27 July 2011

PRESS SUMMARY

Autoclenz Limited (Appellant) v Belcher and Others (Respondent) [2011] UKSC 41
On appeal from the Court of Appeal [2009] EWCA Civ 1046

JUSTICES: Lord Hope (Deputy President), Lord Walker, Lord Collins, Lord Clarke, Lord Wilson

BACKGROUND TO THE APPEAL

This appeal concerns the correct approach to written contracts in the employment context where there is a dispute as to the genuineness of a written term. The question arises in the context of a dispute as to whether individuals are "workers" within the meaning of the National Minimum Wage Regulations 1999 ("NMWR") and of the Working Time Regulations 1998 ("WTR").

The appellant ("Autoclenz") provides car-cleaning services to motor retailers and auctioneers. The respondents ("the claimants") are 20 individual valeters who all worked as car valeters for Auoclenz. All signed similar contractual documents which contained statements to the effect that the claimants were self-employed and the claimants were taxed on that basis. In 2007, Autoclenz required the claimants to sign new contracts.

The new contract contained a clause which provided: "*For the avoidance of doubt, as an independent contractor, you are entitled to engage one or more individuals to carry out the valeting on your behalf, provided that such an individual is compliant with Autoclenz's requirements of sub-contractors as set out in this agreement*…". The contract also provided that: "*You will not be obliged to provide your services on any particular occasion nor, in entering such agreement, does Autoclenz undertake any obligation to engage your services on any particular occasion.*"

The claimants brought a claim in the employment tribunal ("ET") seeking a declaration that they were workers as defined under the WTR and the NMWR and consequently entitled to holiday pay and to be paid in accordance with the NMWR.

Both sets of regulations define worker in materially identical terms as: "*an individual who has entered into or works 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.*"

As a matter of law "no obligations" clauses and "substitution" clauses are inconsistent with contracts of employment or contracts of personal performance It was therefore common ground between the parties that if the terms of the written contract were valid then, as a matter of law, the valeters could not be said to be workers within the meaning of the WTR and the NMWR.

The ET held that these contractual terms did not reflect the true agreement between the parties and could be disregarded so that the claimants could be regarded as employed under contracts of employment within limb (a) of the definition. The Employment Appeal Tribunal ("EAT") allowed

Autoclenz's appeal on the basis that the claimants were not employees under limb (a) but held that they were workers under limb (b) of the definition. It held that on the basis that the ET had applied the incorrect legal test for the identification of sham terms. Both parties had to intend the contractual clause to mislead before it could be said to be a sham and there was insufficient evidence of such an intention. Both sides appealed to the Court of Appeal which restored the judgment of the ET, holding that the claimants were workers within the meaning of (a) and (b).

JUDGMENT

The Supreme Court unanimously dismisses the appeal, holding that the ET had been entitled to find that the claimants were workers because they were working under contracts of employment within the meaning of the NWMR and the WTR. The substantive judgment is given by Lord Clarke, with whom Lord Hope, Lord Walker, Lord Collins and Lord Wilson agree.

REASONS FOR THE JUDGMENT

The ET had been entitled to disregard the terms included in the written agreement between the parties on the basis that the documents did not reflect what was actually agreed between the parties.

In the employment context the courts must be alive to the possibility that written documentation may not accurately reflect the reality of the relationship between the parties. Employers may include terms aimed at avoiding a particular statutory result, even where such terms do not reflect the real relationship: **[21]-[25]**.

Where one party to an employment contract seeks to challenge the genuineness of the terms there is no need to show an intention to mislead anyone; it is enough that the written term does not represent the intentions or expectations of the parties. The question in every case is what was the true agreement between the parties: **[26]-[29]**. The correct approach to that is enquiry is that set out by the Court of Appeal in this case. The focus must be to discover the actual legal obligations of the parties. To carry out that exercise the tribunal will have to examine all the relevant evidence. That will include the written term itself, read in the context of the whole agreement, as well as evidence of how the parties conducted themselves in practice and what their expectations of each other were: **[31]-[33]**.

Nothing in the judgment is intended in any way to alter those principles which apply to ordinary contracts, and in particular, to commercial contracts: **[21]**. However, the circumstances in which contracts relating to work or services are concluded are often very different from those in which commercial contracts between parties of equal bargaining power are agreed. This must be taken into account in deciding whether terms of any written agreement in truth represent what was agreed: **[34]-[35]**.

In the present case the ET had been entitled to find that: (1) the valeters would perform the services defined in the contract for Autoclenz within a reasonable time and in a good and workmanlike manner; (2) that the valeters would be paid for that work; (3) that the valeters were obliged to carry out the work offered to them and Autoclenz undertook to offer work; and (4) that the valeters must personally do the work and could not provide a substitute to do so. It follows that the Court of Appeal was entitled to hold that those were the true terms of the contract and that the ET was entitled to disregard the terms of the written documents: **[37]-[38]**.

References in square brackets are to paragraph numbers in the judgment.