



XpertHR Podcast

Original XpertHR podcast: 17 March 2017

- Laura Merrylees: Hello and welcome to this week's podcast with me, Laura Merrylees. Rarely a day seems to go by at the moment when the issue of self-employed status doesn't crop up in the news. We have, of course, seen cases brought against Uber, CitySprint and, most recently, Pimlico Plumbers hit the headlines. But what can employers take from these cases and how should they be reviewing their self-employed workforce in light of those decisions? Well, today I'm at the offices of Wedlake Bell and I am delighted to be joined by Fiona Rushforth, Senior Associate in the Employment Department of Wedlake Bell, who are one of our regular contributors for XpertHR. Let's just set the scene a bit and talk about the background to these cases and why they are important. Is it about the gig economy, do you think? The expression doesn't have an exact meaning, really, does it? [0:00:54.0]
- Fiona Rushforth: No, that's right. It's used to mean different things, but basically it means work by people who don't have a regular employment contract, but instead work in a different way. Perhaps working several different jobs for different employers. It can also mean people who work at one company, but in a short-term, unpredictable way.
- Laura Merrylees: Why is the gig economy being talked about so much at the moment? [0:01:15.0]
- Fiona Rushforth: Well it's partly because of the significance that the gig economy has for workers, particularly low-paid workers, and for society in general. It's often seen as part of the growing trend for taking away workers' basic rights and making them increasingly insecure and vulnerable. The big focus over the last few years was the zero-hours contract, which also has this effect. But gig economy type contracts are arguably just another way in which companies are trying to achieve the same thing.
- Laura Merrylees: The gig economy is beneficial, isn't it, for some employers? [0:01:44.0]
- Fiona Rushforth: Yes it is. The advantage for employers is that it's extremely efficient. Employers only have to pay people for the work that they actually do, so they are not paying anyone to sit around during quiet periods and the people who work for employers have fewer legal rights, so it's easier for employers to hire and fire people if they are not satisfactory or just if the employers are over-staffed.

Laura Merrylees: And the other reason, of course, that this has been in the news, as I mentioned in the intro, was because of a series of high-profile legal cases, isn't it? [0:02:11.1]

Fiona Rushforth: Yes. There have been a number of cases and, also, some highly publicised prospective legal challenges over the last few months. In particular, these have centred on the transport and delivery industries. These are industries where companies do often try to achieve the type of flexibility we've just discussed by treating their staff as self-employed contractors. The cases have arisen because these people have challenged that status and said that they were actually workers. The cases are particularly interesting, because although they are quite specific to this type of working arrangement, they do provide useful guidance to any company that uses self-employed contractors or workers as well as employees.

Laura Merrylees: There is a wider view that you can take, can't you, of these cases? So in those cases it's advantageous for these individuals to show that they're workers, isn't it, and not self-employed contractors? [0:02:59.7]

Fiona Rushforth: Yes, that's right. Basically because workers do enjoy more rights than self-employed people do, although, of course, not as many rights as employees, who have the full range of employment law rights, both in terms of their protection against dismissal and also their monetary and other benefits. Self-employed people have almost no protection under employment law and their relationship with the company that they do work for is almost solely covered by the terms of their contract.

Laura Merrylees: Just looking more closely at that question of workers having fewer rights than employees, they don't have, for example, unfair dismissal protection or the right to maternity pay. But they do have more rights than someone who is self-employed, don't they? [0:03:37.9]

Fiona Rushforth: Yes. Workers have the same rights to the National Minimum Wage, paid holiday and Statutory Sick Pay as employees do. And those are the key rights which most of the recent cases and challenges have centred on.

Laura Merrylees: It's obviously quite a technical area, but could you just explain, Fiona, how workers and self-employed contractors are defined? [0:03:56.8]

Fiona Rushforth: Yes. Sure. A self-employed contractor is someone who provides work or services to a client as part of a profession or business undertaking. So, for example, someone might provide specialist IT support to 20 or 30 different clients and that would be a very clear example of a self-employed contractor. A worker is defined as someone who undertakes to personally perform work where that work is not carried out as part of a business undertaking providing work to a client. Applying this definition is quite complex and it involves using a large number of tests, which have developed through case law. The most helpful way of looking at those tests is probably to look at how they're applied in some of the recent cases.

