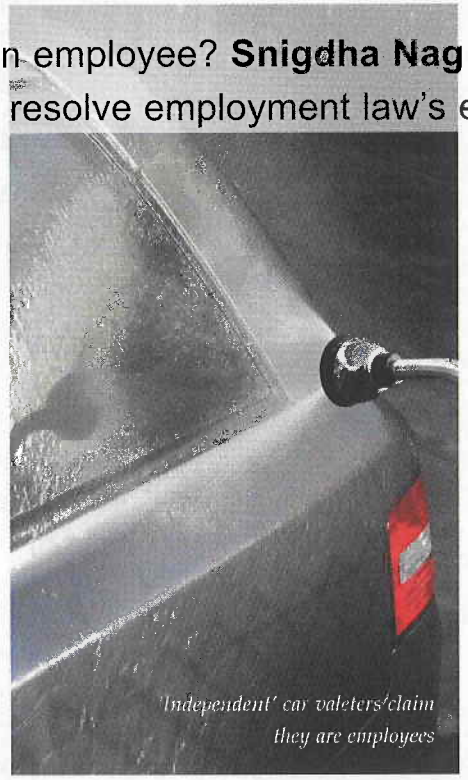
Worked up

When is an employee not an employee? **Snigdha Nag** looks ahead to the Supreme Court's chance to resolve employment law's enduring head scratcher



'Independent' car valeters claim they are employees

The Supreme Court's decision in the long-running dispute of *Autoclenz v Belcher* [2010] IRLR 70, heard on 11 May, is comfortably the most anticipated employment law judgment of 2011. The case tackled the thorny issue of employee status. To what extent can the true facts of a business relationship legally define a member of staff's position? Is it possible that the day-to-day business of the employee can render their status at odds even with a signed contract?

Since the long-standing authority of *Ready Mixed Concrete* [1968] 2 QB 497, no single test on employment status has been conclusive and all the relevant factors (control, integration into the organisation, consistency of arrangements with a contract of service, economic reality and mutual obligation) are weighed up. But what status is given to written documentation signed by the parties?

In 2007, car valeters at Autoclenz were asked to sign a new contract. It used phrases such as 'independent contractor', 'sub-contract' and 'client'. A group of 20 claimants brought claims in the Employment Tribunal seeking a declaration that they were employees or, alternatively, workers, in that order of preference within the meaning of section 230(3)(b) of the Employment Rights Act 1996.

The tribunal found in their favour, holding they were employees (leading to protection from unfair dismissal and the right to redundancy payments). This was because there were two clauses, one allowing for the 'contractors' to delegate work to others and another allowing them to refuse work that did not reflect the reality of the relationship; hence there existed a mutuality of obligations giving rise to a contract of employment. Autoclenz appealed to the Employment Appeal Tribunal (EAT).

The EAT found that they were workers rather than employees and, therefore, entitled to limited protection (such as minimum wage, working time protection and holiday pay). Neither party was pleased with this outcome and the matter went to the Court of Appeal. The Court of Appeal took account of the arguments raised on the law, the evidence presented and decision-making process of the lower courts. The court noted typically a company is in the position to dictate written terms to an individual who must either sign or go without work. This necessarily obviated the need to find an intention to mislead; if the terms did not represent the intention or expectation of either party, it would be enough for it to be disregarded.

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The Court of Appeal held the valeters had employee status for the following reasons: the substitution and right to refuse work clauses did not reflect the rights and obligations in reality; the individuals were not in business on their own account; the valeters were subject to control in the manner of carrying out their work; and, finally, the term entitling Autoclenz not to provide work was exercised only when none was available and hence was not inconsistent with a contract of employment.

Weighing the options

What decision can we expect from the Supreme Court? The idea that the courts will enquire into the true factual scenario rather than take documents at their face value is not a new one. In *Young & Woods v West* [1980] EWCA Civ 6, the court noted contract terms "may not reveal but disguise the real contract and the true relationship which is created between the parties". In that case, the court recognised that it may be 'unjust' for an individual to enjoy the advantages of self-employed status yet claim to be an employee.

However, the court still had a "duty to decide on all the evidence whether the true legal relationship accords with the label or is contradicted by it". That doctrine was reaffirmed in *Protectacoat v Szilagyi* [2009] IRLR 365, where LJ Smith stated: "The court must look at the substance, not the label," allowing a 'partnership agreement' to be disregarded in favour of employee status. If a 'reality approach' is taken by the Supreme Court, it will find itself in good company with consistent authorities.

On the other hand, a more 'strict' contract law approach is possible. In the Court of Appeal, Aikens LJ was reluctant to accept enquiry into the true intention or expectation of the parties. His fear was that would result in a danger the court might concentrate too much on "the private intentions or expectations". His approach was that "ultimately what matters is only what was agreed either as set out in the written terms or, if it is alleged those terms are not accurate, what is proved to be their actual agreement".

This principle can be taken with that enunciated in the *Consistent Group* case by Rimer LJ who stated implied terms by conduct and practice can only override an express written term in limited circumstances: "That can only be done if it is first found to be a sham. That requires a finding that, at the time of the contract, both parties intended it to misrepresent their true contractual relationship."

These principles could lead the Supreme Court in the opposite direction, opening the door for companies to have the potential to exclude employment rights through carefully drafted contract documentation.

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