Improving health and safety for freelancers: the case for greater statutory protection for workers

The employment market in the UK has changed dramatically from the 1970s model of a male bread winner with 'a job for life' to the expectation that employees will work for different employers in the course of their career and a wealth of new employment options including part-time contracts, fixed term contracts, zero hours contracts and job shares. However, there has also been a less prominent, but arguably more significant change in the employment market: the rise of new type of freelancer, the 'team freelancer'. Such a person is registered as self employed with the Inland Revenue but is often engaged on work which would previously have been done by employees. Whereas traditional freelancers such as barristers or consultants usually work alone, these new freelancers work in groups as if they were employees. This shift is particularly prominent in creative industries such as theatre, film and television. The shift towards freelance work has often occurred as a result of the desire for increased choice. In television, the movement itself was known as 'The Producer's Choice'. At first glance, the movement would seem to benefit both groups: the old employer, now the client, can now choose individuals based on a belief in their creative abilities whilst avoiding the risks associated with becoming an employer and the freelancer gains the freedom to work on projects of their choice. However, this shift has important implications for the health and safety of freelancers when they are working in groups, which need to be resolved by a change in the law. These new freelancers appear to have resigned the rights of an employee, but they continue to work in situations where they cannot effectively exercise the rights of one who is self-employed.

The legal difficulties which arise from freelancers working in groups were

recently illustrated in the personal injury case of *Stuart Adam Jones v BBC (1), JC & EM Orbach (2), Bob Bazalgette (3) & Jonathan Rees (4) [2007]*.[1] Mr Jones was a sound recordist who was working as a freelancer for the BBC during filming session at the Orbach farm. At the time of the accident, Mr Jones was attached via a sound cable to the camera operated by Mr Rees, the freelance cameraman. During the shoot, Mr Rees led Mr Jones underneath a windmill which was being lowered; unfortunately, a part of the windmill fell off and hit Mr Jones, rendering him paraplegic. The BBC originally asserted that it was not liable for the injuries sustained by Mr Jones as he was self employed, nor for any negligence on the part of the producer, Miss Thomas, since she was also a freelancer. The case proceeded entirely on negligence alone as Mr Jones abandoned any attempt to rely on statutory health and safety provisions early in the case. Perhaps surprisingly, the judge found that the BBC had 65% liability with 10% going to Mr Rees and remaining 25% to the Orbach's as the owners of the land. The judgement in this case is complex; however, there are two important factors referred to by the judge, which underline the legal difficulties with freelancers. On one side, the BBC was forced to accept liability for Miss Thomas' actions since BBC internal guidance identified her as the person responsible for health and safety onsite. The judge found that since the freelancers were all engaged on work for the BBC and under the control of the BBC, they were therefore 'all employees of the BBC for health and safety purposes' (paragraph 101). He went so far as to describe the BBC's attitude to the health and safety of its freelancers as 'both ambivalent and grudging' (paragraph 86). However, on the other

[1] Stuart Adam Jones v BBC (1), JC & EM Orbach (2), Bob Bazalgette (3) & Jonathan Rees (4) [2007] LTL 28/8/2007 (unreported elsewhere).

side, the apportionment of liability to Mr Rees, suggests he was seen to be self employed as the BBC did not assume vicarious liability as if he was an employee.

Taking the BBC's perspective first, why can freelancers be seen as self-employed rather than casual employees or employees with a series of very short employment contracts? The simple answer is that freelancers generally assert that they are self employed and the courts have upheld this position, at least for tax purposes. In the case of *Hall (Inspector of Taxes) v Lorimer [1992],* Mr Lorimer was a freelance vision mixer who worked for periods of up to few days at a time for a variety of programme makers.[2] When his registration under Schedule D as a self-employed businessman was challenged by the Inland Revenue, the judge upheld Mr Lorimer's position that he was self-employed since although he did not have a stake in the profit of the programme, he did have the opportunity to profit from his success as a vision mixer insofar as gaining further engagements. The judge stated in his deliberation that in accordance with the test for freelancers should be if they were 'in business on their own account.'. This test was originally formulated by Cooke J. in the *Market Investigations Ltd v Minister of Social Security[1969]*.[3] The debate in that case focussed on whether the interviewer, Mrs. Irving, who carried out surveys for Market Investigations, was held to be employed on contracts for service or for services. The judge held that although she had discretion over the timing of her work, she had no financial stake in it and it was therefore a contract for service. Mr Lorimer's position can therefore be distinguished from that of Mrs Irving, at least in financial terms, sufficient for the purposes of taxation.

