

## When is a casual not a casual?

Despite having no legal meaning, the term has been used in journalism for generations – but increasingly hides a multitude of sins regarding employment status that mothers and fathers of chapels (M/FoCs) end up having to deal with.

The biggest of these is whether ‘casuals’ are genuinely freelance or whether they are entitled to employment rights and protection, including paid holiday.

M/FoCs may be asked for advice on employment rights, especially if someone’s hours are reduced or work comes to an end (for whatever reason).

And, in the UK, those rights depend on someone’s employment status – and the law recognises three categories: employee, worker and self-employed.

The NUJ has members who are each of these – depending on how they work – and many have found the only way to find out has been to go to an employment tribunal, supported by the union. The results have included large backdated payments.

The ‘gig economy’ has also seen a spread of false self-employment/freelancing and the undermining of rights at work, highlighted by a string of recent employment tribunal cases, so being able to advise members is even more important than ever.

In the UK, employees and workers are entitled to paid holiday of 5.6 weeks a year, equivalent to 28 days for someone on a five-day week but NUJ research in 2019 discovered that 88 per cent of freelancers did not get paid holiday, as organisations try to rely on labelling them as ‘casuals’ or issuing standard contracts that label people as self-employed or independent contractors.

And, paid holiday is the greatest loss when that happens.

## Termly advice

Work arrangements and labels can vary greatly – with terms such as casual, contributor, contractor, umbrella companies, personal service companies/limited liability companies, zero hours contracts, homeworkers, part-time workers, temporary (fixed-term) employees, interns, apprentices and apprenticeship.

However, basic employment rights depend on whether someone is an employee, a worker or self-employed.

## Rights – and wrongs

The main category **employees** - have protection against unfair dismissal; redundancy pay and rights (both after 2 years continuous service); statutory minimum notice; paid holidays; statutory sick pay;

maternity/parental leave and pay rights; rest breaks; pension auto-enrolment; protection against unlawful pay deductions; protection against discrimination; right to access statutory recognition procedure to have terms negotiated via collective bargaining; protection from victimisation for being a union member or engaging in union activities at an appropriate time; protection in business transfers (TUPE).

The main rights **workers** are entitled to are National Minimum Wage; paid holidays (5.6 weeks a year based on 5 days a week); rest breaks; pension auto-enrolment; protection against unlawful pay deductions; protection against discrimination; reasonable adjustments; right to access statutory recognition procedure to have terms negotiated via collective bargaining; protection from victimisation for being a union member or engaging in union activities at an appropriate time.

**Self-employed (freelances)** do, in some situations, have protection against discrimination under equality legislation (Equality Act 2010), covering the 'protected characteristics' of sex or gender; age; disability; race; religion or belief; gender reassignment; pregnancy and maternity; marriage or civil partnership, sexual orientation.

### **What's the difference?**

The distinction between employees, workers and the self-employed is ambiguous and can be difficult to distinguish.

An **employee** is someone who has entered into or works under a contract of employment, which means a contract of service or as an apprentice.

A **worker** is someone who has entered into a contract of employment or any other contract (which doesn't have to be in writing) whereby they do the work personally, and are not 'in business', either as a sole trader or with others.

A **self-employed person** is an individual who is genuinely free to decide when, whether, with whom and on what terms to enter into each new contract or assignment. They are effectively in business on their own account, selling their services (or goods) to other businesses or their own clients/customers, taking the business risk of failure and the financial rewards of success, sometimes employment staff or sub-contracting to others.

Confusion comes because employment law has these three categories while UK tax rules only have two – 'employed' or 'self-employed'. (This is why we often hear the term 'employed for tax purposes').

### **How do employment tribunals reach their decision?**

A legal case from 1968 – Ready Mixed Concrete v Minister of Pensions and National Insurance – provides a starting point, that there is no single decisive factor, that employment status is fact specific and each case must be decided individually.

Regardless of what a contract says, or the organisation's terminology, tribunals will also consider the unequal bargaining power between an individual and the organisation and how that operates in practice to work out the true agreement between them.

Tribunals will first look to three **irreducible minimum** factors in doing this.

**Mutuality of obligation** is whether the organisation is obliged to provide the work, and the individual is obliged to carry it out.

**Personal service** requires an individual to do the work personally rather than allowing them to arrange a substitute at any time.

Whether **sufficient degree of control** is present and does the organisation have the power to tell the individual when, where and how to perform agreed tasks, regardless of how close supervision may be.

Tribunals will then consider **other factors** – such as any written contract; does it reflect the reality; what the organisation and individual intended; how much the person is integrated into the organisation; relative bargaining powers; what equipment does the company supply, what equipment does the individual supply; tax and national insurance arrangements; (set) hours and how these are agreed; whether individuals are covered by the organisation's policies and procedures; whether individuals work for other clients; how many clients they have; whether they operate through limited or personal service companies; who takes the financial risks and VAT registration; does the individual have to get permission to take holiday or can they just tell the company when they'll be away; can the individual arrange a substitute if s/he cannot do the work for some reason, if so, must that substitute be from a company approved list, approved on an ad hoc basis, is no company permission needed at all, or would the company itself have to make the arrangements to cover an individual's absence.

### **Employee or Worker?**

Someone could be an employee or worker if they:

- work under any contract (even if it is not in writing) to do the work personally
- work mostly for one organisation (but it can also include those who work for more than one organisation)
- do shifts for an organisation
- depend to some extent economically or financially on an organisation
- have their work controlled by someone (as in what they do, how they do it, where and when)
- are closer than an 'arm's length' relationship and are not trading as a business.

### **Chapel impact**

M/FoCs may be asked for advice on employment rights, especially if someone's hours are reduced or work comes to an end (for whatever reason).

Workers are also entitled to paid holiday of 5.6 weeks a year, equivalent to 28 days for someone on a five-day week.

Members who take holiday pay claims – with NUJ support – could receive large backdated payments.

Chapels should also remember that they can accompany workers to disciplinary and grievance hearings and represent workers and ensure that they are included in voluntary recognition agreements and collective bargaining – and that both employees and workers can apply for statutory recognition.

Employees and workers can engage in lawful industrial action, including strikes where there is a trade dispute.

Industrial action law is complicated and formal procedures must be complied with to enable those taking the action to have protection from dismissal by the company. Those who are self-employed would not have protection.

Reps and M/FoCs can be crucial in ensuring that members lodge claims within the legal time limits.

NUJ Officials can support M/FoCs – and can arrange for members to have confidential access to external solicitors, including from Thompsons at fortnightly legal surgeries, or from our in-house legal team.

If cases are not resolved quickly, most employment tribunal claims must be lodged within three months less one day from the date of the action sparking the complaint. The law also now requires that ACAS Early Conciliation is started, but this effectively stops the clock as it can take as long as a month and can be extended a further two weeks. There is generally a further month then in which a tribunal claim can be lodged. (If in doubt about time limits, please contact your NUJ Official.)

Equal pay claims can be submitted at any time while someone is in the job or within six months of leaving or of the ending of a contract with the company and starting a new one with the same company, without having left.

### **Membership responsibilities**

Everyone in the NUJ benefits from high standards of journalism, defending the security of work and bargaining for better pay.

The union expects freelances to support staff members taking industrial action by not agreeing or contracting to undertake work when they know that would undermine that action. Freelances are asked not to agree to cover for those who are taking or going to be industrial action.

Chapels should also have agreements with freelance members giving them voting rights and full participation in chapel activities. A freelance representative should also be invited to take part in talking with employers over freelance pay and conditions.