Employment*Brief*

July 2013

Establishing Employment Status

The question of whether an individual is an employee comes up time and again in the employment tribunal and it is not easy to answer. There are lots of factors which indicate employment and some that don't, and it is impossible to list a clear set of defining criteria against which an individual's status can be definitively determined.

The employment status of an individual is important for a number of reasons, in particular some legal rights only apply to employees, including the right to bring a claim for unfair dismissal. In a recent case, the Supreme Court found that a Methodist minister was not an employee, overturning Court of Appeal and Employment Appeal decisions that she was an employee.

The three key characteristics of employment are mutual obligations, personal service and control. This basically means that the company is obliged to provide the individual with regular work and the individual is under an obligation to make themselves available to do the work and to provide their services personally. The company controls what the individual does, how and when they do it and the individual is expected to conform to certain standards, for example dress, expected of others within the same workplace. If the company is not obliged to offer work on a regular basis and the individual has no obligation to accept work then this points to self-employment, particularly if the individual controls how they do the work.

There are other elements indicating employment status such as exclusivity, where the individual is not free to work elsewhere without permission. Pay and benefits are also significant, if the individual is paid a fixed amount on a regular date irrespective of completion of a specific task. They may receive benefits such as a pension or medical insurance. Integration into the company is relevant, for example a company e-mail address or business card.

A power of substitution in the contract implies self-employment although the situation is less clear where the company has the power to veto the choice of substitute. The tax position can be an indication, but the fact that an individual is paid without deductions is not conclusive evidence that the individual is self-employed and the courts will look at all of the factors in the round.

We are often instructed to draft contracts ensuring that an individual is self-employed. Whilst the contract is an important starting point when identifying status, if the reality is different then regardless of the position on paper, the individual may still be an employee.

NEWS IN BRIEF

Internships under scrutiny

The government is going to take "aggressive" steps to "crack down" on employers abusing National Minimum Wage requirements by using unpaid interns. BIS has stated that over the coming year the government will launch a social media campaign, publish a student handout to inform graduates of their employment rights, and encourage people to identify "bad employers" for investigation.

Calls regarding unpaid internship abuse would be fast tracked and interns being exploited would be able to claim back pay for placements from the previous six years. In addition, BIS has published guidance for employers who offer work experience, including placements and internships.

Reservist employees

Defence Secretary, Philip Hammond, has stated that small firms who employ reservists will receive a cash incentive when the "employees get called out on reserve service". The size of the cash incentive is still undecided, but Mr Hammond stated that there will be a "concrete offer on the table" when the White paper is published.

Zero hours contracts on the rise

Figures from the Office of National Statistics revealed that the number of 16 to 24 year olds employed under zero hours contracts has increased since the start of the recession. There were 35,000 16 to 24 year olds employed under zero hours contracts in 2008, but this rose to 76,000 in 2012.

QUICK REFERENCE SECTION

Statutory minimum notice periods
An employer must give at least:

- One week's notice to an employee who has been employed for one month or more but less than 2 years.
- One week's notice for each complete year of service for those employed for more than 2 years.
- Once an employee has more than 12 years service the notice period does not extend beyond 12 weeks.

National Minimum Wage
(From October 2012)

16 – 17	£3.68
18 – 20	£4.98
21+	£6.19
Apprentices	£2.65

Statutory Sick Pay
(from April 2013)
£86.70 per week

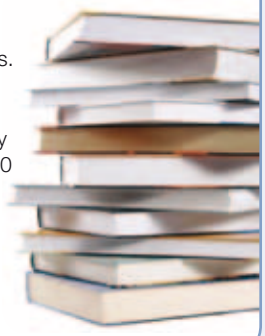
Statutory Maternity/Paternity/Adoption Pay
(basic rate) (from April 2013)
£136.78

Statutory Holiday
5.6 weeks for a full time employee.
This can include bank and public holidays.

Redundancy Calculation

- 0.5 week's pay for each full year of service when age is less than 22.
- 1 week's pay for each full year of service where age during year is 22 or above, but less than 41.
- 1.5 week's pay for each full year of service where age during year is 41 and over.

Calculation is capped at 20 years. Maximum week's pay is capped under the Statutory Scheme at £450.00



Restrictive covenants

In tough economic times employers are likely to want to protect themselves by including restrictions in employment contracts to apply when employees leave. In the absence of express clauses setting out an employee's obligations after termination, the restrictions implied into employment contracts are limited and do not generally extend to the period after termination of the contract, whereas express restrictions can.

Post-termination restrictions protect a business' interests by restricting an ex-employee for a period of time after employment. Whether such clauses can be enforced depends on the circumstances. Unless a restriction protects a legitimate business interest (trade connections, secrets or confidential information) it will be an unlawful restraint of trade and void.

