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BC LEGAL
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BC DISEASE NEWS

A WEEKLY DISEASE UPDATE

CONTENTS

Welcome

Welcome to this week's edition of BC Disease News.

In the last week the result of the EU referendum has confirmed the departure of the UK from the European Union and we report on the likelihood of PI reforms being delayed as a result. Elsewhere, the High Court has found that the 10% uplift that claimants receive for beating their part 36 offer includes contractual interest on the sum won at trial.

This week we present the second in a two part feature in which we look at the issues which can arise in EL/Disease injury claims as a result of the changing nature of the UK workforce. In part one we focused on agency and temporary workers and considered what are the health and safety obligations owed to these workers? Do they differ from permanent employees? And finally, who is considered to be the employer of agency workers and who has responsibility for them? In this week's feature we consider these questions with regards to contractors and self-employed workers.

Any comments or feedback can be sent to Boris Cetnik or Charlotte Owen.

As always, warmest regards to all.

SUBJECTS

Brexit to Delay PI Reforms – Future Loss of Earnings Judgment – Part 36 Uplift Includes Contractual Interest – Resisting Settlement Case Comment: *Kupeli & Ors v Sirketi & Anor* – ACL Highlight Arbitrariness of Budgeting – Parabis Unsecured Creditors Recover Less Than Expected – Self-Employed Workers and Employer's Liability.

Brexit Likely to Delay PI Reforms

We have reported frequently on the Ministry of Justice's (MoJ) plans for reforms to the personal injury sector and more specifically on George Osbourne's intentions to increase the small claims limit for personal injury claims from £1,000 to £5,000. In edition 113, we also reported that the Civil Justice Council (CJC) group was asked by the MoJ to investigate how a fixed costs regime might work in noise-induced hearing loss (NIHL) claims. Elsewhere, the MoJ have also pledged to consult on clinical negligence fixed fees, court and tribunal fees and the right to recover damages for minor injuries with a government review of the Legal Aid, Sentencing and Punishment of Offenders Act due in late 2016/early 2017. [1]

Following the referendum result last week, the resignation of David Cameron as Prime Minister and the new pressures on government lawyers and Parliamentary time to negotiate a calm exit from the EU, it is thought that these reforms will now be put on hold.

Michael Gove, having previously ruled himself out of the running for the role of Prime Minister, has now announced his intention to run for leader of the Tory party. With the bowing out of Boris Johnson, Gove is now competing with Home Secretary, Theresa May for the top position. Whether or not Michael Gove is to become Prime Minister, it is thought that he will make a move from the MoJ to a more senior position in the Cabinet. It is however, unknown who would replace him as Secretary of State for Justice and whether they would be willing to carry forward those reforms driven by Gove.

It is well known that exiting the EU will be a complicated process and may take years to navigate, however, there have been reports of legal challenges to the referendum result which may delay the process even further. A leading QC has successfully crowdfunded £10,000 to take legal advice over whether it is Parliament or the Prime Minister that has the power to trigger article 50 of the Lisbon Treaty (Article 50 of the Lisbon Treaty foresees a two-year negotiation process between the UK and other Member States, during which time the terms of the UK's exit from the European Union will be decided.). The money will be used to instruct leading public law specialists. If it is determined that Parliament must pass primary legislation in order for Britain to exit the EU then considering that the large majority of MPs were a part of the remain camp, it could be that the process is even further delayed. [2]

Elsewhere, leading figures in the legal profession has expressed their willingness to assist in the 'restructuring' of the UK's relationship with the EU. Chairman of the Bar, Chantal-Aimee Doerries QC noted 'the long-term effect of Brexit on the legal services sector's contribution to the UK economy will depend significantly on the nature and terms of the post-Brexit relationship with the EU'.

Catherin Dixon of the chief executive of the Law Society of England & Wales, told MPs that solicitors were ready to help tackle the challenges thrown up by Brexit during this period of 'unprecedented change'. [3]However, she also suggested that plans to review the regulation of the legal services market should be put on hold for the time being to prevent further uncertainty for the profession.[4]

Regardless of who wins the next Tory leadership campaign and how long the exiting of the EU actually takes, any delay in the implementation of the wide ranging civil justice reforms will undoubtedly be welcomed by many in the personal injury sector.

