

What's the status of worker status?

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Last year saw a flurry of worker status claims hit the headlines, particularly in respect of drivers and couriers. The Court of Appeal held that Uber drivers were workers, as did the EAT in respect of Addison Lee couriers. Deliveroo bucked the trend with the High Court dismissing a judicial review challenging the decision of the Central Arbitration Committee which held that Deliveroo riders were not workers.

The Good Work Plan

In December 2018, the Government published its Good Work Plan outlining its proposals for reform of certain aspects of employment law. These included proposals for greater clarity over the determination of status, including aligning the tests for both taxation and employment purposes, and support for the recommendations made by Matthew Taylor in his report ([Good Work: the Taylor Review of Modern Working Practices](#)) that the tests for status should place more emphasis on control and less on the right to substitute.

The Government indicated that further independent research had been commissioned to help it understand how best to support those with uncertain employment status. However, one of the recommendations in the Taylor Report was that the burden of proof in status claims should be reversed so that the employer has to prove that the individual is not entitled to the relevant employment rights and not the other way round (subject to certain safeguards to discourage vexatious claims). The Government confirmed that it would return to this recommendation after an online tool for employment status had been developed.

Why is status important?

Status determines a number of separate rights, with employees having the most rights – including the right to claim unfair dismissal – and the genuinely self-employed having the least. Many of the claims over worker status have focussed on the right to paid holiday – a right that workers and employees have, but the self-employed do not.

Cases this year

The issue of status has remained in the headlines this year:

- Mr Smith's claim against Pimlico Plumbers returned to the Employment Tribunal after his success in the Supreme Court in respect of status. Despite being found by the Supreme Court to be a worker, Mr Smith was unsuccessful in his claim for £74,000 in holiday pay, his claim having been found to have been presented out of time. He indicated at the time that he wished to appeal this decision.
- Uber also confirmed that it wished to appeal the Court of Appeal's decision in *Uber BV and others v Aslam and others* and permission to appeal to the Supreme Court was granted. A hearing date is awaited.
- In September, the Watford Employment Tribunal referred a number of questions to the CJEU concerning the employment status of Yodel couriers, including whether the right to provide a substitute is fatal to the definition of worker status.

However, it is not just couriers and drivers who are affected; status has continued to be challenged in other areas:

- In *Varnish v British Cycling*, a former Great Britain cyclist is appealing an Employment Tribunal finding that she was neither a worker nor an employee of British Cycling and UK Sport. A hearing date is awaited.

- The EAT in Scotland is due to hear an appeal this month about the employment status of specialist foster carers in Johnstone v Glasgow City Council.
- In a separate ECJ ruling in December 2018, (Sindicatul Familia Constanța and others v Direcția Generală de Asistență Socială și Protecția Copilului Constanța), foster parents were held not to be workers. An Employment Tribunal in Flisher v Kent County Council was due to consider the issue of status in September 2018 but the decision was referred back to the Judge and has not yet been published; a separate tribunal in Anderson v Hampshire City Council is also due to consider the issue but a hearing date is awaited.
- 27 'freelance' art educators working for the National Gallery have been held by a tribunal this year to be workers (Braine and others v The National Gallery).
- The EAT in Community Based Care Health Limited v Narayan has also upheld a decision that a GP registered with CBCH, a company providing out-of-hours services to the NHS, was a worker.

Looking forward

As is evident from the cases above, we are awaiting status decisions and appeals covering a number of different sectors and so this area of law is still in a state of flux.

There will also be an additional focus on status as we move into next year, at least as far as taxation is concerned. Under draft legislation, from April 2020, medium and large private sector organisations will become responsible for checking whether contractors need to pay income tax and national insurance contributions, shifting the responsibility from the contractor to the organisation using the service. This mirrors the changes made within the public sector in 2017. Further guidance on status tests, particularly if, as indicated in the Good Work Plan, the tests for tax and employment purposes are to become fully aligned, is therefore awaited.

If you do have a flexible workforce, and would like to discuss any issues relating to status, please let us know.

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