ABBEY TAX PROTECTION

Status:

Autoclenz Ltd V *Belcher and Others*

The Supreme Court has handed down its judgment in *Autoclenz Ltd* v *Belcher and Others*. It has particularly important ramifications for businesses engaging subcontractors, but may also impact upon the freelancer market if contracts are written with terms that are not reflected by the working practices. Arguably, this may be the most significant employment status judgment since *Express and Echo* Publications (1999) in which the principle of substitution was particularly emphasised and before that *Ready Mixed Concrete (1968)* which laid out the fundamental principles for considering all status cases.

Autoclenz provides car-cleaning services to motor retailers and auctioneers. It has contracts with British Car Auctions (BCA) for cleaning vehicles at a number of different places. The claimants were 20 individual valeters who at the relevant time provided car cleaning services at BCA's Measham site in Derbyshire.

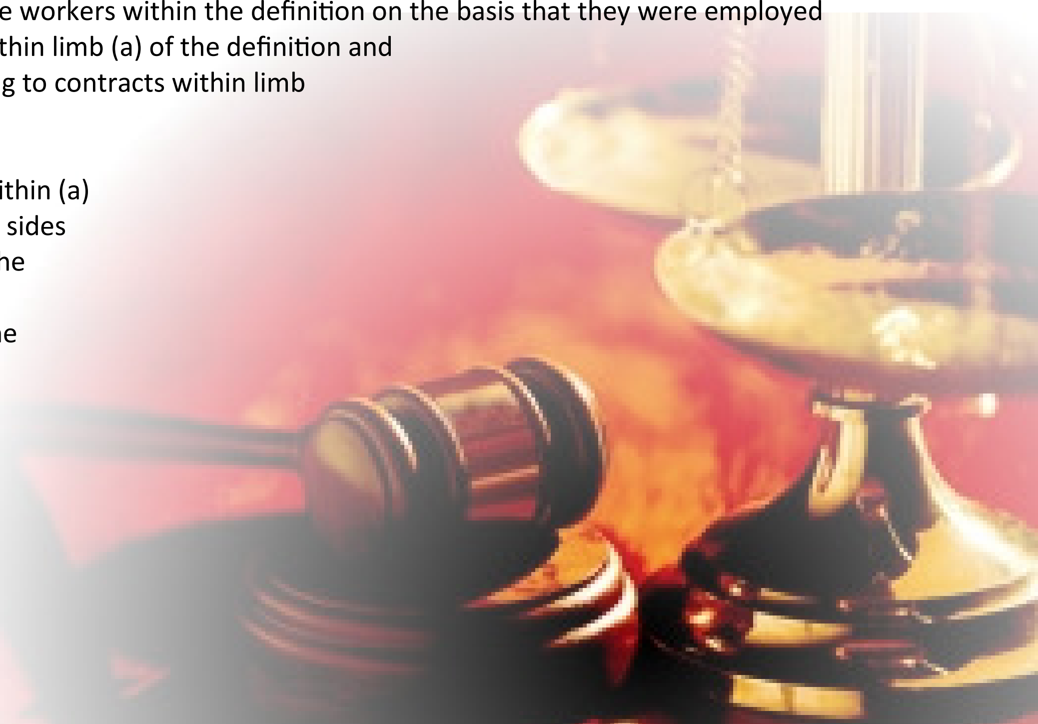
Autoclenz had engaged the car valeters on a self-employed basis since the 1990's. By 2007, the contracts were amended to include mutuality of obligations and substitution clauses which reinforced the intention of the contractual terms to create a contract for services. The individuals argued that the clauses did not reflect the actual agreement between the parties and that they were obliged to provide the services personally.

The question for the initial Employment Tribunal (ET) in March 2008, the Employment Appeals Tribunal (EAT) in June of that year, the Court of Appeal (October 2009) and finally the Supreme Court (May 2011; judgement handed down in July) to consider was whether the claimants were workers defined as follows:

"... 'worker' … means an individual who has entered into or works 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."

The ET held that the claimants were workers within the definition on the basis that they were employed under contracts of employment within limb (a) of the definition and that they were in any event working to contracts within limb (b).

The EAT held that they were not within (a) but that they were within (b). Both sides appealed to the Court of Appeal. The Court of Appeal restored the judgment of the ET, holding that the claimants were within both (a) and (b). *Autoclenz* was granted permission to appeal to the Supreme Court.



The Supreme Court was happy to reiterate the comments of one of the Court of Appeal Judges to sum up the facts:

"Employment Judges have … a sense, derived from experience, of what is real there and what is window-dressing. The conclusion that Autoclenz's valeters were employees in all but name was a perfectly tenable one on the evidence which the (ET) judge had before him. The elaborate protestations in the contractual documents that the men were self-employed were odd in themselves and, when examined, bore no practical relation to the reality of the relationship."