Future Loss of Earnings: Case Comment: *Gurtej Pawar v JSD Haulage Ltd* [2016] EWCA Civ 551

The Court of Appeal in this instance, considered the measure of damages awarded to a HGV driver following a personal injury claim against his former employers after he suffered a serious neck injury whilst driving his lorry on 17th September 2009.

The claim was first heard in May 2014 when a Recorder awarded the following damages:

- PSLA - £19,100
- Past Loss of Earnings - £ 54,300
- Past Care - £1,817.10
- Future Losses – No award

After deduction of an interim payment and compensation recovery unit benefits the recorder gave judgment in the sum of £72,417.14.

The claimant appealed on the basis:

(i) the PSLA award was far too low,
(ii) there was no award for past or future loss of services when both were recoverable,
(iii) the award for past loss of earnings was too low,
(iv) there was no award for future loss of earnings when they were recoverable and,
(v) finally, there was no award for the cost of future therapy when that too was recoverable.

In relation to the PSLA award, Mrs Justice Thirlwall in considering the appeal, stated that the recorder was correct in concluding that the injuries came within Chapter 7 of the Judicial College Guidelines, Section A, Neck Injuries, category (b) Moderate, sub paragraph (i) i.e. the highest section of the category which reads:

'(i) Injuries such as fractures or dislocations which cause severe immediate symptoms and which may necessitate spinal fusion. This bracket will also include chronic conditions, usually involving referred symptoms to other parts of the anatomy or serious soft tissue injuries to the neck and back combined. They leave markedly impaired function or vulnerability to further trauma, and limitation of activities.'

Thirwall J also concluded that the recorder was not in error in awarding £19,100 considering the range of damages for this bracket is £18,350 to £28,300 as she was bound to place it at the lower end of the bracket given pre-existing degenerative changes in the claimant.

However, she did say that the Recorder had erred in her assessment of the award for past loss of earnings. The Recorder found that the appellant had done nothing to mitigate his loss between the year March 2013 and March 2014 in that he had not looked for alternative work. The Recorder had accepted the defendant's submissions that had the appellant mitigated his loss he would have earned £12,000 i.e. the annual national minimum wage and was entitled to recover only the difference between what

he would have earned uninjured (£15,600) and what he could have earned (£12,000) i.e. £3,600 per annum. Thirwall J, pointed out that the flaw in this reasoning was that the medical evidence had not stated that the claimant was in a position to work during this year but that he was in a position to look for sedentary or semi sedentary work. She went on to say at para 30:

'There were a number of factors that would have reduced his chances of obtaining work within a short time of beginning the search: his sickness record, the fact that he was still in pain and taking medication which made him drowsy (all of which the recorder accepted) and the length of time since he had worked. On any view he would have had to undergo retraining of some duration. Given all of those matters it was overwhelmingly likely that it would have taken time to find work during which period he would have been entitled to his loss of earnings at the full rate.'

This was not dealt with by the Recorder and it was found, that was an error. As such, it was concluded that given the lengthy period of unemployment and the need to obtain further skills it was reasonable to allow a period of 8 months for the claimant to have found work. The claimant was entitled to recover damages for his loss of earnings for the period from March 2013 to November 2013 at the rate of £15,600 per annum, i.e £11,700. It was further accepted that the claimant would have secured employment at the minimum wage and so his recoverable loss from December to trial was 6 months' earnings at the annual rate to trial, i.e. £1,800.

In relation to future loss of earnings, the Recorder at first instance concluded that the claim for loss of earnings from trial to March 2017 was extinguished because of the claimant's failure to mitigate his loss. Thirlwall J found that this was incorrect and it had not been open to her to conclude that the claimant would have earned more in sedentary work than as an HGV driver. In fact he would have started at the minimum wage and so the loss was the difference between his pre-accident earnings and the minimum wage, namely £3,600 per annum. Adopting a multiplier of three, the correct award for loss of earnings to March 2017 was £10,800.

