Autoclenz Ltd v Belcher & ors

Documents containing express contractual terms that were inconsistent with 'employee' or 'worker' status were correctly disregarded by the employment tribunal. The tribunal must consider what happened and what the parties expected in order to decide the terms of the real contract. Timothy Brennan QC acted for the individuals in the Court of Appeal and reports on *Autoclenz Ltd v Belcher & ors*

Timothy Brennan QC, Devereux Chambers

The facts

The individual claimants were car valeters. They were on piecework, buying their own materials and uniforms from Autoclenz, and paying for insurance. Each signed a document stating that he was self-employed, that he was not and would not become an employee of Autoclenz and that he was responsible for his own tax and national insurance contributions. In 2004 the Inland Revenue decided that the arrangements were consistent with self-employment for the purposes of income tax.

In 2007 each claimant was required by Autoclenz to sign a new document. This said that he was entitled to engage other individuals to work on his behalf, that he was not obliged to provide his services and that Autoclenz did not undertake any obligation to engage his services. If he had not signed, he would not have got more work.

On claims under the Working Time Regulations 1998 and the National Minimum Wage Regulations 1999 each claimant needed to show either that he worked under a contract of service or that he was a 'limb (b) worker' (someone who had undertaken 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 … customer of any … business undertaking carried on by the individual'). This important statutory definition of 'worker' occurs with minor variations across employment law, including all discrimination legislation.

The tribunal held that the individuals were all employees and 'workers'. The EAT (Judge Peter Clark) considered that he was bound by the decision of the Court of Appeal in *Consistent Group Ltd v Kalwak* to hold that the written agreements were not 'sham' and therefore that the individuals were not employees. He upheld the decision on 'worker'. Both sides appealed.

The decision

The Court of Appeal (Smith, Sedley and Aikens LJJ) reinstated the tribunal decision, saying that the case raised a difficult point. Where there is a dispute as to the genuineness of a written term in a contract, the focus of the enquiry must be to discover the actual legal obligations of the parties. The starting point is the contractual documents. But the tribunal may have to ask whether the parties ever 'realistically intended or envisaged' that the written terms would be carried out. The tribunal has to examine all the relevant evidence, including how the parties acted and what their expectations were.

Autoclenz expected an individual who was not coming into work to give adequate notice of his absence. This was evidence of an obligation to attend, despite the written term. The individuals were ignorant of their rights to engage substitutes and no-one had ever engaged one. This justified a conclusion that there was no such right. The tribunal was therefore entitled to disregard both the 'right to refuse work' and 'substitution' clauses.

Implications

The case has some striking features:

- the claimants signed documents that expressly defined the relationship and the work was given on that basis only. Nonetheless, the court put the written terms aside, looking at what was expected and what happened in practice
- *Consistent Group Ltd v Kalwak* is not authority that a written term can be disregarded only where the parties jointly intended to mislead others; a *Snook* sham is not necessary
- the court disregarded all the fiscal and other consequences of its decision, which were 'by no means all one way'
- such a case can open retrospective claims about deduction from wages, holiday pay and other rights of employees and workers that are not available to the self-employed.

The lesson is that, in this context, a written contract must represent the true business relationship. Where it does not, all the financial and regulatory burdens of employment or 'worker' relationships may unexpectedly arise and with retrospective effect too.

Timothy Brennan QC, Devereux Chambers

Cases referred to:

Autoclenz Ltd v Belcher & ors [2009] EWCA Civ 1046

Consistent Group Ltd v Kalwak [2008] IRLR 505, [2008] EWCA Civ 430

Snook v London & West Riding Investment Ltd [1967] 2 QB 786