Exploring the use of employment contracts in the gig economy

05/05/2017

Employment analysis: A parliamentary select committee has been examining the contracts provided to individuals engaged by Uber, Deliveroo and Amazon and has lambasted Uber's contract as 'gibberish'. Jackie Feser, a consultant at London employment firm Parker & Co Solicitors, comments on recent developments and controversies regarding interpretation of 'self-employment'.

Original news

Gig economy firms are 'free-riding on the welfare state', report finds, LNB News 04/05/2017 120

Loopholes in the law are being exploited to allow 'bogus' self-employment practices, potentially creating an extra burden on the welfare state while reducing the tax contributions that sustain it, a report from the House of Commons Work and Pensions Committee (the Committee) concludes. Evidence taken by the Committee from 'gig economy' companies such as Uber, Amazon, Hermes and Deliveroo, and from drivers who work with them, presented starkly contrasting pictures of the effect and impact of 'self-employment' by these companies.

Are companies under any obligation to ensure employment contracts are written in clear language? Does the employment contract have to be understandable to the employee?

It is a general principle of contract law that contractual terms must be sufficiently clear and certain—clauses which are too vague are unlikely to be binding

Although an employer is not obliged to provide a written employment contract, pursuant to section 1 of the Employment Rights Act 1996 (ERA 1996), employers are required to provide a written statement of particulars (the particulars) which includes details of certain key terms including:

- remuneration
- hours
- place of work
- holiday, and
- sick pay entitlement

Employers are generally required to provide employees with these particulars within the first two months of employment. The nature of the information to be included is prescribed by statute and this should ensure that employees understand at least the basic terms of their employment.

However, many employment contracts contain far more detailed and onerous provisions including, for example, post termination restrictions, which are not always easy for an employee to understand. A precisely drafted and intelligible contract reduces the risk of disputes and increases the likelihood that the terms can

be enforced. Where complex provisions of critical importance are included, it may be advisable for companies to include a provision whereby an employee acknowledges that they have received or at least had the opportunity to receive legal advice about their employment contract.

Having ensured that an employee understands their contract at the time of signing can be useful in the event of a dispute. In addition, there may be circumstances when an employer will be found liable for failing to draw an employee's attention to a particular clause or matter if there are significant financial implications arising and the employee could not reasonably be expected to know this. Regardless of content, certain terms are implied into employment contracts including that of mutual trust and confidence. An employer who deliberately tries to mislead an employee is likely to be in breach of this term.

By altering the vocabulary in employment contracts, are companies able to avoid certain legal stipulations? By referring to its couriers as 'independent suppliers' could Deliveroo avoid certain employment rights?

Companies, including Deliveroo, are unlikely to avoid certain legal realities simply by virtue of the vocabulary they use in their contracts.

The first step in examining the validity of a contract or particular term within a contract is an analysis of any underlying written terms and therefore the vocabulary used. However, following the decision by the Supreme Court in *Autoclenz Ltd v Belcher* [2011] UKSC 41, [2011] All ER (D) 251 (Jul) courts are increasingly looking beyond the written terms and examining the practical realities of a situation.

The Supreme Court held that when considering the employment status of an individual, the nature of the true agreement between the parties must be determined and to the extent that the written terms do not reflect reality they may be disregarded. This is largely due to the inequality of bargaining power between the parties in the employment context and as we have seen from recent cases, where the circumstances are perceived to involve more vulnerable and lower paid employees, the courts are even more likely to look behind the written terms to ascertain the reality of the arrangement.

The Committee accused Uber, Deliveroo and Amazon of adding a clause that attempted to prevent people challenging their self-employed status. What is the nature of this clause? Does this prevent challenging self-employed status?

The Uber, Deliveroo and Amazon contracts published as part of the self-employment and gig economy inquiry all contain a clause which expressly states that the individuals they engage are neither employees nor workers but rather they are self-employed.

These clauses are primarily concerned with ensuring that these individuals do not benefit from protections and entitlements granted to employees and workers under employment legislation but they also seek to ensure that the individuals are responsible for all tax and national insurance related payments. Deliveroo takes this a step further and explicitly prohibits individuals from taking any legal action to challenge their alleged self-employed status. Should they do so, they could in theory be in breach of warranty, liable for damages and required to indemnify the company against any losses or expenses incurred as a result. While Uber does not expressly prohibit legal action its contractual provisions state that should the individual be found to be an employee, they will indemnify and (where requested) defend Uber against any claims.