The position beyond March 2017 was more uncertain. This is because it was agreed between the medical experts that due to a pre-existing degenerative condition the claimant would not have been able to work as a HGV driver in any event. However, it was also said that his continuing symptoms were more severe than they would have been had the accident not occurred. There was no evidence of, or thought given to, whether and to what extent that meant that there was a residual and enduring loss of earning capacity attributable to the accident over and above the loss attributable to his pre-existing condition. Thirwall J considered whether this was a case in which the approach adopted by the Court of Appeal in *Blamire v South Cumbria Health Authority* [1993] PIQR would be appropriate and she concluded that it was not, as in the absence of any evidence, assessment would be entirely speculative. As such she found that the recorder was right to make no award for this period.

It is clear then that a *Blamire* award for future loss of income will not be made where there is a lack of evidence.

Part 36 Uplift Includes Contractual Interest

In edition 137 of BC disease news we reported on the decision of *Bolt Burdon Solicitors v Tariq & Ors* [2016] EWHC 811 (QB), in which Mr Justice Spencer in the High Court, upheld a contingency fee agreement under which Bolt Burdon solicitors received half of the compensation recovered by the claimant.

This week, in the case of *Bolt Burdon Solicitors v Tariq & Ors* [2016] EWHC 1507 (QB), dealing with consequential matters following his earlier decision, Justice Spencer found that the 10% uplift that claimants receive for beating their part 36 offer includes contractual interest on the sum won at trial.[5]

The original order stated that the defendants were to pay £498,083.52, together with contractual interest at the rate of 8% totalling £50,706.44 as well as an 'additional amount' of £49,808.35, being 10% of the judgment sum pursuant to CPR 36.17(4)(d). The issue before the court was whether the 10% should apply to the contractual interest as well.

Mr Justice Spencer said the wording of the CPR was clear that the interest awarded as part of the sum to which the claimant was contractually entitled was part of the award made by the court. In coming to this conclusion he stated:

'*Had it been the intention always to exclude interest from the calculation of the 'additional amount', nothing would have been simpler than to repeat the words "excluding interest" which appear in sub-paragraph (a) in relation to the entitlement to enhanced interest where these special sanctions apply. As a matter of statutory construction, the inclusion of the words "excluding interest" in one part of the rule but the omission of the same words in another part, is a strong indication that there was intended to be a difference'.*

However, the defendants argued that it would be unjust in this case because the rate of contractual interest was far higher than the claimant's true costs of borrowing and so they had already been over-compensated. Justice Spencer said that this was misconceived and that: *'the parties contracted for interest at 8% if the sum due was not paid on time. That entitlement became part of the overall award. There has been no claim for enhanced interest under sub-paragraph (4)(a) of the rule, as there could have been'.*

He went on to say that the additional amount was designed as a 'penal sanction' for the defendant's failure to accept a part 36 offer when he should have. He concluded that '*the make-up of the overall sum to which the prescribed percentage is applied is immaterial'.*

Party Penalised for Resisting Settlement: Case Comment: *Kupeli & Ors v Sirketi & Anor* [2016] EWHC 1478 (QB)

Ruling in the case of *Kupeli & Ors v Sirketi (t/a Cyprus Turkish Airlines) & Anor*, Justice Whipple handed down the most recent decision in which a party was penalised for resisting all early attempts at discussion or negotiation.[6] The defendant faced a costs

judgment that followed the main judgment dealing with losses suffered by passengers who failed to get on a replacement flight with the defendant.

Whipple J decided that the claimants had won, even though only a minority of claims and arguments had been successful she said that the success was 'not so modest that it can or should be treated as immaterial' because ultimately they were to receive a cheque from the defendant. She further stated that there should be a percentage costs order, rather than an issues-based one as it would avoid having to identify the issues to which the particular costs attach which would be a difficult task to carry out in retrospect and could result in the matter being dragged out for several more years.

