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ONE GIG TOO MANY – POINTS TO CONSIDER IF YOU WORK WITHIN THE SO-CALLED "GIG-ECONOMY"

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Addison Lee Ltd are the latest in an increasingly long line of so-called "gig-economy" companies that have fallen foul of the principles set out by Lord Clarke in *Autoclenz v Belcher [2011] ICR 1157*.

As with the majority of these cases, the most well-known of which involved Uber, the case of *Gascoigne v Addison Lee Ltd: 2200436/2016* involved an individual who claimed benefits from the company that he would be entitled to if he was a "worker" within the meaning of the Working Time Regulations ("the Regulations"). Such benefits include no less than 5.6 weeks' holiday pay, maximum 48 hour week, adequate rest breaks, and a variety of health and safety benefits.

Despite Addison Lee pointing to the terms of the contract, which purported to set out that the claimant was an "independent contractor", the Judge determined that the claimant was a "worker" for the purposes of the Regulations, and therefore the claimant was entitled to the holiday pay that he claimed.

It is worth noting, As such, all employees are workers, but not all workers are employees. The definition of "worker" includes:

> "*an individual who has entered into or works [or worked] under ... 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 majority of cases relating to the gig-economy (including the present case involving Addison Lee) involve a claimant who claims to be a worker under the above definition, and are not claiming to be an employee.

There are three main principles that can be taken from this case, and those that have gone before it. It is vitally important to bear the following in mind if you or your company engage, or are thinking about engaging, the services of another person.

1. A dog is a dog, even if you call it a cat

The Court's traditional approach to a contract is that it will assume that the parties read and understood the terms of an agreement that it has signed. The Court is traditionally reluctant to depart from the words of such an agreement, and professes its role is to interpret and not redraft the terms (despite the best efforts of Lord Hoffman in *Attorney General of Belize v Belize Telecom Ltd [2009] UKPC 10* to establish a more extensive interpretative approach).

However, the Court will go further in employment cases in order to determine whether the purported contract sets out "the true agreement of the parties". This means that the Court will look at the overall picture and see whether or not the relationship between the contracting parties is as described by the contract. In that regard, the Court took into account the following, when determining that the relationship was not as expressed in the contract:

a. The website used language suggesting couriers were workers, encouraging potential couriers to "*work for us*", expressing pride in "*our couriers*", and other such comments suggesting a closer than arms-length relationship between the company and the couriers.

b. The fact that technology, company materials, and insurance were provided by the company to the couriers, with the insurance being paid for via a small weekly charge which was still levied whether he was working or not.

c. The fact that the work was organised through the company's internal systems and technology, and under the company's direction, despite the fact that the claimant had a flexible working pattern.

As the Judge said, at [45] of the judgment:

> "*Website verbiage can be dismissed as advertising puff, but when it differs so starkly from the contractual wording, alarm bells must ring. I find the true relationship to be closer to the working of the website…*"

It is not enough to have a contract that states what the intended relationship is. That relationship must be demonstrably played out in fact if it is to stand up to scrutiny.

2. Who has the control?

The Judge made the point (at [51] of the judgment) that "*the theme of vulnerability and dependence is also relevant when deciding whether the claimant was in business on his own account.*" The more "equal" a relationship appears, the less likely a person is to be seen as an employee or worker.

To an extent, this also boils down to a question of control – to what extent is the company in control of the individual for the period that the individual makes themselves available to perform the services. Generally speaking, an independent contractor has a large degree of autonomy over whether they accept work, and how they perform the service. The more that the company directs the actions and workload of the individual, the more likely it is that the individual is an employee or worker.

This was one of the major difficulties that Addison Lee were unable to overcome. The company deemed anyone who was logged onto the system as being available and willing to provide the services. The claimant was put under gentle pressure to accept work that was put his was by the controller (such pressure included the system not having an option to decline work). The claimant was also able to produce documentary evidence showing that he did in fact do continuous work when logged on.

As the Judge said at [53.2], "*as the name suggests, when logged on he was controlled by the controller.*"

What should be noted here is that it is not enough for the company to say that the individual is able to decide whether or not to log onto the system. There is nothing unusual about flexible working, and the main benefit of the gig-economy is the ability of the individual to work as and when suits them. The question is whether or not, for the period that the person is willing and able to perform a service, such person is a worker.

3. Making it personal

In the present case, it was not disputed that the claimant provided a personal service to the company, and so there was no discussion on the subject. Nevertheless, in another recent case (*Pimlico Plumbers Ltd v Smith [2017] EWCA Civ 51*) the Court of Appeal set out that the question of whether or not a service is "personal" will depend on the extent to which the individual is contractually obliged to provide the services themselves, or whether (and when) a substitute may be appointed.

If an individual has an unfettered right to substitute another in to do the work, then the service is not personal. By contrast, a conditional right to substitute may not be inconsistent with personal service if, for example, (a) substitution is permitted if the individual is unable (rather than unwilling) to carry out the work, or (b) the individual must obtain the consent of another person who has absolute and unqualified discretion to say no.

Where now for the gig-economy?

The gig-economy has been characterised by companies such as Uber and Addison Lee, whose business model has enabled them to be highly competitive in an already saturated market. High numbers of purported "independent contractors" means that overheads are low, and therefore profit is maximised. In return, such companies claim to offer flexible working hours that enable individuals to dip in and out of work in a way that best suits them – enabling them to create a more pleasant work/life balance than may otherwise be possible.

These cases are highly fact specific. There is no reason why these cases should be seen as setting the precedent that the gig-economy is dying; far from it. Rather, it is an acknowledgment that companies and individuals who are engaged in the industry must adapt if they are to survive, so as to ensure (so far as possible) that everybody knows where they stand from the beginning of the relationship.

However, if you are not legally trained then it is easy to become lost when considering a contract. For a company, this means that you leave yourself open to the argument that the individual did not know what they were signing up to. For an individual, it means that you enter into work without knowing what your rights are. Litigation is an expensive and time consuming way for all parties to resolve disputes that arise as a result of this lack of knowledge.

In order to avoid the potentially huge expense of litigation, if you are a company looking to employ an independent contractor, it may be worthwhile offering such potential contractors legal advice on the terms of the agreement from an independent lawyer. If you are an individual, consider taking legal advice on the terms of such a contract in any event, so that you know where you stand.

There is also a difficult line to be tread between "advertising puff" and, for want of a better word, misrepresentation of the relationship. It is, of course, in the best interests of the company to espouse the benefits of a particular relationship and downplay the negatives. However, it is also in the company's best interests to ensure that its workers or independent contractors know where they stand, minimising the risk of grievances or claims arising later.

If you are uncertain about whether your promotional material makes the position clear, consider taking legal advice so that you are aware of any potential pitfalls, and can remedy the position before it causes a problem. If you are an individual and are unsure as to what your rights will be if you sign the contract, speak with your employer and/or take legal advice.

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