

Contractor loses IR35 appeal - substitution clause viewed as “window dressing”

The Revenue has overturned an [IR35](#) appeal by Cardiff based Alternative Book Company Ltd. on the grounds that the contractor, Keith Shepherd, had a ‘contract of service’ with his client and the relationship was overwhelmingly of employment.

Contracts No Protection

Shepherd’s defence hinged on a range of arguments, including the [right of substitution](#). However, a substitution clause was not introduced to the contract and signed by the client until several years after the contractor started work; original contracts stated that Shepherd would be providing the services personally, not under a ‘contract for services’.

In addition, when giving evidence the client made it clear that he would not accept a substitute and that Shepherd, not his service company the Alternative Book Company, was interviewed for the role. No substitute was offered during the seven years Shepherd spent with the client, and in the Special Commissioner’s view, substitution would not be possible as Shepherd was the only employee of the Alternative Publishing Company.

According to the Special Commissioner, this did not give Shepherd an ‘unfettered right’ for substitution, so was excluded from the hypothetical contract. Indeed, the Special Commissioner referred to the substitution clause as ‘window dressing’.

Control

The contracts, even when amended in later years, did not reflect Shepherd’s real working relationship and he was essentially controlled by the client. When the evidence was examined, the key factors of [control](#) in this case included:

- o Shepherd supplied his services exclusively to the client
- o Four weeks notice was required to terminate the contract
- o Prior authorisation was required for overtime and holidays
- o Control of Shepherd by the client was on the same basis as for full-time employees
- o Shepherd accepted whatever work was available at any given time.

When questioned, the client’s version of the working relationship differed markedly from how the contractor, Shepherd, described how things worked on a daily basis. Shepherd claimed that he did not need permission for absences, but his contract during the period under investigation contradicted this.

Despite claims that he had autonomy and was not controlled by the client, the reality was that Shepherd reported regularly to project managers within the business and accepted any work that filled his average 36 hours per week.

According to the Special Commissioners, the evidence of control was reinforced by the fact that Shepherd worked on-site, used the client’s equipment and his hours matched those of permanent employees working to flexitime rules.

Not in Business on his Own Account

Although Shepherd’s defence highlighted his work for another client and on a gaming software business, the Special Commissioner found “no compelling evidence that Mr Shepherd was in business on his own account.” During the period he worked for the client, Shepherd:

- o Was not exposed to significant financial risk
- o Billed based on hours worked, not specific project deliverables
- o Made little investment in his own equipment
- o Showed no evidence of additional marketing for other work.

So Shepherd fell foul of a number of classic IR35 pitfalls, such as failing to include the right for substitution in his contract from the outset, being controlled by the client and failing to maintain a contract that reflected the true working relationship.

Lessons learned

“ Once again this highlights the importance of ensuring that the contracts reflect the real relationship with the client. ”

John Kell, Professional Contractors Group

Have Your Say...

“ I worked at a client once who wanted me to use their in house holiday booking system to request time off. I told them that if they did this they would be treating contractors like employees...”

Pete - London Contractor

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This case, although unlikely to provide us with any major landmark case law, does pose some interesting questions. This is particularly true as the Special Commissioner, in his judgements, refuted evidence that has won cases in the past. Why, for example, was the termination clause and the notice period considered to be a controlling factor? And why did the initial interview indicate control? After all, every contractor has to interview with new clients to win business.

It highlights the importance of clarifying the relationship with the client right from the start. Had Shepherd's right of substitution been genuine and in his initial contracts and had he managed the client's expectations regarding control, hours, leave of absence and the work he would accept, it is possible he may not have lost this appeal. The other important lesson is that IR35 is not a paper exercise only, and the contracts must reflect the real situation.

ContractorCalculator will examine the issues arising from this case in greater detail in forthcoming articles.

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Join the debate...

Do you have to ask your client for permission to take time off?

Having to ask permission for time off can be an indication that you are controlled by the client, which is one of the main factors in an IR35 challenge.



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