In addition to this, Whipple J felt that to assess costs in this way would '*avoid the spectre of what I would consider to be an undesirable and unfair outcome, namely of the claimants' overall win (as I have found it to be) being eradicated (in effect) by the defendant's costs attributable to particular issues'.*

In considering what percentage of the claimant's reasonable costs the defendant should be ordered to pay, Whipple J noted that '*Atlasjet did not answer the claimants' pre-action protocol letter (in fact Atlasjet was not served with proceedings until August 2012, over two months after that letter was sent, showing that the claimants were open to an informal response; the claimants are justified in saying that they had no option but to serve proceedings, given Atlasjet's silence'.*

She continued: '*The claimants' Calderbank letter dated 24 April 2015 was, as things turned out, pitched too high; but it was at least some attempt at settlement. Atlasjet refused the offer and made no counter offer. The Calderbank offer was undoubtedly an admissible offer to settle to which I must have regard under CPR 44.2 (4)(c)'.*

In conclusion, Whipple J ordered that Atlasjet pay 33% of the claimant's reasonable costs.

Association of Costs Lawyers Highlight Arbitrariness of Budgeting

An annual survey of Costs Lawyers carried out at this year's Association of Costs Lawyers (ACL) annual conference has identified that, costs lawyers feel the extent to which the costs management regime works is very much dependent on which judge you are before.[7]

The survey received 128 responses and asked ACL members how the costs management regime was working and 'it depends on the judge you're before' was the most popular answer. Costs lawyers also felt that 'solicitors think they can do it – and they're wrong', while the sense persists from previous surveys that budgeting has added a layer of work and cost for no benefit.

In relation to the new format bill of costs and the associated J-Codes, views were mixed with most acknowledging that the courts would have to take a hard line to make them work as 'however good they are, solicitors aren't interested'. A quarter of those taking the survey believed that the new format would actually make things worse and 20% saw the new bill as a good idea, although more work was needed to make it fit for purpose.

The main threat to the Costs Lawyer profession was identified as being the government's reform agenda such as the wider use of fixed costs. Despite this 64% reported either maintaining or increasing work levels from the previous year and 11% said they had taken on more advocacy.

The chairman of the ACL, Iain Stark stated:

'*It is in the entire legal profession's interests to make costs management work, or otherwise face the prospect of having far more arbitrary fixed costs imposed from above for large swathes of cases. The new bill of costs, if properly implemented, could help with this process. We see Costs Lawyers as playing a pivotal role in both of these projects and the ACL will be front and centre of the debate'.*

Unsecured Lenders of Parabis To Recover Less Than Expected

We reported in edition 136 of BC disease news how the unsecured non-preferential creditors of collapsed Parabis group were likely to lose a much larger amount than was first estimated. It has now been announced that these creditors have been told to expect just half of the already small anticipated return on their outstanding debts. [8]

In the administrator's progress report which was published at the beginning of this week, it was outlined that unsecured creditors will receive less than a penny in the pound of what they are owed which has recently increased to £113.9m. The report states:

'*The estimated debt is more than previously reported as the majority of the uplift relates to a VAT liability which is a joint and several liability across seven members of the Group who were also member of the VAT group, this may not be the final position'.*

Therefore indicating that the losses of the unsecured creditors could increase yet further.

Parabis went into administration last November and has now been disbanded and sold to various buyers. As is to be expected where such a large corporation has failed, the administrators conducted investigations into the behaviour of the company's directors in order to determine if they contributed to the downfall of Parabis. The progress report states:

'The Administrators conducted investigations into the conduct of the directors and transactions entered into prior to the Company's insolvency, as required by the Company Directors Disqualification Act 1986 […]During the investigations, the Administrators reviewed the Company's books and records, pre-appointment bank statements and management accounts. Questionnaires that were completed by the directors/partners were also reviewed. The Administrators also liaised with company staff in order to confirm whether there was any conduct that required further investigation'.