Laura Merrylees: So the most well-known of these legal cases is, of course, *Uber* and Uber drivers claim that they are workers. [0:04:39.0]

Fiona Rushforth: Yes. So this was a case brought by two Uber drivers in the Employment tribunal on behalf of a group of 19 drivers. The drivers argued that because of the nature of the way they worked for Uber, they were workers and not self-employed. Uber argued that it's a technology platform that simply puts its network of drivers in touch with passengers. And it said that its 30,000 drivers were all operating their own separate businesses, linked by the technology platform. The reason for the drivers' challenge was that they earned less than the minimum wage in many months, so they brought a claim for back pay and they also didn't have basic rights, such as holiday pay and sick pay.

Laura Merrylees: And of course we all know now that the drivers won that case. Can you just talk us through, though, the reasons for that decision? [0:05:22.1]

Fiona Rushforth: Yes. The tribunal considered two things – how the relationship was classified on paper and how it worked in reality. One of the areas where Uber fell down was that the tribunal looked at their contracts with the drivers in detail and said that the contracts didn't correspond at all with the reality of the working relationship. And that meant that the tribunal largely disregarded what the contract had to say about the relationship.

Laura Merrylees: Okay, so what did the tribunal say about how the relationship worked in practice? [0:05:46.6]

Fiona Rushforth: Well it made a number of findings about the way that Uber drivers work. The point of this exercise was to apply the main worker test and decide, on balance, whether the drivers met the criteria to be workers. So they were looking to decide first was there a personal service and second, did the drivers have a profession or business undertaking and thirdly was Uber the client of that business undertaking? So, generally speaking, factors that show genuine independence by the drivers pointed towards their being self-employed and factors that showed a high degree of control by Uber pointed towards the drivers being workers.

Laura Merrylees: So what were the points in Uber's favour? [0:06:22.6]

Fiona Rushforth: Well the drivers don't have to make any commitment to work. They have no obligation to log on to the app which is how they effectively come on duty. And once a driver has accepted a booking, the app puts the driver in personal contact with the passenger and, as a minor point, drivers don't have to wear uniform.

Laura Merrylees: So, conversely, what were the points that went against Uber? [0:06:42.3]

Fiona Rushforth: Well the rest of the details of the relationship showed that Uber basically had too much control over the way the drivers worked to show genuine self-employed status. Once a driver is signed in to the app, they have ten seconds to accept a booking and if they fail to accept bookings, they get warning messages which can lead to their access to the app being suspended or blocked. They don't know the destination until they collect their passenger and they can't use their own route. They also can't agree a higher fare than the one set by

Uber and the fare goes directly to Uber. Also, Uber operates a rating system, similar in some ways to an appraisal process, and if the driver's rating is too low, the driver is prevented from using the app and effectively can't work for Uber anymore.

- Laura Merrylees: Based on that the tribunal decided they were workers? [0:07:27.6]
- Fiona Rushforth: Yes it did. But, interestingly, only when the individuals have turned the app on and are therefore available for work. So that means that when calculating a minimum rate of pay and holiday pay, only the hours where the app is turned on are considered.
- Laura Merrylees: So does that mean that Uber now has to pay all its workers back pay for holidays and top-ups to minimum wage rates? [0:07:47.9]
- Fiona Rushforth: Well, no, it doesn't, because Uber has been given permission recently to appeal to the Employment Appeal Tribunal, so it won't pay out anything until that process is finished. And even if it does lose its appeal, it isn't obliged to pay out to the workers who didn't bring the claim, but it will have to change its contracts going forward to avoid more claims.
- Laura Merrylees: And does the *Uber* decision mean that this type of arrangement will never qualify as a genuine self-employed arrangement? [0:08:12.6]
- Fiona Rushforth: No. In fact the tribunal said that Uber could have used a business model that would have led to the decision going the other way. Although it didn't provide any guidance as to what that model would look like.
- Laura Merrylees: But it's fair to say that the trend in recent cases is definitely going in the individuals' favour, isn't it, not the companies'? [0:08:29.4]
- Fiona Rushforth: Yes, that's true. *CitySprint* is the next big case and again the company fell down because ultimately it had too much control over its cycle couriers to show that they were self-employed.
- Laura Merrylees: Yes and *CitySprint* was another case where the company said that all its couriers were self-employed contractors who were in business for themselves. Then one of the couriers brought a claim for holiday pay, which she would be entitled to as a worker, wouldn't she? [0:08:53.9]
- Fiona Rushforth: Yes. The tribunal said that the contracts didn't represent the reality of the situation and largely disregarded them, just as they did in *Uber*. Again the tribunal looked at the reality of how the relationship worked and applied the worker test to that.
- Laura Merrylees: Okay and what was it then that made the tribunal decide the courier was a worker? [0:09:10.5]
- Fiona Rushforth: Well, as I mentioned, one of the main points for worker status is that there has to be an obligation for the person to provide the work personally. If the person can genuinely provide a substitute to do the work for them in any circumstances, their claim to be a worker will fail on that basis.