Once you have established a legitimate business interest, a restriction is only enforceable if it goes no wider than necessary to protect it. The restriction should be limited in time and geographical area. Although in some cases a worldwide restriction has been upheld by the court, this will be exceptional. What is acceptable in one industry may not work in another. You also need to consider the role of the employee, a restriction that would be acceptable in a manager's contract is unlikely to be acceptable for a secretary.

Aside from confidentiality clauses, broadly, there are three types of restriction:

• Non-solicitation clauses preventing an ex-employee from soliciting colleagues or customers. To be enforceable, generally the restriction should only apply to customers who came into contact with the employee within a period of time before they left, how long depends on a number of factors including the time it would take the employee's successor to gain influence over contacts, seniority and customer loyalty.

• Non-dealing clauses preventing an ex-employee from any dealings with your customers or employees. Unlike with non-solicitation covenants there is no need for the ex-employee to have made the approach, but the clause is wider in scope so could be harder to enforce.

• Non-compete clauses preventing an ex-employee from working for competitors. Although recently there have been a number of cases where non-competition restrictions have been upheld by the court, these have traditionally been harder to enforce. The reason for this is that as a matter of general law employees are not permitted to disclose confidential information that would amount to a trade secret and express confidentiality clauses can be included in contracts. As a result any additional restriction may be viewed as unnecessary. These clauses are more likely to be enforced where a non-solicitation or confidentiality clause would not work, for example where the ex-employee's hold over customers is such that the only effective protection will be to ensure they are not engaged with a competitor at all for a period of time.

We recommend that advice is sought whenever these clauses are being contemplated, whether a clause is appropriate in a given case is very fact specific.

What protection does the law give to whistleblowers?

There is no financial cap on compensation in whistleblowing claims, and no requirement for a minimum period of service.

Two levels of protection exist for whistleblowers:

Unfair dismissal. Dismissing an employee will be automatically unfair if the reason, or main reason, is that they have made a "protected disclosure".

Unlawful detriment. Workers are protected from being subject to any detriment on the grounds that they have made a "protected disclosure". A detriment includes threats; disciplinary action; loss of work or pay or damage to career prospects.

Who is a worker?

The definition of a "worker" is wide and includes agency workers, freelance workers, seconded workers and trainees.

When is a disclosure protected?

The information disclosed must, in the reasonable belief of the worker, tend to show that one of the following has taken place, is taking place or is likely to take place:

- A criminal offence.
- Breach of any legal obligation.
- Miscarriage of justice.
- Danger to the health and safety of an individual.
- Damage to the environment.
- The deliberate concealing of information about any of the above.

Recent changes have now defined qualifying disclosures as being those, "in the public interest." There are also several distinctions between valid internal and external disclosures.

Why is protection of whistleblowers important?

Internal risk control

Businesses have an interest in uncovering wrongdoing or dangerous practices within their organisation. A business is likely to want to manage what information (if any) is spread to the outside world. Encouraging the reporting of these types of issues through internal channels may help avoid:

- Serious accidents.
- Fraud.
- Regulatory breaches.

Avoiding litigation

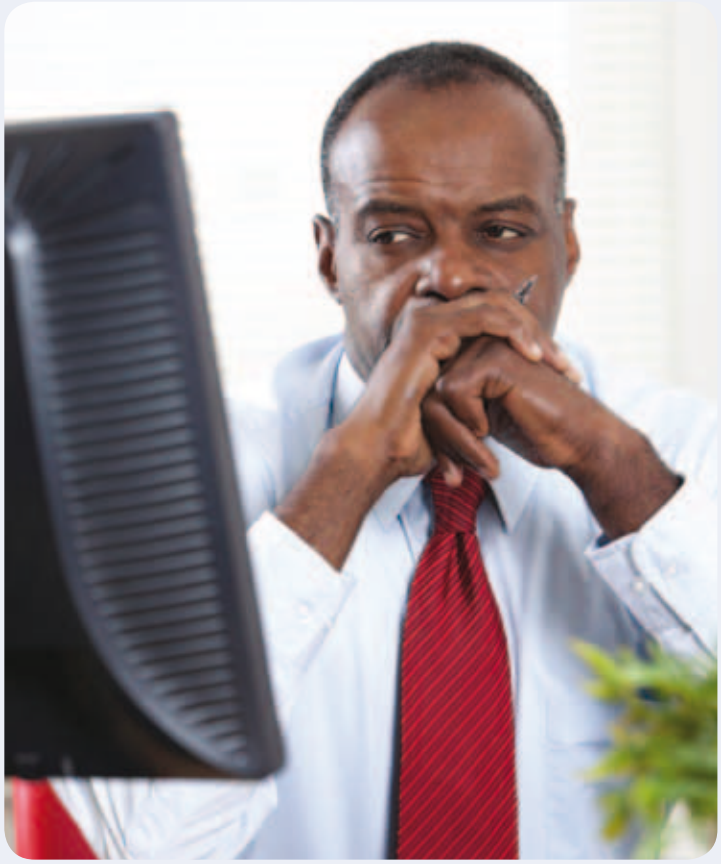
Whistleblowing cases can involve significant management time and legal costs, which are not usually recoverable.

