

Should contractors inside IR35 have employment rights?

Suppose the Revenue claims that you are inside [IR35](#) on a given contract? You can probably fight it, and the Revenue does lose many of these cases. But in case you can't, you'll have to pay back tax, national insurance contributions, and interest and penalties on your earnings. The [financial impact of IR35](#) is massive for contractors, and this is something you really want to avoid.

You Pay Expenses And Extra Tax

Paradoxically, you will be paying all this tax without ever having received any of the benefits that employees get. No holiday pay. No sickness benefit. No 'personal days.' You are expected to take care of all your insurances yourself. You pay a much greater part of your own expenses than do employees.

And when the Revenue comes calling six years after you had the contract--for the review period is a full six years long--you will have spent all that extra money, but you'll still have to pay the same tax as employees who didn't have to.

Can You Claim Rights?

Now, suppose you wanted to claim employee rights, which is done on a regular basis through the Employment Appeals Tribunal. You want to take your case to court and get all those benefits that you've missed out on?

"You'd be out of luck," says Theresa Mimmagh, a lawyer (senior consultant) with the Hove-based legal consultancy [Lawspeed](#) which specialises in recruitment and contractor affairs. "You can only go to the Employment Appeals Tribunal within three months of the end of your contract to demand employee rights but HMRC can wait six years to claim that you are actually within IR35."

Bear in mind that a case with the Employment Appeals Tribunal may take two to three years to decide. And while you don't actually need a lawyer to go before the Tribunal, you probably don't have much chance without one in this complicated area of legislation. So you have to decide right after your contract is up if you intend to make this effort or not.

How Did This Happen?

This brutal absurdity came about because the Government never completed the IR35 legislation as it promised to. As Bill Dodwell, a tax consultant with the London-based firm [Deloitte](#) points out, the legislation on IR35 was never completed. "The Government promised to see that those found inside IR35 would also get employee rights, but somehow never got around to it. They simply never completed the proposed package."

And there is no formal mechanism in the UK to contest an institutionalised legal contradiction of this kind, that is where one part of the Code contradicts another part of the Code--in this case where Employment Law conflicts with Tax Law.

Employment Law Status

So should contractors who fear they may be inside IR35 go right to the Tribunal?

It's not really that simple, because proving an implied contract of employment is no easy thing to do. The [case law](#) is the same as that for proving IR35 status, and even the Revenue with all its resources almost never succeeds in doing that.

The [Employment Appeals Tribunal](#) is very sympathetic and fair to workers who make these claims. But the judges will expect you to prove that you weren't really working for the agency, you were working directly for the client.

The most recent case law in this matter, a 2006 judgement called James v. Greenwich, the Tribunal ruled that there must be a clear relationship between the client and the contractor, one which supersedes that between the agency and the contractor. James v. Greenwich is up for appeal, and a judgement is expected on October 28th 2007. That judgement is expected to bring a good deal of clarity into this somewhat murky area of case law.

Without going into the legal technicalities, you can see that this is something that you will want perfectly clear before you go to the expense of taking your case to the Tribunal.

But of course the Revenue doesn't have to jump through all these legal hoops at first. The tax

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Theresa Mimmagh - Lawspeed

inspector will claim you are inside IR35, and then it's up to you to fight it out in court to prove the contrary.

Yes, it's brutally unfair, yet the Government has no plans to make the necessary changes.

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“ The Government never completed the IR35 legislation with the agreed upon employment law changes ”

Bill Dodwell-Deloitte

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Should contractors be taxed like employees but have no rights?

Under IR35, contractors are taxed like employees, but obtaining the rights that employees enjoy isn't easy for us. Is that fair?



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