The report stated specifically that: '*Based upon the outcome of the investigations, there were no matters identified that required further action'.*

The deal to sell off various parts of the Parabis business was believed to have saved almost 2,000 jobs across the group. National firm Lyons Davidson bought some of the claimant division of Cogent Law and the Parabis joint venture with Saga Law in a deal valued at an estimated £500,000.The remainder of the Cogent Law business was sold to Merseyside firm Carpenters Law in an arrangement thought to be worth £3m.

Feature Self-Employed/ Independent Contractors: Employees for the Purpose of Employer's Liability?

Introduction

This week we present the second in a two part feature in which we look at the issues which can arise in EL/Disease injury claims as a result of the changing nature of the UK workforce. In last week's edition of BC disease news we noted that agency and temporary workers, independent contractors and self-employed persons are an increasingly important part of the UK labour workforce due to increasing employer desire for workforce flexibility and an increasing migrant population. In part one of this feature we focused on agency and temporary workers and considered what are the health and safety obligations owed to these workers and do they differ from permanent employees?

In part two of this feature, we consider these questions and how they apply to independent contractors and self-employed workers.

What are self-employed workers/independent contractors?

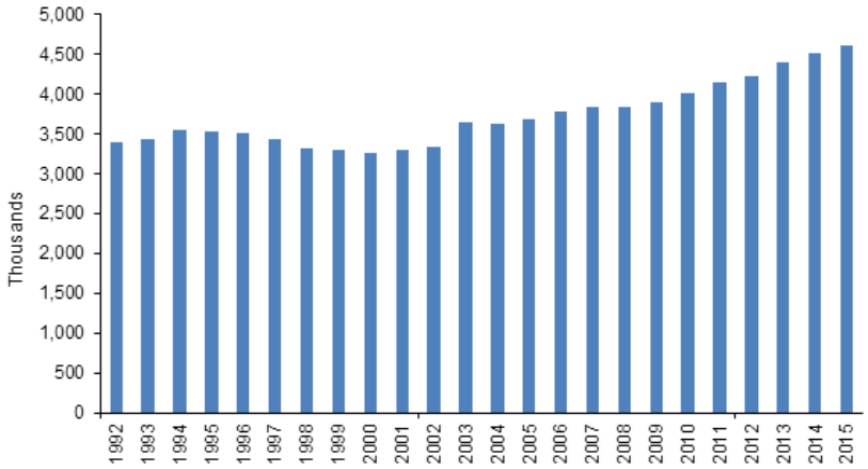
A person is self-employed if they run a business for themselves and take responsibility for its success or failure. Self-employed workers are not paid through PAYE. Employment law doesn't cover self-employed people in most cases because they are their own boss.

Independent contractors are self-employed, but they usually trade via a limited company, partnership or as a sole trader though an umbrella company i.e. an intermediary between the contractor and their end client which predominantly deals with the administration of the arrangement e.g. tax and payroll. As such, going forward, when we refer to a self-employed worker this term will encompass independent contractors.

Self-Employed Workers as part of UK Workforce

The Labour Force Survey carried out by the Office for National Statistics found that the number of self-employed people increased from April 2015 by 209,000 reaching a total of 4.70 million (15% of all people in work) by April 2016.[9] This is an increase of around 600,000 since the start of the recession in 2008/9 so that the UK is now seeing an all-time high of self-employed workers.[10] The trend in self-employed workers can be seen in the following graph:

Trends in self-employed population, UK

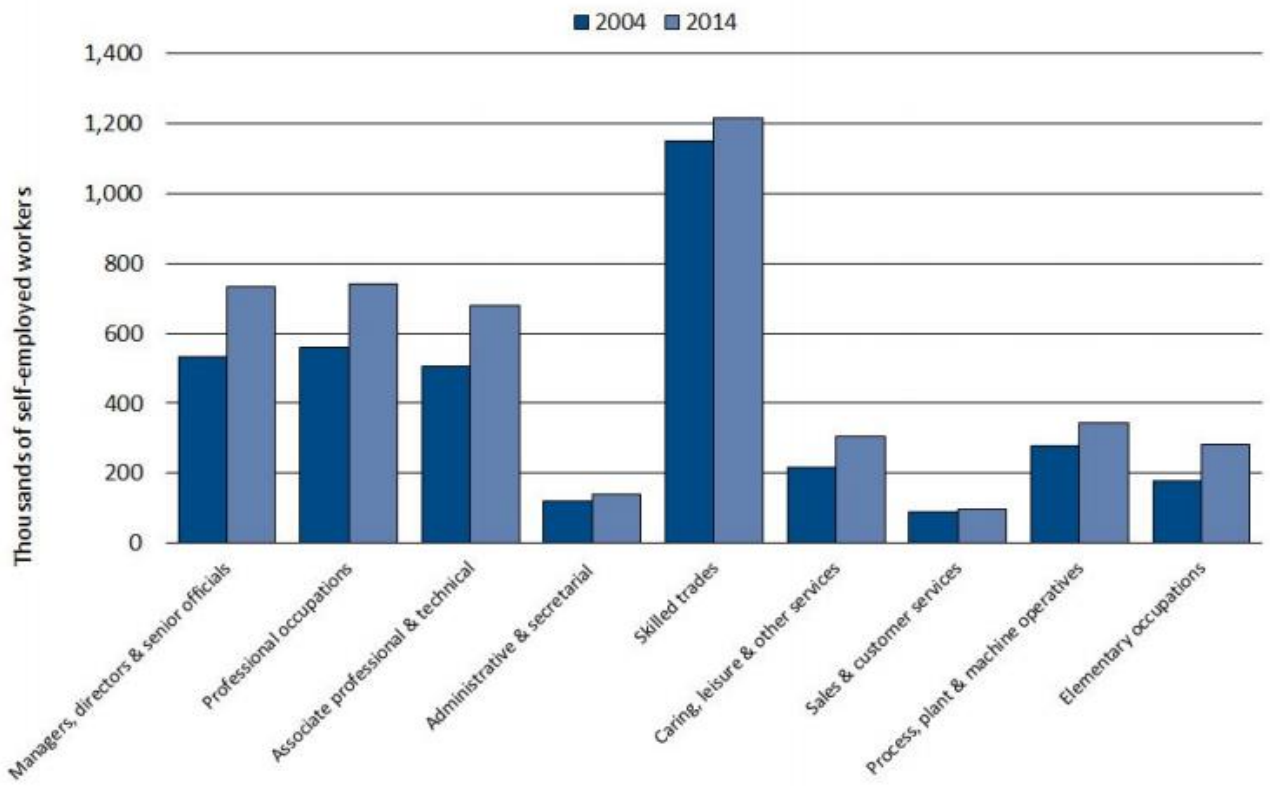


Source: ONS Labour Force Survey, September to November quarters from 1992 to 2015

As with agency and temporary workers there are a significant proportion of migrant workers amongst the self-employed. This may be due to the fact that migrants often face barriers to entering employment in their host countries and in the UK the self-employment rate of migrants is three percent higher than native workers.[11]

The self-employed cover a wide range of occupations, sectors and industries. One quarter of all self-employed people are in skilled trade occupations with construction, taxi and cab drivers and carpentry and joinery being the most common job roles.[12] The graph on the following page shows self-employed workers by occupation in 2014 compared with 2004:

Figure 6: Self-employed workers by occupation



Source: Labour Market Statistics, ONS.

Self-Employed v Employees

HMRC state that someone is probably self-employed if most of the following are true:[13]

- They are in business for themselves, are responsible for the success or failure of their business and can make a loss or a profit
- they can decide what work they do and when, where or how to do it
- they can hire someone else to do the work as a substitute for themselves
- they are responsible for fixing any unsatisfactory work in their own time
- a client agrees a fixed price for their work - it does not depend on how long the job takes to finish
- they use their own money to buy business assets, cover running costs, and provide tools and equipment for their work
- they can work for more than one client

In addition to this, one can look at the contract between the worker and the client. If there is a contract *of* service then this would indicate an employee-employer relationship, whereas, if there is a contract *for* services then this would indicate a self-employed person and client relationship.