Reputational damage and staff morale

An external disclosure of suspected malpractice, especially to the media, can lead to negative publicity for the business and damage staff morale. Any claim by a whistleblower who believes they have suffered reprisals is likely to have a similar effect.

Avoiding criminal liability

A business will be guilty of failing to prevent bribery if a person associated with it (for example, an employee) bribes another person with the intention of obtaining or retaining business or a business advantage. A business



will have a defence if it can show that the business had "adequate procedures" in place to prevent bribery. The government has published guidance indicating that this would include having effective whistleblowing procedures in place that encourage the reporting of bribery.

Practical steps to help reduce business risk

- Implement a whistleblowing policy that enables staff to confidentially report concerns about:
  - illegal;
  - unethical; or
  - otherwise unacceptable conduct.

Ensure that it enables the worker to bypass the level of management where the problem exists.

- Publicise the policy internally and train any managers on it. Make it clear that victimisation of a whistleblower will lead to disciplinary action.
- Investigate disclosures promptly and keep the whistleblower informed of progress where possible. A lack of contact with the whistleblower may lead them to make an external disclosure.
- Do not rely on confidentiality clauses to prevent external disclosures, as they are unenforceable if the disclosure is protected. Taking action against a whistleblower for breach of confidence may amount to an unlawful detriment.

A Compromising Position

It is often thought that Compromise Agreements are only relevant to situations where employment has been or is shortly to be terminated. It is true this is where they are most common but an employer and employee can enter into an agreement to settle claims in circumstances where employment is continuing.

Claims relating to contractual terms in the contract can be waived by entering into a contractual agreement. However, any agreement to settle or waive most statutory claims will be void unless it meets one of the exceptions. The two most commonly used are:

- Agreed through ACAS, usually referred to as a COT3 or;
- Recorded in a Compromise Agreement that complies with certain statutory requirements.

Compromise Agreements take many forms and can be from 2 to 34 pages.
What is necessary is that:

- The agreement must be in writing.
- The agreement must relate to a "particular complaint" or "particular proceedings." Specific details need to be included rather than a general "all claims"
- The employee must have received legal advice from a relevant independent adviser on the terms and effect of the proposed agreement and its effect on the employee's ability to pursue any rights before an employment tribunal.
- The independent adviser must have a current contract of insurance, or professional indemnity insurance, covering the risk of a claim against them by the employee in respect of the advice.
- The agreement must identify the adviser.
- The agreement must state that the conditions regulating compromise agreements have been satisfied.

Although it is common practice for the employer to pay a fixed contribution to the cost of the legal advice the employee receives it is not a necessary requirement of a valid agreement.

The government are currently proposing that this type of arrangement be renamed a settlement agreement, and that employers should be able to raise this issue without it being used as a claim for constructive dismissal by the employee.

TRIBUNAL FEES ON THE CARDS

Much talked about and finally on their way! As part of a raft of reforms to the Tribunal system the introduction of issue and hearing fees are with us this Summer.

The hearing fees are payable by the claimant and are dependant on the type of claim. Most standard claims (such as unfair dismissal) will attract an issue fee of £250 and a hearing fee of £950. Any intermediate applications will also attract fees ranging from £60 to £360. A system of fee remission will apply to those in receipt of certain benefits. With fees due to be implemented on Monday 29th July 2013 will this be a hindrance to claimants or simply a further level of bureaucracy to wade through?

Also on the cards is a system of fines for losing employers if there are "aggravating features." These fees will range from £1,000 to £5,000 if paid within 21 days.

Last but not least the current cap on unfair dismissal compensatory awards of £74,200 is to be limited to one year's gross pay or the existing limit whichever is the lower. Commentators believe that this will lead to an increase in the type of claims that are not subject to the cap such as discrimination based claims.

CONTACT

If you would like any additional information on any of the subjects discussed in this newsletter please do not hesitate to contact us.

Amanda Finn
Tel: 01622 678341
Email: a.finn@gullands.com

Laura Claridge
Tel: 01622 678341
Email: l.claridge@gullands.com