

Sham contracts: a solicitor's headache?

by Matt Champ

INTRODUCTION

With self-employed agents attending civil hearings up and down the country in ever increasing numbers the status quo has been unchanged for some time. However, this article asks the question about whether there is actually an employment relationship and what impact this might have on firms who instruct such agents to attend hearings for the benefit of a third party client.

WHAT ARE SOLICITORS' AGENTS?

Solicitors' agents, also known as freelance advocates, are people who are instructed by a firm of solicitors, their principal firm, to attend court and address district judges in line with instructions given by a third party end client in civil and interim hearings.

They are typically engaged under "self-employed" agreements.

IMPORTANCE OF DISTINGUISHING BETWEEN SELF-EMPLOYED AND EMPLOYEES

The major impact of the difference is that there are a number of employment rights that are not available to self-employed persons. Some of these rights include the right not to be unfairly dismissed, the right to holiday pay, certain family employment rights, the right to be paid the minimum wage, the right to notice periods and also certain protection under the Transfer of Undertakings (Protection of Employment) Regulations 2005.

LEGAL REQUIREMENTS OF AN EMPLOYEE

There is no universal definition of an employee. An attempt is made under section 230(1) Employment Rights Act 1996 which defines an employee as:

An individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

This definition is not particularly helpful, and so we must turn to the case law that has attempted to define the essential

characteristics of an employer/employee relationship.

In the tried and tested case of *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497, Mackenna J stated at paragraph 515 that an employee would satisfy the requirements if:

...these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service.

Case law has subsequently developed this into the "irreducible minimum" without which an employer/employee relationship cannot exist (*Carmichael and Another v National Power plc* [1999] 1 WLR 2042). The irreducible minimum includes control, mutuality of obligations and personal performance by the employee. If all of the above are present then the person will be an employee.

It must be asked what happens when the situation is not accurately reflected by the contractual documents.

SHAM CONTRACTS

This is an area of employment law that has seen much change in recent years. It is regrettable that it has taken so long for the courts to appreciate that employers might attempt to take advantage of the law to their employees' detriment.

It is worth noting that other areas of law have not been so slow, a notable example being Lord Templeman in *Street v Mountford* [1985] AC 809 at paragraph 819 when considering whether a licence could be a lease, even if contrary to the parties expressed wishes:

If the agreement satisfied all the requirements of a tenancy, then the agreement produced a tenancy and the parties cannot alter the effect of the agreement by insisting that they only created a licence.

The leading case in the employment context is *Autoclenz v Belcher* [2011] UKSC 41. Smith LJ gave the leading judgment in the Court of Appeal which was expressly approved by the Supreme Court. The answer to the above question was that the court had to look at the true intentions of the parties and not simply what was present in the documentation:

It matters not how many times an employer proclaims that he is engaging a man as a self-employed contractor; if he then imposes requirements on that man which are the obligations of an employee and the employee goes along with them, the true nature of the contractual relationship is that of employer and employee [at 69].

Thus it can be said with confidence that if the contract does not accurately reflect the intentions or expectations of either of the parties then the court, if asked to assess the status of that contract, may decide that it is in fact an employment relation even if the documentation expressly says the contrary.

APPLICATION TO SOLICITORS' AGENTS

One of the strongest arguments against an employment relationship is that the principal firm is under no obligation to provide work. However, it must be asked whether this is true if the firm in question do, in fact, provide work to the advocate day in and day out.

Similarly, the advocate is apparently under no obligation to accept the work. However, surely this is exactly what the Supreme Court was talking about at paragraph 35 of *Autoclenz* when it mentioned the importance of inequality of bargaining power:

So the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part.

The advocate depends on his principal firm for his income. If it is made clear to him that if he does not work he may not be allocated any work further on down the line, then it must be asked whether he is actually, in reality, able to refuse work. This is supported by the notion that some firms insist that if an advocate does not “book” time out of their diary then the advocate is deemed to be happy to work for that day and the advocate’s consent is not sought prior to any allocation even if it is at the last minute.

The principal firm usually provides the training for the advocate. Is this usual for a firm who apparently engages self-employed contractors? There is an argument to say that it is not, and suggests perhaps a closer relationship that the principal firm may care to admit.

In terms of remuneration does payment from the same

account on the same day each week suggest self-employment? Again this author would argue that it shows continuity that may lend weight to the fact that the “self-employment” agreement is not a true reflection of the parties’ intentions. This is a stronger assertion when it is considered that some firms will check the invoices and alert the advocate in question that they have under-claimed. The author would argue that this may be seen as simply making a payment of wages “through the back door.”

Of course it goes without saying that the advocate must perform the works personally as it is only the advocate who is on the principal firm’s indemnity insurance.

In terms of control, again, if the advocate knows that any refusal to work could lead in his income stopping in future weeks it must be asked whether that advocate can actually refuse to go where he is sent by the principal firm. The principal firm does not of course have to have a huge amount of daily control over the advocate in general, the matter should be “viewed in the round” (*White v Troutbeck SA* [2013] EWCA Civ 1171 at [41]).

So if the agreement to be self-employed was seen as being a sham, it must be noted that it appears that the mutuality of obligations, personal performance and control are all present. Many other relevant factors must also be considered. Can the advocate use the firm’s offices? Does he go to the firm’s social functions? Who provides his references? Whose supervision is he under? Whose business cards does he use?

All of these small factors when taken together seem to add to the weight that there is a potential argument to say that the freelance advocates or solicitor’s agents are in fact employees of their principal firms and are entitled to rely on the legal rights mentioned above. Such a finding would also have an impact on the taxes due from the principal firms if they were found to be employers.

Unfortunately there is no direct case law on solicitor’s agents claiming they are employees. This could be for several reasons. However, it may be that any such claims have been settled under consent orders that have confidentiality clauses. It does seem that it would be a great risk for a firm that engages numerous advocates to be able to risk a precedent that establishes that they are indeed employees. An adverse finding may be as significant, as when Rebecca Edmonds helped to establish that pupils were to be paid at least the national minimum wage by her chambers which consequentially lead to the Bar Council regulating the future payment of pupils.

CONCLUSION

Although the advocate may be told from his first day that he is self-employed, when one looks at the actual nature of the relationship between the agent and his principal firm it could

be decided that any “self-employment agreement” is not a true reflection of the parties’ actual intentions.

Following the Supreme Court’s decision in the case of *Autoclenz* there is certainly an argument that such self-employment agreements are in fact shams and the advocates are in reality employees of their principal firms.

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