

Employment Status and Why It Matters - Part 1

Definition and Determination of Status

When determining employment status in the UK there are three main types of employment status: “employee”, “worker” and “self-employed”.

What is an employee?

Under section 230(1) of Employment Rights Act 1996 (“ERA”), an employee is defined as:

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

Under section 230(2) of the ERA a contract of employment means

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

What is a worker?

A worker is defined under section 230(3) of ERA 1996 as

“an individual who has entered into or works under (or, where the employment has ceased, worked under):

a contract of employment, or

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”.

Note: All employees are workers, but not all workers are employees.

What is a self-employed person?

A self-employed person can be defined by modifying the wording of section 230(3) of ERA 1996 as

“an individual who has entered into or works under (or, where the employment has ceased, worked under):

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 by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual”.

The factors a court will consider when determining status?

Whilst the starting point is the contract between the “employer” and the “worker”, this is by no means determinative of status.

When considering status, a court of tribunal will take account of the working reality of the relationship and will consider the following factors-

1. The obligation upon “employer” to provide work.
2. How payment is phrased; one off fee, or hourly or daily rate, or annual salary.

3. The obligation upon the “employer” to pay the “worker” if there is no or insufficient work for the “worker” to do.
4. The obligation upon “worker” to carry out the work personally.
5. The frequency and pattern of usage. Is it a one-off task or task of short-term duration or something more substantial?
6. Whether the “worker” has, or is part of, a separate business.
7. The degree of autonomy the “worker” has when carrying out his or her work.
8. Whether the “worker” is expected to provide his or her own tools and/or workplace.
9. Whether the “worker” is expected to pay for their own training.
10. Whether the “worker” is expected to provide and pay for their own insurance.
11. The extent to which the “worker” is integrated into the “employer’s” workforce.
12. The extent to which the “worker” is subject to the “employer’s” policies and procedures.

Why does this matter?

These three types of status carry with them different employment related rights and impose upon the employer different obligations, with the status of employee bestowing the most rights and imposing the highest level of obligation and self-employed status bestowing the fewest rights and a much lower level of employer obligation. Legal rights and obligations are of course enforceable in the employment tribunal and in courts. Thus, getting it wrong can lead to expensive litigation and can lead to substantial amounts of money being paid in compensation and to reputational damage.

In Part II of this Article, I will discuss the potential consequences of getting employment status wrong in more detail.

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