- Laura Merrylees: But what if there is a more limited right to provide a substitute? And that's much more common, isn't it, to have a limited right to provide a substitute? [0:09:29.8]
- Fiona Rushforth: Yes. That's right. So, for example, the right can apply only when the person can't provide the work themselves because of illness. You will also often see an arrangement where the company has the right to approve or disapprove the substitute. This type of right can be one factor pointing towards self-employment, but it's of course not as strong as an unrestricted right.
- Laura Merrylees: And there must be situations where the contract says that an individual can provide a substitute, but in reality that would just never happen? [0:10:01.9]
- Fiona Rushforth: Yes. That's very common indeed. Almost all self-employed contracts will state that the contractor can provide a substitute and that was the case in *CitySprint* as well. The contract said that the courier could provide a substitute, provided he or she met the company's requirements. But the tribunal said that in reality, it wasn't permitted. The company's requirements were so stringent that in practice only another courier on the circuit could do the work. Also, the administrative requirements for providing a substitute were so complicated that no one would actually want to do that, rather than just having the job reallocated.
- The tribunal also said that the clause was so complex that the courier wouldn't have understood it and that there were no actual examples of anyone providing a substitute in practice. In fact the claimant brought evidence that a colleague's request had been turned down.
- Laura Merrylees: So the contractual right to substitute obviously didn't help the company in this case. Where else did the company fall down though, in its arguments? [0:10:56.6]
- Fiona Rushforth: Well there were various elements that showed a fairly high degree of control. The courier had to attend a two-day induction course and she had to wear a uniform and she was even directed to smile at the customers. She was directed the whole time she was on the circuit and whenever she was working the company knew where she was through a tracking device. Also, the couriers could, theoretically, work as and when they wanted to, but in practice the claimant worked four full days a week and none of her colleagues really worked in an ad hoc way. The contract also provided that if they were out of touch for five days, they would not be used anymore.
- Laura Merrylees: And were there other factors as well as control that played a part in the decision? [0:11:33.2]
- Fiona Rushforth: Yes there were. The company billed the clients and then paid the courier a weekly amount. And that was held to basically be a payslip by another name. And the way the company described the couriers to clients, they called them 'our couriers' and said they were dedicated and fully-trained, also went against them. And then another factor which went against the idea that she was a contractor offering services to a client was that she had no way to improve her business

opportunities, because the company spread jobs fairly across the couriers.

Laura Merrylees: Now I understand that another factor was that because of the inequality in bargaining power between the courier and the company, what she had agreed to contractually had less significance?
[0:12:10.2]

Fiona Rushforth: Yes and that's a significant point in a lot of the current run of cases and potential cases, because they generally involve very low-paid and potentially vulnerable workers. So it's possible that there is an element of a court wanting to protect exploited workers and make sure they are at least getting minimum wage.

However the next case *Pimlico Plumbers* heard in the Court of Appeal is interesting, because it involves someone at the other end of the spectrum, earning around £100,000 a year.

