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Assessing Employment Status



The Court of Appeal has decided that two self-employed interpreters did not have the necessary contractual relationship to be protected by discrimination law. Here, we take a look at how that protection is created.

Employment Status

There are generally three types of employment status: employee, worker and self-employed. This categorisation is important because employment rights are dictated by a person's employment status e.g. whether they get paid holidays; whether they are able to claim unfair dismissal; etc. Employees have the most employment rights; workers have a small number and self-employed people have very few.

Importantly, employment status is not defined by the job that someone does, or necessarily the contract that they are under. What matters is the everyday working relationship that exists between the individual and the 'employer'.

How Do You Identify Status?

There is no piece of law that defines the difference between employees, workers and self-employed people. The methods of identification have emerged through case law when an Employment Tribunal has considered the everyday working relationship and come up with certain aspects of a relationship which must exist in order for that individual to be an employee for the purposes of employment law, and therefore gain the protection of all employment rights. In order for an individual to be an employee, there must be:

Control – the individual must be under the control of the employer in terms of where and when the work is done, and how it is done. Rules and procedures will be applied to the individual;

Mutuality of Obligation – the employer is under an obligation to offer work to the individual and the individual is under a corresponding obligation to do the work offered. Occasionally, this can be watered down to simply an obligation on the individual to do the work when it is offered;

Personal Service – The individual must be required to do the work themselves i.e. they cannot send a substitute in their place.

Although these are the main three tests, all the other aspects of the working relationship must be conducive to a relationship of employment. If any single aspect of the main three are missing, the individual cannot be an employee and will not qualify for the full range of employment rights.

What About Discrimination?

The scope of the Equality Act 2010 is different in that it only requires someone to be under "a contract to personally provide services" in order to be protected against discrimination. A recent case analysed the working relationship of two interpreters who were self-employed for tax purposes to see if they were protected by the Equality Act. The original employment tribunal looked specifically at the mutuality of obligation aspect and decided that, because the interpreters could turn down the work when it was offered, they did not meet the requisite test and therefore were not protected against discrimination.

The Employment Appeal Tribunal overturned this decision and decided that mutuality of obligation had nothing to do with whether someone was under "a contract to personally provide services" and therefore could be protected.

The Court of Appeal disagreed with this and restored the original tribunal's decision. It said that although mutuality of obligation did not specifically relate to the question of protection under the Equality Act, it was indicative of the entire nature of the relationship and therefore, the interpreters would not be protected against discrimination.

What Does This Mean For Me?

This case provides some clarity on the ability for individuals to make claims of discrimination. It indicates that the aspect of mutuality of obligation is important in determining the scope of the Act. Therefore, if employers operate this kind of assignment based work for people who are self-employed for tax purposes where there is no obligation on the individual to accept the work, that individual is not likely to be able to make the claim at tribunal that they have been discriminated against.

The content of this briefing is correct at the time of publishing.

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