

IR35 win for freelancer in commissioners case

The Special Commissioners recently found in favour of freelancer Mike Ansell in an IR35 status case.

Details of the judgement are now available and Kate Cottrell from Bauer & Cottrell examines the implications.

Kate writes:

The Special Commissioner Graham Aaronson QC lists five main reasons for finding for the taxpayer in this case:

- o (i) the absence of any obligation on Marconi or BAe to keep Mr Ansell in work throughout the three months/six months period of his respective engagements;
- o (ii) the absence of any obligation by Mr Ansell to put in a particular amount of work, whether each day or each week or in aggregate during the period of the engagement;
- o (iii) the ability which Mr Ansell had to take time off at his own choosing, without seeking permission from the team leaders at Marconi or BAe; and
- o (iv) the ability to withdraw and suggest a substitute individual (which both Mr Ansell and Marconi/BAe regarded as genuine, even though it was very unlikely that the situation would in fact arise); and
- o (v) the various other practical matters (no company car, sick pay, social club etc.) which differentiated contractors from employees at a daily practical level.

It seems to us that the Special Commissioner has clearly set out the commercial relationships between end-users, agencies and contractors. The evidence contained in the decision, concerns the commercial advantages sought by the end-users in using contractors rather than employees, the process of projects and budgets for those projects and the reality of the fact that contractors can be got rid of at short notice, giving the end-user the flexibility they sought at the outset. By understanding these relationships, it would in our opinion, be difficult to show any mutuality of obligation and none was found as in (i) and (ii) above.

Point (iii) is useful for two reasons. Firstly the Revenue in almost every case we have seen claim that the freedom to take time off is nothing more than the flexitime system they themselves enjoy. We do of course argue that flexitime in the Revenue is a privilege and not a right and that those on such a scheme are paid for all the time they put in, but point (iii) now shows this as a significant factor in IR35 cases. Secondly in this particular case Mr Ansell did not actually exercise this right and as part of a team worked fairly conventional hours. This "perceived freedom to turn up or not was a matter of principle rather than practice" is stated in the decision. Generally the Revenue would argue that by not exercising these rights they are not relevant but this case again makes such a right a significant factor to be considered.

The findings at point (iv) are also useful. In our opinion IR35 Commissioners cases appear to have moved away from contractual rights and in the case of substitution the Revenue will argue that unless and until a substitute has been agreed by the agency/end-user there is no right. It is helpful in this case that the right to substitute has been found to be genuine and it is effective "even though it was very unlikely that the situation would in fact arise".

Point (v) lists a number of practical matters that differentiate contractors from employees. Once again this case has found these to be significant rather than the Revenue long held view that such things are a consequence of the status of the worker and not indicators of it.

Conclusion

The arguments in the Ansell case are not new. We use them all the time. We have no doubt that the Revenue will use the particular factors of Ansell to support a view in another case that IR35 applies! We also have no doubt that there will be another case where other completely different factors will be of greater significance! That is the nature of the beast and the danger inherent in taking cases before the Commissioners and the Courts.

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