Laura Merrylees: Tell us about that case. [0:12:37.8]

Fiona Rushforth: So on the face of it there were more elements to suggest the claimant was a contractor than in the other cases. His contract described him as a self-employed operative. He was required to work a 40-hour week for Pimlico Plumbers, but this requirement was not enforced and he decided those hours for himself. He did work exclusively for Pimlico Plumbers, but he didn't have to and some of his colleagues did undertake private work. Also, he could negotiate prices with his customers and he worked unsupervised and Pimlico Plumbers wasn't obliged to provide him with work and he wasn't obliged to accept any particular jobs. That was both in the contract and it was also found to reflect the reality of the situation.

Then he bought all his own materials and equipment and there were also circumstances where he bore the risk in the relationship, which is indicative of self-employed status. So he wouldn't be paid where the customer didn't pay or he had to correct his own work when it was unsatisfactory. And if he misquoted for a job, he would bear the loss of that misquote.

Laura Merrylees: We were looking at this issue of substitution and about the obligation to provide work personally. Could he, in these circumstances, provide a substitute? [0:13:47.7]

Fiona Rushforth: Well that was a very interesting element of this case. The contract actually didn't say anything about the right to substitute. But in practice the plumbers did substitute for each other. And they also used other specialists to do some of the work and paid those specialists themselves.

But it was held that this still wasn't enough to prevent him from having worker status. The Court of Appeal said that this substitution was more like employees swapping shifts with each other than genuine substitution and there was no evidence of anyone using a substitute from outside the company. And the employer had to approve any substitution. The other thing the court said was that using specialist subcontractors to do elements of the work was not the same as substitution and it didn't go against worker status.

Laura Merrylees: So what were the main elements of control? [0:14:31.6]

Fiona Rushforth: Well the worker had to wear a uniform and drive a branded van, although he paid a rental charge for the van, and he had to provide a minimum number of hours personally, not through a substitute. His contract with Pimlico Plumbers also contained an onerous restrictive covenant that prohibited him from working as a plumber in any part of Greater London for three months after the termination of the contract.

The finding was that he was an integral part of the business and was subordinate to the company, not a business undertaking providing services to his client.

Laura Merrylees: And you mentioned that there are several similar prospective cases, I think Deliveroo is one of them, isn't it? [0:15:10.2]

Fiona Rushforth: Yes, that's right. Deliveroo drivers are reportedly taking legal advice from the same lawyers that brought the legal challenge by drivers against Uber to assert their right as workers. They say that the fact that they wear uniforms, carry a branded delivery box and are subject to performance reviews means they are workers. And Jinn delivery couriers, who work through an app like Uber are protesting about being paid by the job, which makes their pay less than the minimum wage in many cases.

Laura Merrylees: And there have been news stories in the last couple of weeks, haven't there, about DPD and I think they deliver for John Lewis and M&S, don't they? [0:15:42.1]

Fiona Rushforth: Yes, that's right. DPD claim that all their drivers are franchisees running their own businesses with DPD as a client. But some of the drivers say they're subject to similar types of control as in *CitySprint* and *Uber* and are entitled to minimum worker rights. This particular matter was widely reported because the drivers can be fined £150 if they take the day off sick.

Laura Merrylees: As you said, a lot of these recent cases, they are in the field of low-paid taxi and delivery drivers, but you mentioned that the principles and what you can take from the cases are applicable to employers in general? [0:16:16.0]

Fiona Rushforth: Yes. That's right. These types of arrangements are obviously quite niche, but a lot of the principles applied are the same. So, for example, it's very interesting that in these cases the partial right to substitute didn't help the company. In practice, not many companies are going to go further than these companies did because contractors very often provide services directly to the company's customers and it's generally too risky to allow an unrestricted right of substitution. Most employers are going to want to insist on the right to approve the substitute. And even when they don't they are going to want to insist on a minimum level of qualifications.

It's been established by case law that it isn't destructive of a right to substitute, but in *CitySprint* under the criteria in place, only colleagues could substitute and that was enough to destroy the usefulness of the substitution clause for the employer.

Laura Merrylees: So what can listeners do to try to ensure that their substitution clauses and arrangements are actually effective? [0:17:10.3]

Fiona Rushforth: Well as we saw in these cases, if the contract terms do not reflect the arrangements in practice, those contract terms are likely to be disregarded. So one big lesson from these cases is to try and make the contract and the working practices align as much as possible. This means a contractual substitution clause is less likely to be ignored by the courts.

