

UPDATE

Worker Status Update: November 2017

Worker status is once again making headlines, with a number of important developments since our [last update](#).

As a refresher, English law recognises three types of employment status: employee, worker, and independent contractor. Workers are entitled to paid holiday, among other benefits, though they are entitled to fewer benefits than employees. There has been an avalanche of claims in the past year brought by those who dispute their status as independent contractors.

Uber at the EAT

Uber were unsuccessful in their appeal, with the Employment Appeal Tribunal ("EAT") confirming the conclusion of the Employment Tribunal ("ET") that the Claimant drivers were workers, not independent contractors. The EAT confirmed the approach taken by the ET which looked behind the contractual documents between the parties to discern the "reality" of the working relationship.

Uber announced late last week that they have requested permission to appeal directly to the Supreme Court. It is unknown at this stage if they are seeking to join the Pimlico Plumbers appeal – as was mooted by counsel for Uber during the EAT hearing – or as a discrete case.

Deliveroo

In a surprising decision on 14 November, the Central Arbitration Committee ("CAC"), which adjudicates on disputes over union recognition, decided that Deliveroo riders were not workers, and therefore not entitled to have a union recognised.

You may recall that we covered the hearing in June - [see our article here](#). This dispute arose after Deliveroo riders in the Camden area of London attempted to have a union recognised. A key requirement for union recognition is that the individuals are either workers or employees. If the riders were self-employed independent contractors, as Deliveroo argued, they would have no entitlement to union recognition.

This decision has made waves in the employment law world as it is the only case to date where a court or tribunal has sided with the company and confirmed independent contractor status.

The prevailing message in judgments to date is that courts will look at the reality of a relationship, regardless of how clever drafting by “armies of lawyers” characterises the relationship. However, the CAC’s decision shows that re-drafting terms can go some way to minimise risk for the company as it was based on a new contract Deliveroo put in place for riders in May 2017, just before the case was heard. This contract increased the amount of flexibility given to riders, including by removing the requirement that riders wear Deliveroo branded clothing, expressly allowing riders to work for other delivery companies, and allowing riders an absolute right to substitute performance. These factors all played into the CAC’s decision that the riders were independent contractors, but the right of substitution was particularly key.

Other claims

There are many other claims rumbling away in the background on this issue.

Foster carers – The Independent Workers Union of Great Britain (“IWGB”), which is also backing claims against Deliveroo and Addison Lee, has launched a new line of attack, this time arguing that foster carers are workers. Existing court authority suggests conclusively that foster carers are not workers on the basis that the relationship between a foster carer and local authority is not a contractual one. This claimant is likely to have difficulty arguing to the contrary.

Eagle-eyed readers may remember a recent case where the Glasgow ET found that foster carers were employees of Glasgow City Council, but that case was specific to its facts and is unlikely to have any influence on this new claim.

Outsourced workers – The IWGB is also backing a claim by 75 outsourced workers at the University of London for the right to have their union recognised by the University. The workers are employed by the outsourcing company, but they argue that the University should be recognised as a “joint employer” and therefore the workers should be able to collectively bargain directly with the University. If successful, the consequences for outsourcing would be significant.

Worker status claims – We understand that claims in the Employment Tribunal are also ongoing against several companies, including Hermes, Deliveroo, DX, and UK Express (which makes deliveries for Amazon).

A legislative solution?

The Taylor Review released its report in July, but no clear action has been taken by the government to act on the report’s recommendations.

However, last week two Parliamentary Committees (which consist of MPs from all parties and consider particular policy areas), the Work and Pensions Committee and the Business Select Committee, published a draft bill – [available here](#) – that would address the perceived failures of the law. This draft bill is unlikely to become law, but it may prove influential on the government as and when they formulate their own reforms.

- It would amend the statutory definition of employment status to incorporate the analysis used by courts and tribunals in recent cases. In practice this would have minimal impact because tribunals will already refer to this in making decisions.
- More significantly, the bill would create a presumption that individuals were workers if there was a dispute over whether the individual was a worker or independent contractor. It would then fall on the company to prove the individual was an independent contractor.
- Members of the Committees also suggested that there should be penalties – including fines – for “repeat or serious breaches of employment legislation”, such as failure to pay benefits to those incorrectly classified as independent contractors

What next?

The Supreme Court’s decision in the Pimlico Plumbers appeal (and possibly Uber’s appeal) is likely to be the next major development in this story. We would expect the Supreme Court’s judgment to be handed down in the first half of 2018. It is likely that any moves by the government to reform the law will wait for that decision. In any event, Brexit will continue to dominate political time and will in 2018, so worker status may not be a priority for the government.