

## Employee, worker or self-employed contractor?

There has been much recent media coverage of the successful actions by Uber drivers and CitySprint cycle couriers.

To understand the basis of these cases it is worth restating the characteristics of an employee, a worker and a self-employed contractor.

An **employee** works under a contract to perform work personally. The tests of employment status are well established and include:

- personal service and mutuality of obligation – an on-going obligation on the employer to offer work and an obligation on the employee to discharge work offered; and
- control – the employer broadly directs how, when and where the work is undertaken

A **worker** shares the obligation of personal service with an employee but frequently mutuality of obligation is absent. For example in the case of casual workers there is no obligation on the company to provide regular work and the worker is not obliged to accept work offered.

A **self-employed contractor** by contrast is in business on their own account providing services to customers or clients, investing in their business, generally providing their own equipment, marketing their business and engaging in financial risk. Mutuality of obligation, personal service and control are absent.

### The Uber cases

A number of Uber drivers brought claims asserting worker status (as opposed to self-employed). The Employment Tribunal found that contracts created by Uber to support its workers' self-employed status did not accord with the reality of the working arrangement.

The applicants had to undergo an 'on-boarding' process before they could start work. Once they started, the drivers were not required to make any commitment to work but when they signed into the app they only had 10 seconds to accept a booking. If a driver failed to accept bookings, warning messages were generated which could lead to their access to the app being suspended or blocked. Uber also operated a rating system and could withdraw the driver's access to the app if their ratings fell below a prescribed level. Drivers did not invoice passengers directly; passengers paid Uber via the app and Uber paid the driver weekly for the fares they earned, minus a 'service fee' of 20-25% for the use of the app.

In reality, the Tribunal found that Uber was running a straightforward transport business and the drivers were workers at all times when they were authorised to drive, had turned on the app and were ready and willing to accept passengers. They were therefore entitled to benefits including National Minimum Wage and holiday pay.

### Other cases

A similar case was brought by a cycle courier for CitySprint. She was required to pass a two-day recruitment process and was then asked to electronically acknowledge a number of key

terms, which did not impose an obligation on her to accept work and gave her the ability to send a substitute. However, the Tribunal found that this did not reflect the true relationship. In fact, she was expected to work when she said she would, was directed by a controller through radio and mobile phone, wore a uniform and was told to smile as part of providing a professional service. Accordingly, the Tribunal said she was a worker during the periods when she was logged into CitySprint's tracker system.

More recently, the Court of Appeal considered the status of a plumber (Mr Smith) who had been engaged by Pimlico Plumbers. The contractual documentation said Mr Smith was under no obligation to accept work and the company was not obliged to offer him work, but a separate provision required him to complete a minimum of 40 hours per week and in reality he could not reject work. He was also subject to restrictions preventing him from working as a plumber in the Greater London area for three months following termination, he had to drive a Pimlico Plumbers branded van and wear a Pimlico Plumber's uniform. However, he provided his own materials and tools, was VAT registered and was responsible for his own insurance. Nevertheless, the Court of Appeal agreed that he was a worker as he was required to provide a personal service and Pimlico exercised a level of control that was inconsistent with self-employed status.

### **Increased focus and risk**

These cases demonstrate how fact-sensitive decisions about employment status are but they also show the willingness of the courts to look behind artificial contractual arrangements to the reality of the legal relationship. With the government currently undertaking an independent review of employment practices, and with more cases in the pipeline, this issue shows no sign of going away.

Employers who fall foul of a challenge by their self-employed workers are likely to face bruising financial and reputational risks.

For further information, please contact:

Jane Klauber  
Partner  
+44 (0)20 8394 6483  
[Jane.Klauber@russell-cooke.co.uk](mailto:Jane.Klauber@russell-cooke.co.uk)

Carla Whalen  
Associate  
+44 (0)20 8394 6419  
[Carla.Whalen@russell-cooke.co.uk](mailto:Carla.Whalen@russell-cooke.co.uk)

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