Laura Merrylees: Specifically, what should the clause say? [0:17:29.9]

Fiona Rushforth: Well the clause should be as wide as it can reasonably be. It's good to say that the contractor can substitute in any circumstances, not just when they aren't available to do the work themselves. And the company should keep the requirements of that substitution to the minimum it needs to protect the business. That's obviously a balancing exercise, because a company can't have someone who totally lacks the necessary skills being substituted. But if possible, the company wants to at least ensure that the contractor can bring in someone who doesn't already work for the company.

Laura Merrylees: Is there anything else that you can do in practice? [0:18:03.6]

Fiona Rushforth: Well as we saw in all these cases, it counted against the company that there was no substitution from outside the company in practice so if the employer receives a request for substitution, it should try to accept those wherever possible.

Laura Merrylees: Now control was another area where many of the companies that we're just talking about fell down, wasn't it? I mean what can employers do to sort of mitigate against that? [0:18:28.2]

Fiona Rushforth: Well just try to keep it to a minimum, both in the contracts and in reality. So, for example, letting the contractor select their own hours. But again this is a balancing exercise. If these people provide services to the employer's clients, the employer will want to ensure that they do it in a way which is in keeping with the company's brand and standards.

Laura Merrylees: Well that's right, because I can see that a lot of employers listening to this will say, 'Well we need at least as much control over how our contractors interact with our customers and to provide their services as Uber and CitySprint do, we need to have inductions and quality control and a way of evaluating them.' So what would you advise them to do? [0:19:05.4]

Fiona Rushforth: Well employers need to differentiate their self-employed contractors from their employees and workers as much as possible. So, for example, don't describe them as 'our', don't give them branded business cards, use a different type of email address, rather than soandso@nameofcompany. If employers can avoid uniforms and branding, that's obviously a plus and if contractors work for other people as well that will definitely help to protect employers from a finding of worker status. But ultimately it may be that you say, 'We can't avoid the pitfalls that brought down Uber and CitySprint and

Pimlico Plumbers whilst still ensuring that contractors do what they need them to do and meet their standards.'

Laura Merrylees: So given that's the case, what should employers do in those circumstances? I mean should they put all their self-employed contractors onto a different contract and start giving them worker rights, holiday pay and the other rights? [0:19:52.8]

Fiona Rushforth: Well not necessarily. For one thing the cases we've looked at are fact specific and a number of them are subject to appeal. Two of the cases – *Uber* and *CitySprint* – were heard in the employment tribunal, so they are not binding and don't affect decisions in other cases. And another factor is that a lot of companies use contractors who are highly skilled and relatively well-paid and if companies are using contractors who genuinely want to work in that way, usually because of the tax benefits for them of doing so, they are a lot less likely to bring a complaint.

Laura Merrylees: So employers are going to be relatively safe, aren't they, if their contractors sign up to those terms willingly? [0:20:25.3]

Fiona Rushforth: Yes, relatively so. One risk area is where the company ends the relationship with the contractor, at which point they become disgruntled and bring a claim. However, this is actually something that companies do often cover off in the contract, making sure that contractors provide an indemnity to reimburse the company for the costs of any claim they bring against it.

Laura Merrylees: And the other risk? You mentioned there was one risk, what's the other one? [0:20:51.1]

Fiona Rushforth: The other risk is that HMRC will look at arrangements to review whether so-called contractors are really workers. And this does happen, because of course contractors pay less tax than employees and workers. The risk of this may be increasing, because it's been recognised that the gig economy and the increasing tendency to try and treat people as contractors not workers does have a big impact on how much employment tax is collected by the Government.

Laura Merrylees: So is the Government taking any steps to look into this? [0:21:18.7]

Fiona Rushforth: Yes. There's a review at the moment on the impact of the gig economy called the Taylor Review. It's not specifically looking at the tax impact, but the impact on the economy and the employment landscape overall. It's not due to report until July 2017, so even if action is recommended, it will be quite a while before anything is put in place.

Laura Merrylees: Well thanks very much, Fiona. And you will find plenty of information on the topics that we've covered on our website. A good first port of call is our topics page on employment status.

Well that brings us to the end of this week's podcast, which you've been listening to with me, Laura Merrylees. We're back again next Friday.