One legal problem with this financial test is that The Management of Health and Safety at Work Regulations 1999 (No.3242), part (2) states:

[2] Hall (Inspector of Taxes) v Lorimer [1992] 1 W.L.R. 939

'Every self-employed person shall make a suitable and sufficient assessment of—

(a) the risks to his own health and safety to which he is exposed whilst he is at work; and (b) the risks to the health and safety of persons not in his employment arising out of or in connection with the conduct by him of his undertaking'[4]

The risk assessment does not have to be recorded, where a company has less than five employees. The existence of an assessment of risks by a sole trader can be inferred from later actions. In a simple hypothetical example, if a self employed painter visits a house, looks at the height of the upstairs windows and quotes for the re-painting of the exterior window frames to include the hire of an access tower, it is clear that a risk assessment has taken place. However, many of the new freelancers are frequently hired by the day and do not quote for the job. For example, in the corporate events industry, a professional rigger, lighting or sound technician frequently would not see any of the proposed plans until the first day of the installation at the venue. Such freelancers work as a team to install equipment which has been supplied by the client company, using a risk assessment which has been drafted by the client company and approved in advance by the venue. Without any involvement in the planning stages, the freelancer cannot possibly make an effective assessment of the dangers. Furthermore, it is surely a fallacy to suggest that a team of ten to twelve people can be undertaking separate risk assessments and discussing them whilst apparently working as a team. The problem here is that based on a test of financial risk and associated opportunity to profit, these individuals are self employed; however, they are operating as employees when at work. Furthermore, they are placed in a much greater position of risk than Mr Lorimer, since he was working within a relatively secure studio

[3] Market Investigations Ltd v Minister of Social Security [1969] 2 Q. B. 173, 184-185

environment, whereas events freelancers are frequently working at height, installing three phase power and engaging in heavy lifting, within a very tight time scale. In the event of an accident in this working environment, it is difficult to see how it could be morally just that freelancer could have no claim beyond a duty of care at common law since it would seem right that the client should bear the responsibility for harm to the freelancers, given that they designed and quoted the job as well as doing the risk assessment.

This argument suggests that it is control on-site that should be the key test for liability of the client for a freelancer's actions, at least in terms of health and safety. In the case of *(1) A M Baird (2) Daniel McCarthy (3) Denis McCarthy (4) McDonough v Byrne Brothers (Formwork) Ltd [2002]* individuals who had been hired by the company to work as labour only sub-contractors and who were specifically described as self employed on their job contracts, were found to not to be self employed since they were subordinate to the person for whom they were working and thus did not have control over the work.[5] This test was used similarly by the judge in *Harvey Jennings v Forestry Commission [2008]* to refute allegations of an employee relationship. [6] In this case, the Forestry Commission appealed against findings of liability in relation to an injury suffered by J in course of the completion of a contract to install fencing. J alleged that he was employed by the Forestry Commission and they therefore owed him a duty of care as the relationship was that of employer and employee. The Court of Appeal held that this was not the case since J clearly had control over the operation, used his own vehicle and supplied his own materials. Therefore, control can also be the deciding factor in an alleged employer to

[4] The Management of Health and Safety at Work Regulations 1999 (No.3242), part (2)

[5] (1) A M Baird (2) Daniel McCarthy (3) Denis McCarthy (4) McDonough v Byrne Brothers (Formwork) Ltd [2002] IRLR 96

employee relationship.

The case of *Baird & others v Byrne Brothers* also raises a further complication, namely that of the term 'worker'. This case actually concerned eligibility for holiday pay over the Christmas break under The Working Time Regulations 1998.[7] In section 1, (2), workers are defined as individuals who have entered into either:

(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;

In this case, none of the men were found to be employees due to the lack of mutual obligation but all of men were workers. This situation appears to be very similar to the position of many "team freelancers" in that they also have no mutual obligations but they work as a team under the control of another person. Further evidence of the efficacy of this definition of worker given above is provided by the adoption of the term in the Construction (Design and Management) Regulations 2007. [8] It has great application in this area since construction sites have a tradition of freelance working combined with a high potential for accident. The term worker would seem to be a broader definition than employee and therefore has much potential to resolve some of the difficulties of classification, if introduced into the Health and Safety at Work Act.

How would introducing the idea of workers into the Act operate in practice?

