

Breakfast Briefing

Employment Status

July 6 2023

Agenda



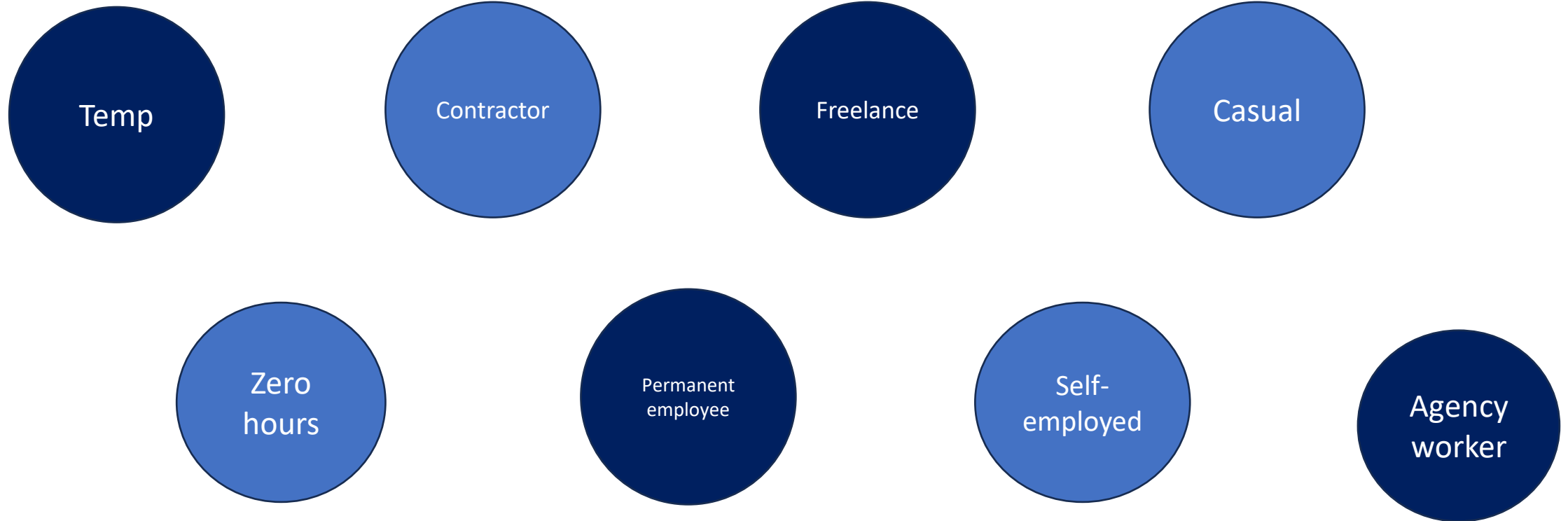
- > Why does it matter?
- > Employee
- > Worker
- > Self-employed
- > Determining employment status
- > Case law
- > Key points

Why does it matter?



- Employers and employees have obligations that are implied into the contract between them
- Some legal protections only apply to employees
 - ACAS Code of Practice on Disciplinary and Grievance Procedures only applies to employees
 - TUPE
- Tax treatment
- Vicarious liability
- Insurance
- GDPR

Types of worker



Employee

Worker

Self employed

Employee



“An individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.”

Section 230(2), Employment Rights Act 1996 (ERA96)

“A contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing”

Section 230(2) ERA96.

- Right to receive redundancy pay, protection from unfair dismissal, right to written particulars, right to notice, SSP, statutory maternity pay, right to request flexible working etc.

Worker



- Broad category who do not have a contract of employment but still perform work or services for an organisation
- Certain rights such as right to be paid the national minimum wage, protection from discrimination and holiday pay

"an individual who has entered into or works under (or, where the employment has ceased, worked under): (a) a contract of employment, or (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes 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 client or customer of any profession or business undertaking carried on by the individual".

Section 230(3) ERA96

Self- employed



- Self-employed individuals work for themselves and take responsibility for managing their own business
- Usually engaged through an agency or intermediary
- Deal with their own tax and insurance
- Protected against discrimination, health and safety and protection from the rights and responsibilities set out in the terms of the contract they have with their client

Self- employed



- Government guidance:

Someone is probably self-employed if they're self-employed for tax purposes and most of the following are true:

- they put in bids or give quotes to get work
- they're not under direct supervision when working
- they submit invoices for the work they've done
- they're responsible for paying their own National Insurance and tax
- they do not get holiday or sick pay when they're not working
- they operate under a contract (sometimes known as a 'contract for services' or 'consultancy agreement') that uses terms like 'self-employed', 'consultant' or an 'independent contractor'

Determining employment status



- Courts and Tribunals will look beyond the written terms of the contract
- Sham agreements
- Irreducible minimum
 - Personal service and substitution rights
 - Control
 - Mutuality of obligations

Nethermere (St Neots) Ltd v Gardiner

- Demonstrated in case law

Determining employment status



- **Autoclenz Ltd v Belcher and others**

- Car valeters wanted a declaration that they were actually workers and not self-employed subcontractors
- No control over hours or deductions from pay for insurance or materials
- Written agreement didn't have mutuality of obligations and also allowed for substitutions
- Court of Appeal explained that parties do not have equal bargaining power in an EC, so courts and Tribunals must look to reality of arrangement. Held that they were workers when looking at reality of arrangement.
- Supreme Court upheld decision, stating the ET were, *“entitled to hold that the documents did not reflect the true agreement between the parties.”*
- Although no contractual obligation to attend work, in practice they were expected to attend and perform work personally
- Largely based on control test

Determining employment status



- **Pimlico Plumbers Ltd v Smith**

- Provided plumbing and maintenance services and engaged individuals as “self-employed contractors”
- Claimant believed he was actually an employee and should have been given enhanced employment rights such as sick pay, holiday pay etc
- Appealed all the way up to Supreme Court who held he was a worker
- Considered the level of control they had: had to wear uniforms; use company vans; worked specified hours
- There was nothing in the contract which gave the express right of substitution – he could swap shifts but SC said the right was ‘so insignificant as not to be worthy of recognition’ in the terms deployed
- Held there was operational and financial control including how much he would be paid and restrictive covenants.
- ‘wages’ ‘gross misconduct’ – words associated with employment relationship

Determining employment status



- **Uber BV v Aslam**

- Dispute arose re whether drivers who were engaged on a self-employed basis were workers
- Held that worker status is a test of statutory interpretation rather than contractual. Legislation was to protect vulnerable individuals. Therefore, the more control more likely it is to be a worker
- Factors considered included: Uber dictated the fare charged (pay); imposed contractual terms; constrained drivers' choice to accept or decline rides; restricted communication between driver and passenger and exercised significant control over the way in which drivers provided services.
- Held that individuals were workers due to the degree of control Uber had over the arrangement. Confirmed by Supreme Court

Key points from today's session



- Have contracts which accurately reflect the reality of the relationship between the individual and your organisation – contracts are the starting point
- Having a provision to the effect of ‘you agree you are not an employee’ does not offer a defence in a dispute over status
- Assess the level of control and supervision over contractors: do they wear your uniform?; do you monitor their work?; do you provide their equipment?
- Ensure a contractual right to substitution is genuine
- Consider mutuality of obligations – is there is an expectation you will provide work and an expectation the individual will perform it?
- Conduct regular reviews
- Seek advice if uncertain