



Employment Status

'I feel angry that I have none of the benefits of being an employee. I believe every single homeworker deserves at least the basic employment rights.'

Pamela James – homeworker.

The big picture

Thousands of workers in the UK are vulnerable to exploitation from unscrupulous employers, either because they do not have full employee status, or because it is unclear whether they have employee status or not. Whilst uncertain employment status is a problem for all kind of workers in the UK, this is a particular issue for homeworkers as well as agency and temporary workers.

Why this matters

Homeworkers who have worked for a company for several years, often on low wages, and often taking on rushed orders at short notice to the company's convenience can discover if they become pregnant, fall ill or their work simply stops they have no protection under the law, because they are not 'employees.'

Types of status

There are three main types of employment status under UK law at

present: employees, workers and the self employed. Qualifying hurdles and exclusions may apply, but in broad terms:

- Employees are entitled to the full range of employment rights and protection in respect of unfair dismissal, redundancy, sick leave and pay, maternity leave and pay, the right to written terms and conditions.
- Workers are entitled to a smaller range of basic protections - the most significant for homeworkers being minimum wage and holiday pay. (*Workers may be entitled to statutory sick pay if they are earning enough and paying Class 1 National Insurance contributions through their employer - PAYE.*)
- The self employed are technically free to negotiate their own terms with the people they contract with.

In practice many homeworkers do not receive full employment rights and – if challenged – their employers can argue they are 'workers' and not technically 'employees'. The only way this can be resolved is at an Employment Tribunal which – as we will see – can be both an extremely

stressful process and highly unpredictable.

Alternatively homeworkers may be told by their employers that they are self-employed - even if they do not in practice have the independence or control over their work patterns that would enable them to genuinely negotiate terms. False self-employment is just another way for unscrupulous employers to avoid the obligations they have toward employees. Again, if challenged, this can only be decided at tribunal.

In effect this uncertainty can make it difficult for homeworkers to assert even their most basic rights to the NMW and holiday pay. Workers can be deterred from demanding these rights through the very real fear that they may lose their work as a consequence - without employment contracts they have little protection against such victimisation.

Homeworkers – isolation and information

The current lack of clarity can be particularly difficult for homeworkers to tackle, as working from home, they have little access to the mutual support of other workers or to other sources of information, advice and support regarding their situation. They are also unlikely to have the benefits of easy access to union recognition.

Tax and National Insurance

The situation is further complicated by differences between the way the HMRC (Her Majesty's Customs and

Revenue) determines employment status and the way it is decided at tribunals. Someone could be termed 'self-employed' for tax and NI purposes but an 'employee' or 'worker' with regard to employment rights - or vice versa. This inconsistency makes it even harder for workers to find out what they are entitled to and assert their rights.

Tribunals and the four tests

If a worker does take their employer to tribunal and attempts to prove that they are an employee, their status will be subject to four tests:

- Control – Does the worker or the company control how and when the work is done?
- Integration – Is the worker integrated into the company? Is the worker included in occupational benefit schemes? Is their work core to the company's business?
- Economic reality – Is the worker economically dependent?
- Mutuality of obligation – Is the company obliged to provide work? Is the worker obliged to accept and do the work?

Tribunals may ascribe varying weights to these four factors, which makes predicting an outcome very difficult. Tribunals also rely on precedents set in previous cases with the layering of decision upon decision increasing the complexity of judging employment status. Recently the 'mutuality of obligation' test has been treated as the strongest factor. In practice this has led to workers who are clearly employees in terms of all other tests being denied

employment status through a clause in their contract stating they are under no obligation to accept work (even if in reality they have always been expected to undertake the work provided).

Employers

Employers themselves may often be unclear about the status and entitlements of homeworkers who work for them. It can be a very expensive process for a company to go through an Employment Tribunal, and then discover – after the event – that their workers have not been receiving their full entitlements and amends must be made. In addition, those employers who want to ensure their homeworkers are treated on a par with on-site staff can find themselves undercut by more unscrupulous businesses. A level

playing field of clear minimum labour standards is therefore essential to deliver fair competition.

