

Kingston Smith Corporate & Business Tax Alert



Is your subcontractor an employee?

There has been a recent decision by the Supreme Court on employment status (Autoclenz Ltd v Belcher), and whilst it does not represent a significant change in the law, it serves to emphasise the importance of looking at the true relationship between a worker and his 'employer' rather than just the written contract between them.

Background

The Supreme Court has upheld a Court of Appeal decision in Autoclenz Ltd v Belcher and Others that car valeters, who had subcontracted their services were really "workers" (and hence employees) within the meaning of the National Minimum Wage Regulations 1999 ("NWMR") and of the Working Time Regulations 1998 ("WTR"). This is despite the fact in 2004, HM Revenue and Customs (HMRC) undertook a review and were satisfied that the valeters were self-employed!

Autoclenz Ltd (Autoclenz) had a contract to valet cars for British Car Auctions (BCA). It advertised for self-employed valeters and successful applicants were referred to as sub-contractors in their contracts. Mr Belcher and his colleagues (the valeters) cleaned cars at BCA's Measham site. They wore BCA overalls (having previously worn Autoclenz overalls) and Autoclenz provided all the cleaning products and equipment and arranged group insurance cover. The valeters were paid on a piecework basis and submitted weekly invoices. Autoclenz deducted a fixed sum for the provision of cleaning materials and insurance from the payment due each week. The valeters were responsible for payment of their tax and NIC. The revised contracts also contained the requisite no mutuality of obligations clause, described the valeters as self-employed and contained a substitution clause; all the hallmarks of a self employed contract.

Reasons for the decision

The judges ruled that the true nature of the relationship and the true intentions or expectations of the parties was not reflected in the contract. The following observations were made about the valeters:

- They had no control over the hours that they worked, except that they could leave when their share of work on site has been completed;
- The substitution clause and the right to refuse work were unrealistic possibilities that were not truly contemplated by either party when they entered into their agreements; This also was at odds with the fact that the valeters were required to notify in advance if they were unavailable for work;
- They did not have any say in the way in which the work was organised except that their earnings were proportional to the hours they worked;
- Invoices were prepared by Autoclenz and it was Autoclenz who determined the deductions to those invoices.



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The Supreme Court concluded that the valeters were employed workers because they were working under contracts of employment within the meaning of NWMR and WTR.

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This case reaffirms that the legal nature of a relationship between two parties is beyond what is written in the contract if it is asserted by either party, or in some cases by a third party, that the document does not represent or describe the true relationship.

About Kingston Smith's Corporate and Business Tax team

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