Self-employed persons work for themselves and as such they do not enjoy many of the employment rights that employees will have. However, the self-employed must assess workplace health and safety risks to themselves and others. This is a duty under the Health and Safety at Work etc Act 1974. Further to this, self-employed people sometimes work alongside other self-employed workers. If this is the case everyone has the right to expect that their fellow workers have assessed any health and safety risks. Similarly, a self-employed person working on a client's premises has the right to expect that the client has carried out a health and safety risk assessment.

Self-employment can take different forms and it can sometimes be difficult to determine whether an individual is truly self-employed or actually employed.

Liability – Self-Employed Worker or the Hirer?

The issue is often one of fact but there are several authorities which provide some guidance.
The most established and commonly cited authority, which provides guidance on whether or not a contract *of* service exists i.e. an employee/employer relationship, is *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 Q.B. 497 in which Justice Mackenna gave the following guidance at para 515:

'A contract of service exists if the following three conditions are fulfilled: (i) the servant agrees that in consideration of a wage or other remuneration he will provide his own work and skill in the performance of some service for his master; (ii) he agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master; and (iii) the other provisions of the contract are consistent with its being a contract of service'.

It can be seen that the test outlined in *Ready Mix* has at its heart the so called 'control test' of which Mackenna J said the following:

'Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when, and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant. The right need not be unrestricted.

*"What matters is lawful authority to command, so far as there is scope for it. And there must always be some room for it, if only in incidental or collateral matters" ((*1995), 93 CLR 561 at p 571).

To find where the right resides one must look first to the express terms of the contract, and if they deal fully with the matter one may look no further. If the contract does not expressly provide which party shall have the right, the question must be answered in the ordinary way by implication.'

This passage was recently considered in *Mr G White, Ms K V Todd v Troutbeck SA* (EAT, 23 January 2013), before HHJ Richardson in which at para 40 he said:

'*Firstly, the key question is whether there is, to a sufficient degree, a contractual right of control over the worker. The Key question is not whether in practice the worker has day to day control of his own work. It has often been observed that in modern conditions many workers – especially the professional and skilled – have very substantial autonomy in the work they do, yet they are still employees.[…]. Secondly, all aspects of control are relevant to this question. It was once thought that for a contract of employment to exist the master must be empowered to direct not only what is to be done but also the manner in which it is to be done. But many kinds of employee – such as the surgeon, the captain and the footballer discussed by Somervell LJ in Cassidy v Ministry of Health [1951] 1 All ER 574 at 579 – are engaged to exercise their own judgment as to how their work should be done.'*

The Supreme Court has recently described the reasoning in *Ready Mix,* in *Autoclenz v Belcher* [2011] IRLR 820, as the 'classic description of a contract of employment'.

However, it is not just the control test which needs to be met in order to determine whether an individual is in fact an employee. In *Market Investigations Ltd v Minister of Social Security* [1968] 3 ALL ER 732, Cooke J stated at 737-8:

'The observations of [various judges' earlier decisions] … *suggest that the fundamental test to be applied is this: "Is the person who has engaged himself to perform these services performing them as a person in business on his own account?". If the answer to that question is "Yes", then the contract is a contract for services. If the answer is "No" then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt have to be considered, although it can no longer be regarded as the sole determining factor; and that factors, which may be of importance, are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task'.*

In *Lee Ting Sang v Chung Chi-Keung & another [1990] 2 WLR 1173*, Lord Griffiths stated further:

'*The question is to be answered by applying English common law standards to determine whether the workman was working as an employee or as an independent contractor. What then is the standard to apply? This has proved to be a most elusive question and despite a plethora of authorities the courts have not been able to devise a single test that will conclusively point to the distinction in all cases. Their Lordships agree with the CA* [of Hong Kong] *when they said that the matter had never been put better than by Cooke J in Market Investigations Ltd v Minister of Social Security'.*

