Supreme Court Autoclenz ruling confirms 'sham' contracts can't disguise employment

Contractors can't use 'sham' contracts to create a business-to-business relationship with a client when in reality the relationship is one of employment. The **Supreme Court's Autoclenz v Belcher ruling** has confirmed that 20 car valeters were actually employees, and not self-employed contractors, as their written contracts suggested.

In dismissing the appeal by Autoclenz, Supreme Court Judge Lord Clarke, together with a panel of four other judges, referred back to the original Employment Tribunal in which tribunal Judge Foxwell said, "I do not think it can be said that [the valeters] are businessmen in business on their own account."

Lord Clarke further highlighted that the original tribunal found the valeters were subject to control and direction by Autoclenz employees. Also, they had no control over their hours or deductions made by Autoclenz from their pay for the cost of insurance and materials.

In 2007, the valeters were issued with a contractual letter that dealt with two key areas – **substitution** and **mutuality of obligation** (MOO) – that can help prove workers are genuine contractors, rather than disguised employees.

The letter included a substitution clause, allowing the valeters to offer an alternative person to do the work. It also stated that there was no mutuality in the relationship; in other words, the valeters would not be obliged to complete any work offered by Autoclenz, and Autoclenz was not obliged to offer any work. However, if they wanted to continue working for Autoclenz, the valeters were obliged to sign the new document.

Despite the wording of the agreement, the Supreme Court found that the original tribunal's evidence of the real relationship between the valeters and Autoclenz was "findings of fact which Autoclenz cannot sensibly challenge in this Court".

And applying case law developed under contract law, Lord Clarke said that the original Employment Tribunal was "entitled to hold that the documents did not reflect the true agreement between the parties."

Tellingly, the ruling cited the Ready Mixed Concrete case from 1968, in which Judge MacKenna laid down the three conditions which have subsequently been used in **IR35 cases** to determine whether a **contract of service** or employment exists.

What this case reinforces is that contractors cannot rely on having an 'IR35 friendly' contract as their only defence against an IR35 enquiry by HMRC, as this may be correctly identified in a court as a 'sham' contract.

The courts will always examine the evidence concerning the real relationship between a contractor and their client. If it is one of employment and not a genuine business-to-business relationship, the courts will rule accordingly.

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