

The decision in *Autoclenz* is a forceful reminder to employers who engage self-employed contractors directly (as opposed to via a supplier company) to consider carefully whether the reality of the working arrangement is consistent with the documented contractual relationship. If not, employers risk individuals whom they have engaged as contractors successfully claiming that they are entitled to the full range of statutory rights afforded to employees (or to the fewer, but still substantial, statutory rights enjoyed by workers).

Organisations which wish to engage self-employed contractors will be best placed considering the reality of the engagement at the outset and focusing on whether (i) the services to be provided must be provided by the individual personally; (ii) whether

there is an obligation on the employer to provide work and on the individual to accept it; and (iii) whether the organisation has a significant degree of control over the way in which the services are to be performed. If the answer to these questions is 'yes' it is more likely that the relationship is one of employer-employee.

The *Autoclenz* decision brings into sharp relief the approach taken by the courts in scrutinising the reality of a working relationship. Even where the express terms are crystal clear, no practical detail is too minor to escape the court's consideration: from whose responsibility it is to purchase uniforms to how fee invoices are prepared. A critical first step for any organisation engaging a contractor is to consider how the provision of services can be structured and operated genuinely to reflect a client-contractor relationship.

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