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SHAM SELF-EMPLOYMENT CONTRACTS

Introduction

Until recently there has been some ambiguity in EAT and Court of Appeal decisions regarding the requirements to establish whether or not there is a sham (usually self-employed) contract. Lately this has been regarding whether or not it has to be the intention of both Parties that there is a common intention to mislead within the written documentation. A recent Court of Appeal decision of **Autoclenz Limited vs. Belcher and Others 2009 EWCA CIV 1046** has cleared up the situation.

Background

Whilst there are obviously benefits in self-employment, many of these contractors are now trying to establish either worker or employee status to get the benefits of protection and/or unpaid wages and holiday pay.

Section 230(1) of the Employment Rights Act 1996 defines an employee as an individual whose entered into work under a Contract of Employment. A worker is more broadly defined to include anybody who works under a Contract, whereby he or she personally undertakes to perform the work in the course of the business. So the minimum conditions are mutuality of obligation i.e. the individual has some obligation to do the work offered and the employer an obligation to provide it and secondly a requirement that individual carry out the work personally and thirdly to be subject to an employer's control substantially in the way the work is carried out.

The general principle is that any written contractual terms will be taken to reflect the agreement between the Parties and the Courts are not entitled to find that the terms were not what was really intended, unless there is ambiguity in expressed written terms and so they had to be taken at face value, even if they are not all put into practice.



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In the event, however, that a Party alleges that the written documentation is a sham i.e. where it is intended by the Parties to give to third Parties or to the Court the appearance of creating between the Parties legal rights and obligations different from the actual legal rights and obligations, if any, which the Parties intend to create, then it is open for the Tribunal to find that the written documentation does not set out what the Parties' relationship actually is.

Recently it was an obligation in proving a sham that both Parties intended to paint a false picture by the written documentation.

[Autoclenz Limited vs. Belcher and Others](#)

In the case of Autoclenz Limited vs. Belcher and Others referred to above, the apparent inconsistencies in Court decisions were reviewed and the appropriate approach synthesised for future application.

The case concerned Valets, who were employed to clean vehicles at various sites on behalf of the contractor. The applicant with 19 others were engaged on this basis. They were recruited through advertisements asking for self-employed people and were required to sign a Contract to describe they were subcontractors. That Agreement was amended in 2007 to provide for facility of substitution of individual and further there was no guarantee that the contractor would engage any valet services at any times.

The contractor supplied all cleaning equipment and materials and charged 5% of the Valets' weekly pay for that service and payment was on piece work for each car cleaned. Valets were required to have Public Liability Insurance. The contractor had a group Policy in place in respect of which it deducted £9.00 per week from each Valets' wage packet. The Valets paid Tax and National Insurance on a self-employed basis and the Revenue were satisfied it was self-employment. However Belcher and his colleagues alleged they were workers or employees and they were looking for unpaid wages and holiday pay.



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It was made clear by the Court of Appeal that where one Party was alleging a document was a sham, there is no need to show that the Party disputing the term to say it was a product of a common intention to mislead.

Consequently where there was a dispute as to the genuineness of a written term in a Contract, the Tribunal has to examine all the relevant evidence including written Agreements, how the Parties conducted themselves and what their expectations of each other were, to discover the actual legal obligations.

Further the Parties' conduct can be persuasive evidence from which a Tribunal can draw an inference of the Parties' true obligations, but one should be cautious: the fact that Parties conduct themselves in a particular way does not necessarily reflect their legal obligation. So a legal right to provide a substitute individual which was never exercised in practice would not necessarily mean it was not genuine.

A Court would have to consider whether the words of the written Contract represent the true intention or expectations of the Parties, not only at the inception of the Contract, but also at any later stage where the evidence shows that the Parties have expressly or impliedly varied the Agreement between.

In this particular case the Court of Appeal decided that the Employment Tribunal had dealt with matters correctly and the facts showed that the true legal obligations of the Parties were that they were employer and employee. No one seriously expected the Valets to provide a substitute and they were expected to turn up everyday and do the work provided. There was therefore the necessary mutuality of obligation to the workers and the necessary degree of control for the workers to be employees.

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