

# 你是僱員還是自僱人士？

## Are you an employee or a self-employed person?

勞工處 Labour Department

**受**僱與自僱的問題，近來在社會上引起了廣泛關注和討論。就業人士是僱員還是自僱人士，並非取決於職銜或合約，而須視乎該名人士與協約的另一方的實質關係。縱使雙方已簽署自僱合約，但假如雙方實質上存在僱傭關係，則僱主仍須履行《僱傭條例》、《僱員補償條例》及其他相關法例的責任。

### 不能逃避的責任

數年前有一個法庭案件，一名銷售員與被告公司簽署了一份自僱合約，每日報酬為港幣三百元另加佣金，在公司安排下到指定百貨公司銷售公司的產品。此外，公司每月按銷售員的收入支付百分之二點五給她作強積金供款。

在合約終止後，銷售員向公司追討代通知金、有薪年假、法定假日薪酬及遣散費。勞資審裁處基於多種因素，裁定銷售員得直，這些因素包括每日底薪為港幣三百元；公司負責安排銷售點及提供貨品；銷售員無須出資或承擔商業風險，也不能聘請幫工。公司不服裁決，向高等法院上訴，但被駁回。

在另一個類似的法庭案件中，一名木工匠遭被告公司拖欠四個月薪金，於是在合約終止後向公司追討欠薪及遣散費或長期服務金。公司則稱木工匠為獨立承辦商而並非其僱員，拒絕支付遣散費或長期服務金。

高等法院裁定該木工匠為公司的僱員，理由包括：公司對木工匠工作的品質有所監控；木工匠無法基於損益的考慮而控制成本或制定價錢；木工匠從未自行僱用幫工，也從未獲告知可以那樣做；所有材料和工具都由公司提供；以及公司曾多次替木工匠申報稅項。因此，法院裁定公司須向木工匠支付欠薪及遣散費。

**R**ecently, there has been widespread public concern and discussion about the issue of employment versus self-employment. **In determining whether a person is an employee or a self-employed person, it is not so much the title of the job or the contract as the actual relationship between both parties to the contract that matters. Even if there is in essence an employer-employee relationship between both parties to a self-employment contract, the employer still needs to fulfil his obligations under the Employment Ordinance, the Employees' Compensation Ordinance and other relevant legislation.**

### Obligations that cannot be shirked

In a court case several years ago, a saleslady signed a self-employment contract with the defendant company. Her remuneration was HK\$300 per day plus commission. She was assigned to sell products of the company in designated department stores. In addition, the company made contributions equivalent to 2.5% of her earnings to a Mandatory Provident Fund (MPF) scheme.

Upon termination of contract, the saleslady lodged claims against the company for wages in lieu of notice, annual leave pay, statutory holiday pay and severance payment. The Labour Tribunal ruled in favour of her on such grounds as that the basic salary was HK\$300 per day; the company was responsible for arranging sales venues and providing products; and the saleslady did not have to make any investment or bear any financial risks, nor was she allowed to hire helpers. The company appealed against the ruling to the High Court but the appeal was dismissed.

In another similar court case, the defendant company failed to pay a woodworker wages for four months. He lodged claims against the company for wage arrears and severance payment or long service payment upon termination of contract. The company, however, alleged that the woodworker was an independent contractor rather than its employee, and refused to pay severance payment or long service payment.

The High Court ruled that the woodworker was an employee of the company on the following grounds: the company exercised control over the work quality of the woodworker; the woodworker could not control the cost or set the price based on considerations of profit or loss; the woodworker had never hired workers on his own, nor had he ever been told that he could do so; all materials and equipment were provided by the company; and the company filed tax returns in respect of the woodworker on numerous occa-

## 僱員？自僱人士？

目前並沒有不容置疑的單一方法可區分僱員與自僱人士，不同行業或公司可能有不同習慣或行業特性，要分辨僱員與自僱人士需要考慮所有相關因素，而某個因素有多重要也沒有定律。下表列出一些參考例子：

| 僱員通常擁有的權利和責任<br>An employee's general rights and obligations   | 自僱人士或判頭通常擁有的權利和責任<br>A self-employed person's or contractor's general rights and obligations                |
|--|---|
| 工具由僱主提供<br>work equipment provided by the employer   | 自備工具<br>provides his own work equipment   |
| 無須承擔業務虧損風險<br>no need to bear the risks of business loss   | 需要承擔業務虧損風險<br>bears the risks of business loss  |
| 無權自行聘請幫工<br>no right to hire helpers   | 有權自行聘請幫工<br>has a right to hire helpers   |
| 僱員補償保險由僱主投購<br>employees' compensation insurance provided by the employer  | 需要自行安排保險<br>responsible for his own insurance   |
| 工作範圍、程序、出勤和工作時間的控制權主要在於僱主<br>workplace, work procedures, attendance and working hours largely controlled by the employer | 對工作範圍、程序、出勤和工作時間擁有較大控制權<br>workplace, work procedures, attendance and working hours largely self-controlled |
| 僱主會向稅務局申報僱員的薪俸和安排強積金供款<br>income tax return filed by and MPF scheme contributions made by the employer                   | 自行處理稅務和強積金供款<br>responsible for his own taxation matters and MPF scheme contributions                       |

## 僱主要注意的事項

僱主不可以單方面將僱員轉為自僱人士或判頭，否則僱員可根據《僱傭條例》中有關不合理更改僱傭合約條款的規定，向僱主提出補償申索。僱員也可根據普通法，視有關轉變為法律構成解僱(constructive dismissal)，向僱主追討解僱補償。

此外，即使在合約中僱主聲稱僱員為自僱人士或判頭，或僱員自稱為自僱人士，但如果雙方實質上存在僱傭關係，則僱主仍須履行他在有關法例下的責任，違例的僱主可被檢控。

如讀者希望瞭解更多有關僱員與自僱人士或判頭的分別，可致電2717-1771，或親臨勞工處勞資關係科查詢。 

sions. Hence, the company was ordered to pay arrears of wages and severance payment to the woodworker.

## Employees? Self-employed persons?

There is no single conclusive test to differentiate an employee from a self-employed person as different industries and companies may have different

customs or trade practices. All relevant factors have to be taken into account in making a distinction between an employee and a self-employed person. There is also no strict rule as to how important an individual factor should be. The table above lists some examples for reference.

## Points to note for employers

**An employer should not unilaterally change the status of his employee to a self-employed person or contractor. Otherwise, the employee may lodge a claim for remedies against his employer on the grounds of unreasonable variation of the terms of the employment contract under the Employment Ordinance. The employee may also make a claim for termination compensation against his employer on the grounds of constructive dismissal under common law.**

In addition, if in essence there exists an employer-employee relationship, the employer is still required to fulfil his obligations under the relevant legislation even though he calls his worker a self-employed person or contractor, or his worker calls himself a self-employed person in the contract. Employers who violate the law will be prosecuted.

For details about the differences between an employee and a self-employed person or contractor, please call 2717-1771 or make enquiries in person to the Labour Relations Division of the Labour Department. 