Dependent workers?

Homeworkers may also be described as ‘dependent workers’. This term has emerged to describe the growing number of workers who fall into the grey area between employment and self-employment. They are economically dependent on their supplier for work, but do not have an employment contract. Although the term ‘dependent worker’ is now frequently used in international policy debates around employment relationships it is not a precisely defined or legally recognised term and so only serves to illustrate the growing complexity of status issues, rather than to resolve them.

Gosport Rubber Trimmers - A Case Study

Around 60 homeworkers worked for Industrial Rubber Plc (IR Plc) trimming a wide variety of rubber components including ferrules for walking sticks, seals for motorcycles, and the casing for reflecting road studs (cats eyes). Some had worked for IR Plc for over 14 years.

Homeworkers at the company were not receiving the minimum wage and in April 2001 the Inland Revenue issued the company with an enforcement notice. Thirteen homeworkers were named on this enforcement notice. This eventually went to tribunal where the unanimous decision of the tribunal was in favour of the homeworkers. The homeworkers named on the enforcement found they were getting less work following the tribunal, and the work they were receiving was more laborious and less well paid compared to those workers who were not named on the enforcement notice. This is illegal under the NMW Act 1998, as workers should not suffer a detriment as a consequence of asserting their right to the minimum wage.

The company then said it could not give them more work unless they signed new contracts. The contracts included a clause saying that the company were under no obligation to offer work and the homeworkers were under no obligation to complete the work. For 7 weeks over Christmas 2002 the homeworkers who were on the enforcement notice received no work. After

seeking advice they signed these contracts and submitted them with a letter stating their grievances, which they hoped would protect their statutory rights. Homeworkers, with NGH and the TGWU, decided to fight for employee status and demonstrate they were suffering a detriment as a consequence of asserting their right to the minimum wage. The homeworkers filed claims for redundancy and unfair dismissal (employee rights) to employment tribunal. Despite strong evidence, including payment by the company of tax, national insurance, holiday, sick and maternity pay, the fact that the homeworkers did not specifically object to the mutuality clause forced on them under the threat of no work proved decisive - and on 14th October 2003 the tribunal decided that the homeworkers were not employees.

This case demonstrates how difficult it can be for homeworkers to establish their employment status and therefore gain the same rights and protection as employees. Tribunals make their decision on employment status based on a range of factors and it is very difficult to predict what decision they will make on any individual case.

The call to extend employment status

Homeworkers play an important and integral role in the production processes or service sector of much UK industry. The products that they make, assemble, process or package are used by many of us every day and are sold throughout the world in an increasingly global economy and, as such, they deserve better employment protection.

NGH is calling for the extension of all existing employment rights to all homeworkers who are not genuinely self-employed, i.e. running their own business. The existing rules on employment status are unclear and unjust and need to change.

Broad support

'We need action to stop workers being abused illegally, but we also need action to stop the abuse that is within the law. The rights that agency staff don't get. The rights that those

without a contract of employment don't get. The rights that homeworkers don't get.'

Brendan Barber, TUC General Secretary.

Other groups of workers, such as agency workers, temporary workers and many construction workers are also denied rights because the rules on employment status are unclear. Their representatives are also campaigning for a revision of the law on employment status, so that all workers can benefit from the full protection of employment rights.

The TUC established a Commission on Vulnerable Employment in 2007, a panel made up of employers, trade unionists and independent experts - who gathered extensive evidence on the causes and consequences of vulnerable employment. The Commission reported in May 2008 and made a number of recommendations on how the law should be amended to better protect vulnerable workers. The Commission concluded,

'It is wrong that 'workers' and the bogus self employed should be denied the legal protections enjoyed by 'employees' – employment rights in the UK are assigned using a complicated and outdated system that requires review.'

So far the government has argued that the extension of rights would harm labour market 'flexibility', and has therefore refused to extend protection to vulnerable groups, such as homeworkers. There is, however, growing pressure for the government to reconsider this position and grant employment status to all workers who are not genuinely self-employed.

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