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[6] Harvey Jennings v Forestry Commission [2008] EWCA Civ 581

[7] The Working Time Regulations [1998] S I No. 1833

[8] Construction (Design and Management) Regulations 2007 No. 320

Workers would gain most, but not all of the rights of employees. For instance, both groups would be entitled to the rights under (2) (a)

> 'the provision and maintenance of plant and systems of work that are, so far as is reasonably practicable, safe and without risks to health'

This would provide a statutory basis for claims based upon an absence of a safe system of work. This modification would have provided a basis for Mr Jones to claim a breach of statutory duty against the BBC, as represented by Miss Thomas, in the case referred to earlier.[9] However, only employees would have an exemption from charges for the cost for 'special requirements' such as any PPE, which was required to complete the work. Such a modification would be required since workers who are not employees have no long-term financial bond with the employer and therefore it would be unreasonable to expect the employer to invest in them. This would not be a license for workers to operate without PPE since article (2) (a) would oblige the employer to ensure that all workers, whether employees or not, used a safe system of work.

The primary advantage of this reform to the employer would be the clarification of the extent of their liability. Under the present system, a company can conclude a contract for services with an individual, believing it to limit their liabilities, only to discover that the courts deem the individual to have been an employee for the purposes of health and safety. Confusion would be significantly reduced if categories relating to financial risk and taxation were not regarded as interchangeable with categories of health and safety responsibilities. This is a particular problem for small companies who often make a disproportionately high use of freelancers but who have no in-house legal advice.

[9] Stuart Adam Jones v BBC (1), JC & EM Orbach (2), Bob Bazalgette (3) & Jonathan Rees (4) [2007] LTL 28/8/2007 (unreported elsewhere).

One significant counter-argument to the position that provision should be made for workers in the Health and Safety at Work Act is that freelancers, especially those who have been employees, should be able to identify the problems within their existing contracts and negotiate a fair compromise. However, whilst it is self-evident that a freelancer is not obliged to work for any particular client, their freedom of contract becomes rather illusory if all of the clients are offering very similar terms. This situation is analogous to the position during a severe recession when jobs are in very short supply and therefore employers can negotiate terms which are unfavourable to the employee. The Health and Safety at Work Act creates responsibilities from which an employer cannot derogate in order to protect employees, since an employment contract is not made between two equal partners. . By analogy, the state should impose some constraints upon freelance contracts, where the freelancer will work under the control of the client as if they were an employer, in order to protect the weaker party.

The second advantage of this reform to all parties would be an improvement in the clarity of the control arrangements in the work environment. There would be less distinction between those self employed persons who are responsible for their own safe working practices but work alongside employees and employees who must conform to the employers' safe working practices. Such a measure would also support the implementation of European Recommendation 'Concerning the improvement of the protection of the health and safety at work of self-employed workers'. [10] Paragraph (4) of the Recommendation stresses the importance of 'protection of the health and safety of both self-employed workers and of other

[10] Council Recommendation 2003/134/EC concerning the improvement of the protection of the health and safety at work of self-employed workers OJ L 53, 28.2.2003, p. 45-46

persons working at the same workplace.' Whilst, self employed persons who are running a business undertaking would not be classified as workers since they would be in a client relationship, the re-classification of some of those people currently seen as exempt from the employers' direct control would improve safety. Additionally, where experienced freelancers are in short supply, they can also dictate the terms of the engagement. This can make it particularly difficult to implement newer, safer working practices where freelancer workers do not wish to change. It would be very regrettable to see a situation where a company risk assessment required that a freelancer used PPE, the freelancer chose not to do so, the company believed that the freelancer was self employed and so able to decide risks themselves, only for the court in the event of an accident, to categorise the freelancer as an employee, thus making the company liable.

In conclusion, the Health and Safety at Work Act was originally intended to provide greater protection for employees whilst obligating employers to assess their own working practices and thus reducing the burden of direct regulation of industry through Parliament. After thirty years, the employment market has changed and there are no longer clear divisions between employers, employees and the self employed. In particular, a new division has grown up in case law: freelancers may be classified as self-employed for tax purposes based on the test of 'whose business?'; alternatively, they may be classified as employed for health and safety purposes based on a test of control of the work activity. As a result, the Health and Safety at Work Act needs to be updated by the inclusion of the category of worker to take account of individuals who take financial risks as skilled self-employed persons, and should therefore be taxed accordingly, but whose daily working practice is closer to that of an employee and who accordingly require additional protection in health and safety

law. This will ensure that the Health and Safety at Work Act is effective in its avowed aim of 'securing the health, safety and welfare of persons at work' into the future.[11]

Word count = 2999

[11] Health and Safety at Work Act (1974) Part 1 (1) a