
Employment, self-employment and intellectual property

You need someone for your business in a creative position – say, a web designer. You wonder whether it's best to employ them or engage them on a self-employed basis.

A recent case shows two things:

1. Whatever you decide, even if the worker agrees with you, a court or HMRC might disagree.
2. If you employ them, you'll own any intellectual property they create, e.g. copyright in designs. So although engaging them on a self-employed basis might have advantages for tax and employment rights, overall you might gain from employing them.

The case arose because Business 1 had entered into a contract with Business 2 for the services of a programmer. Business 2 was the programmer's service company. This structure was used because of its tax-advantages for both parties.

The dispute arose because both Business 1 and the programmer claimed ownership of certain copyright. Neither claimed that the programmer was employed, but the ownership of copyright was affected by employment status – intellectual property created within employment is owned by the employer.

The judge decided that the programmer was employed. This issue will always depend on the specific facts, but briefly – a person is probably an employee if they:

- are contractually obliged to personally do the work requested (rather than assign it to someone else), and
- work under the business's control as part of its workforce.

On the other hand, they're probably self-employed if:

- they're in business in their own right
- market their business
- accept your work when it suits them, and
- work for others.

This decision means that Business 1 owned all the copyright. It also means HMRC might demand more tax. In some circumstances, it would also mean that the worker might benefit from employment rights – if the person works directly for the business, then even if you both agree it's self-employment, a tribunal might decide they're an employee or a worker. That probably wouldn't happen in the example of this recent case because the programmer would probably be considered an agency worker, working via the service company.

Note that for tax or intellectual property purposes, there are two categories: self-employed and employed. For employment rights there's a third category, a worker, which is between the other two. The law is also applied by different tribunals, but similar tests apply.

What this means for you

There are risks in claiming that a worker is self-employed:

1. You might get a shock if HMRC thinks otherwise and claims more tax.
2. You might get a shock when the person claims employment rights you haven't budgeted

for (such as paid leave).
3. You won't own any intellectual property they create.

How we can help

To employ someone you could use our **Employment agreement**. If they're self-employed you could use our **Consultancy agreement**, which includes guidance on the issue of employment status. We also have a **Zero-hours worker agreement**, which also has similar guidance.

You better believe it: employee complaints and ulterior motives

Imagine one of your employees isn't performing as required. You approach the end of the performance management procedure and it looks like you're going to dismiss him. But then he alleges that one of your senior managers racially discriminated against him. You always take such accusations seriously, but here you think his motivation is to stall proceedings. What do you do?

Following a recent Employment Appeal Tribunal (EAT) case, to avoid a claim of victimisation, we'd suggest you take his complaint seriously and don't treat him badly for making it.

In this case, the claimant was a trainee surgeon employed by an NHS hospital. Various issues arose during his training leading to performance concerns. The claimant told his mentor that he thought he was subject to unfair treatment but didn't want to raise a formal complaint. Eventually, when it looked like he was going to be dismissed, he did make a formal complaint of race discrimination. Some facts of the case aren't clear, but it seems that because of his complaint the hospital didn't allow him to return to his previous department.

A couple of months later the claimant presented a claim at the Employment Tribunal. Part of this was a claim of race discrimination, which included a complaint of victimisation. In equality legislation, victimisation is defined as treating someone less favourably than someone else because they've done a 'protected act' – here, the act was making a complaint of race discrimination.

However, if an allegation is false **and** was made in *bad faith* it's not considered a 'protected act' and so no claim of victimisation could succeed. The tribunal found that the allegations were false. But that doesn't mean they were made in bad faith. So the question was – what is the meaning of bad faith?

The Employment Tribunal felt the claimant's belief in the allegations was unreasonable and that his motive for making the complaint was to delay or avoid the poor performance procedure. For that reason they decided that the complaint had been made in bad faith and so they dismissed his victimisation claim. The claimant appealed to the EAT.

The EAT decided that the only thing that mattered here was whether the claimant **believed** in the allegations – based on the Employment Tribunal's factual findings, the complaint had not been made in bad faith because he believed his claims, even if that belief was judged to have been unreasonable.

Taken together with the Employment Tribunal's other findings (not allowing him to return to his previous department), the EAT upheld his victimisation claim. That case will now return to the Employment Tribunal to consider how much the claimant should be compensated.

What this means for you

It's not unusual for employees facing poor performance procedures to make their own allegations at the last minute. They may have considered making the allegations sooner, but delayed so as not to rock the boat – as other procedures draw to a close, they feel they've nothing to lose.

This case only shows that you mustn't treat the employee badly because of the allegation. It doesn't mean you need to abandon all proceedings – you're justified in wanting the best employees. It won't always mean delaying the performance procedures – Acas's guide to discipline and grievances addresses this, and says that it depends on the circumstances (pages 22-24).

How we can help

Our **Employee handbook** contains a *Capability procedure and policy* and a *Grievance and disciplinary procedures policy*.

Long-term sickness: some work is better than no work

An employee's been off work sick for a long time. You sympathise, but it's a small business and you can't afford to continue like this any longer. Are you entitled to dismiss?

You could certainly consider dismissal – its fairness would depend on whether it would be reasonable. But as shown by a recent judgment, first you should consider reasonable adjustments, such as offering part-time work.

There are two potential claims that the employee could bring:

1. Unfair dismissal – for a dismissal to be fair it has to be for a potentially fair reason, which absence is, and has to be fair in all the circumstances. In this recent case, the employment tribunal decided that the dismissal was procedurally unfair because the employer hadn't obtained a medical report addressing whether the employee was capable of returning to work part time.
2. Unfavourable treatment because of something arising due to a disability.

Unfavourable treatment arising because of a disability, which is a type of disability discrimination, means that the employer has treated a disabled employee unfairly and that the treatment can't be justified as a 'proportionate means of achieving a legitimate aim'.

The employment tribunal dismissed the discrimination claim because, in their opinion, dismissal was a proportionate means of achieving a legitimate aim (of providing the best service to users). The Employment Appeal Tribunal disagreed with that – in that part of their judgment, the employment tribunal hadn't considered the possibility of part-time work. That meant that the tribunal hadn't properly considered whether there was a less harsh way for the employer to achieve its legitimate aim: part-time work might have been suitable for both parties.

Why was the discrimination claim relevant, if the tribunal had upheld the unfair dismissal claim? One reason is that unfair dismissal compensation awards are capped at the lower of 52 weeks' salary or, currently, £83,682. That limit doesn't apply to discrimination claims. Also, in discrimination claims the claimant will receive compensation for injury to feelings.

What this means for you

If an employee is unable to work for a long period due to sickness you may be entitled to dismiss them. However, you should also consider less drastic approaches first. For example, if they can't do the job because:

1. of chronic back pain, consider providing a specialised chair;

2. a condition means they can't do long shifts, consider shorter shifts with shorter gaps between;
3. they can't come to the office every day, consider whether working from home would be practical.

How we can help

Two **Employee handbook** policies mentioned in the article above are also relevant here, and our *Equal opportunities policy* addresses reasonable adjustments.