In deciding the facts of the case in *Lee Ting Sang,* the conclusion reached was that the man in question was an employee and the approach used by Lord Griffiths is worthy of repetition:

'*The picture emerges of a skilled artisan, earning his living by working for more than one employer as an employee and not as a small businessman venturing into business on his own as an independent contractor with all its attendant risks. The applicant ran no risk whatever save that of being able to find employment which is, of course, a risk faced by casual employees who move from one job to another…'*

Another main authority in relation to independent contractors is *Lane v Shire Roofing* [1995] (CA), whilst this judgment lacks the application of a specific test it is very useful for the following statement of approach from LJ Henry:

'*Two general remarks should be made. The overall employment background is very different today (and was, though less so, in 1986) than it had been when the above cases [*i.e. the earlier authorities mentioned above]. *First, for a variety of reasons, there are more self-employed and fewer in employment, with more temporary and shared employment. Second, there are perceived advantages for both workman and employer in the relationship between them being that of independent contractor'.*

However, that passage followed an earlier one where Henry LJ had stated:

'*When it comes to the question of safety at work, there is a real public interest in recognising the employer/employee relationship when it exists because of the responsibilities that the common law and statutes…places on the employer'.*

This approach was later followed in *Jennings v Forestry Commission* [2008] EWC Civ 581, in which the issue of whose business it was, was again identified as an important consideration. In this case the claimant who conceded that he had been self-employed for several years, entered into a 'service contract' with the Forestry Commission. Whilst at work he was driving his own Land Rover on a steeply sloping field when it went out of control and rolled over. In determining who was liable for the injuries sustained by the claimant, LJ Richards stated at para 25:

'*If one stands back and asks whose business it was, the answer is that it was obviously the claimant's business. He was taking the financial risk, and he stood to gain or to lose according to the speed and efficiency with which the work was completed'.*

Ultimately, the answer to the question of whether an individual is self-employed or employed would depend greatly on who had ultimate control over the work and whose business it was. It is also clear from the case law that this is a matter which must be determined on the facts.

For example, Lord Griffiths in *Lee Ting Sang*, stated:

'*It must now be taken to be firmly established that the question of whether or not the work was performed in the capacity of an employee or as an independent contractor is to be regarded by the appellate court as a question of fact to be determined by the trial court. At first sight it seems rather strange that this should be so, for whether or not a certain set of facts should be classified under one legal head rather than another would appear to be a question of law. However…it was held in a series of decisions in the CA and in the HL under the English Workmen's Compensation Acts 1906 and 1925 that a finding by a county court judge that a workman was, or was not, employed under a contract of services was a question of fact.'*

More recently, the Supreme Court in *Autoclenz Ltd v Belcher & Ors* [2011] UKSC 41 has clarified that a written contract of employment which expressly states an individual as being a contractor and not an employee may be disregarded, if the evidence shows that the written contract does not reflect the actual reality of the agreement between the parties. This was intended to discourage the occurrence of 'disguised employment' whereby employers use contractors to fill permanent positions in their company but do not provide them with the corresponding employee rights.

Conclusion

As with agency and temporary workers, we have been seeing an increasing trend in self-employed workers over the last decade or more and the level of self-employment in the UK is currently at an all-time high. The research suggests that this trend will continue. The issue of who is the employer in the context of EL and disease claims is likely to also increase.

A central theme in determining who is responsible for any injuries suffered by self-employed workers is that of control. Some of the elements of control which have been said to indicate an employee/employer relationship include, who provides remuneration, who is entitled to give orders about how the work is to be done, who provided the materials for work and who has the ability to terminate the work.

In addition to this, one must look beyond the issue of control and consider whether the individual was undertaking the work as part of their own business. This can be done by posing the question, does the individual run the business themselves and are they solely responsible for the success or failure of the business?

These factors should be considered on a case by case basis and are fact specific.

References

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This newsletter does not present a complete or comprehensive statement of the law, nor does it constitute legal advice. It is intended only to provide an update on issues that may be of interest to those handling occupational disease claims. Specialist legal advice should always be sought in any particular case.

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