The Judge believed that the claimants were not businessmen in business on their own account and that there was nothing that the claimants could do to make their "businesses" any more profitable by the way in which they organised themselves, albeit the more work they did the more they earned. He further argued that they had no control over the way in which they did their work or over the hours that they worked; they did not source their own materials. They were subject to the direction and control of the *Autoclenz's* employees on site.

These comments regarding control could not be further apart from those made by the Tribunal Judges in the recent IR35 cases, *MBF Design Services*, *ECR Consulting, Marlen* and *Primary Path*, where all four contractors were seen to be in business on their own account, face financial risk and were very much in control of ***how*** the work was performed.

The Judge was satisfied that the claimants were required to provide personal service despite the substitution clause which he believed did not reflect what was actually agreed between the parties, which was that the claimants would show up each day to do work and that *Autoclenz* would offer work provided that it was there for them to do. Again, the clause saying that there was no obligation on *Autoclenz* to offer work or on the claimants to accept work was wholly inconsistent with the requirement for valeters to notify *Autoclenz* in advance if they were unavailable for work; indeed, this requirement demonstrated that there ***was*** an obligation to attend for work unless a prior arrangement had been made. The Judge therefore found that the substitution clause and the right to refuse work were unrealistic possibilities and not what the parties had in mind when they entered into their agreements.

Based on the ET's findings, the Supreme Court argued that four essential contractual terms had been established:

(1) That the valeters would perform the services defined in the contract for *Autoclenz* within a reasonable time and in a good and workmanlike manner;
(2) That the valeters would be paid for that work;
(3) That the valeters were obliged to carry out the work offered to them and *Autoclenz* undertook to offer work; and
(4) That the valeters must personally do the work and could not provide a substitute to do so. Therefore, the Court of Appeal was correct to hold that those were the true terms of the contract and that the ET was entitled to disregard the terms of the written documents, in so far as they were inconsistent with them.

The Supreme Court has therefore determined that when assessing the veracity of contractual clauses Tribunals should take into account:

- The expectations of the parties – does anyone really expect a substitute will be sent?
- The bargaining power between the parties.

This second point was key in *Autoclenz*: the valeters washed cars when and where they were told; their bargaining power was effectively nil. It is also one of the areas which will determine that there will be less impact on the IR35 marketplace than in the engagement of subcontractors who may not be contributing the

same level of skill and knowledge. A freelancer/contractor may be in a position to negotiate rates and how they provide the services. It would be difficult for a freelancer to argue that they suffered with regards to bargaining power if they were earning considerably more than the direct employees who are allegedly 'managing them'. This case needs to be put into context - freelancers operating as a genuine business will be viewed entirely differently and have a different degree of bargaining power.

The Supreme Court also suggested that the conduct of the parties may override the written terms agreed between the parties and this judgement has increased the scope of an individual to claim that the agreed written terms are a sham.

This case is a salutatory lesson to any business which is seeking to engage self employed contractors and subcontractors who may really be nothing more than disguised employees. Whilst this was an employment matter, it will be a case that will no doubt guide HMRC in its attempts to determine status cases in its favour.

Where there is a desire to create a genuine trading relationship between independent contractors, it will be important for the parties to ensure that the parameters of any engagement are accurately recorded through a written contract for services. However, this case suggests that the 'sanctity' of the written contract no longer exists and that if the working practices do not support the contractual terms, then it will become easier to challenge the status of the engagement.

The indications are that this case will have less of an impact upon the freelancer market. Firstly, it is highly unlikely that a limited company contractor would be seeking employment rights and therefore seeking to argue that the contract terms were a sham. However, the contractual terms must nevertheless reflect the working practices. If the End Client's response to a substitute being offered is one of horror, then including an unfettered right of substitution will be exposed for what it is and only serve to undermine all the other terms.

Secondly, the Court of Appeal's judgment considered contractual relations over the course of the engagement; i.e. what may have been agreed at the outset may change due to the actions of the parties over time. It is therefore as important for a freelancer concerned about IR35 as an engager who is concerned about the status of its subcontractors to review the terms periodically to make sure that they are still accurate.

Thirdly, the IR35 Intermediaries legislation allows HMRC to create a 'hypothetical contract' which already requires the Tribunal to consider all the contractual terms (both Upper and Lower), as well as consider the actual working practices. Therefore a First Tier Tax Tribunal will always test the contract terms against the working practices. Nevertheless, one wonders whether HMRC's approach might be more aggressive in seeking to argue that if any clauses can be exposed as being a 'sham' then the Tribunal should not only question the intention of all the contractual terms, but also whether the engagement could ever be considered to be a contract for services.

Even if *Autoclenz* is unlikely to impact adversely upon the freelancer market, there is no doubt that those businesses who engage sole traders need to be very careful.

If you would like to discuss this update in more detail, please contact us by calling 0870 166 6270 or email marketing@abbeytax.co.uk.