

# National Minimum Wage Legal update

17 May 2018


# Case law trends

## Section 54 National Minimum Wage Act 1998

- “Employee” = works under a contract of employment
- “Worker” = any other contract to
  - perform work/services personally
  - for another party whose status is not that of client/customer of profession/business

Cut to the “gig economy”...

Uber – “workers” for NMW, Working Time Regs

- Key factors: control, degree of integration, no right of substitution, no bargaining power with end-user
  - “Working” for NMW when logged on, ready and willing to accept fares and in their “patch”
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## Citysprint - “workers” for Working Time Regs

- Key factors: lack of autonomy, degree of integration


## BUT – Deliveroo Central Arbitration Court decision

- Not “workers” for trade union recognition
  - Key factor: unfettered right of substitution
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## **Addison Lee (cycle)** – “worker” for NMW and Working Time Regs

- Key factor: contract vs reality, lack of autonomy, requirement for personal service

## **Addison Lee (drivers)** – “worker” for NMW and Working Time Regs

- Key factor: personal service, car purchase from AL, whole of income earned from AL
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## Implications?

- vet your contractual arrangements carefully
- theory versus reality – increasing willingness to look behind the contract
- (for now) genuine right of substitution is strong indicator away from worker status
- for employment law purposes, possible to be both a worker and “self-employed”
- relevant for NMW, holiday pay and WTR rights

# Enforcement routes



## Section 19C NMW Act

- Appeals against HMRC notice of underpayment to Industrial Tribunal
  - 28 days within date of HMRC's notice
  - No prescribed format
  - Tribunal has power to rescind HMRC's notice, or order rectification
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## Unlawful deduction from wages claim

- Article 45 Employment Rights (NI) Order 1996
- 3 month time limit (from the date of the deduction) or last in series of deductions
- No two year limitation period (as in GB, from July 2015)
- ET1 form lodged in Industrial Tribunal (no fee)
- “Employer” to defend within 28 days


## Unlawful deduction from wages claim

- Presumed that worker not paid NMW unless “employer” can prove to contrary (s. 28 NMW Act)
- Anti-avoidance provisions (s.49 NMW Act)
- Special protection against detriment and dismissal
- £183,773.53 – largest ever NMW unlawful deductions award?! *Tirkey v Chandok*

## Breach of contract claims – **Industrial Tribunal**

- Only if employment has ended
- Jurisdiction up to £25,000
- 3 months time limit (from termination)

## Breach of contract claims – **County Court**

- Employees and workers
  - Employment/engagement can be ongoing
  - 6 years after the breach/underpayment
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