Given the Supreme Court's decision in *Autoclenz Ltd v Belcher*, and the warnings in other cases to look beyond the army of lawyers, it seems unlikely that such clauses would be held enforceable if they do not reflect the reality of an individual's employment status and even conflict with other written terms.

In addition, there are legal restrictions preventing parties from contracting out of certain statutory provisions. These include ERA 1996, s 203 and section 144 of the Equality Act 2010. Preventing an individual from arguing that they are an employee or worker effectively amounts to giving up potential rights under such legislation which they are not legally able to do (subject to certain exceptions such as under a settlement agreement). However, individuals would likely have to challenge the validity of these clauses before they could

seek to enforce any rights or entitlements granted to employees or workers. This is often an unrealistic proposition for such individuals.

What can we learn following recent employment cases such as those involving Uber and Pimlico Plumbers?

Recent employment cases have examined the key elements of the definition of employee and worker and demonstrate their importance for those drafting or advising on related contractual documentation.

Personal service

To satisfy the definition of worker (and employee) an individual must be under an obligation to provide services personally. This is often countered, by those arguing for self-employed status, through the inclusion of a substitution clause allowing others to perform services in place of the contracting individual, so that there is arguably no obligation of personal service. However, the recent cases involving Uber, Pimlico Plumbers and CitySprint have shown that any right to provide a substitute needs to be unfettered. Where a substitution clause is prescriptive in its requirements as to the circumstances or to whom responsibilities can be delegated (as was the case in CitySprint where only another CitySprint courier could fill in), it is likely to amount to an obligation to provide personal services and will not necessarily therefore defeat a challenge to self-employed status.

No customer/client relationship

An often key distinction between worker and self-employed status is the nature of the 'business' relationship between the parties. Uber, Pimlico Plumbers and CitySprint were held not to be genuine clients or customers of businesses being run by the individuals bringing claims as would be the case with the truly self-employed. This was a critical finding. Arguably Uber tried (and failed) to use contractual documentation to circumvent the reality of the relationship. Uber argued that it only provided a technology platform (and not transportation services) through which drivers provide transport services to passengers on a self-employed basis and that drivers enter into a contract with each passenger. However, the Employment Tribunal disregarded the contractual documentation considering it did not reflect the practical reality, stating that 'the notion that Uber in London is a mosaic of 30,000 small businesses linked by a common 'platform' is to our mind faintly ridiculous'.

Restrictive covenants

Recent cases show that restrictions on working for others are also inconsistent with self-employment. Those who are self-employed are likely to advertise their services widely and have numerous clients or customers. The degree to which an individual can undertake work for others is therefore of relevance. In *Pimlico Plumbers Limited and Another v Smith* [2017] EWCA 51, Mr Smith was subject to numerous post termination restrictive covenants which prevented him from working as a plumber in any part of Greater London for three months following termination. He was also prevented from carrying out other work while working for Pimlico Plumbers. This was held to be inconsistent with the notion that Pimlico Plumbers was a client or customer of a business run by Mr Smith.

What are some of the other important issues in employment contracts in the gig economy?

There is clearly a lack of clarity surrounding the definitions of employee, worker and self-employed. However, the overarching theme of control and integration in recent cases does suggest that those wishing to utilise the 'gig economy' model may need to consider a lighter approach when it comes to drafting contracts.

They must also however, ensure that the reality of the arrangement is consistent with the documentation. Where extensive provisions govern dress codes, equipment usage, working hours, billing/invoicing systems or where individuals are subject to company disciplinary and grievance procedures, individuals are more likely to be considered employees or workers. The less control exercised by the company and the less integrated an individual is into the daily operations of the business, the more likely they are to be considered self-employed. Gig economy arrangements do need to provide genuine flexibility and a significant degree of independence.

It should also be noted that the tax and national insurance position does not mirror that under employment law. HMRC has only two categories for the purposes of the PAYE system, employee and self-employed. If an individual is self-employed for tax purposes it does not necessarily follow that they are self-employed for the purposes of employment legislation.

Interviewed by David Bowden.

The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.