

No IR35 precedent set for contractors by island consultants case, experts say

Experts agree that the [IR35](#) case lost by the Stour, West Midlands-based Island Consultants Ltd. did not set a precedent that would affect contractors in the future. (see recent article - [Island Consultants Ltd lose IR35 Case.](#))

Island Consultants Ltd. was engaged by the agency Spring Ltd, to provide business and data analysis on Severn and Trent Water's five-year project of upgrading their billing system. The project was managed by a Mr Carson and involved STW employees, people from an external software company and contractors. Mr Hough had no managerial responsibility for any of these other workers and had an identity badge that clearly indicated he was a contractor.

Does Not Change Life for Contractors

As John Kell, policy director at the London-based [Professional Contractors Group](#) points out, the issue was unfortunate, but not one that changes the basis of the received [case law for IR35](#).

But the implications for contractors are significant, according to the Brighton-based legal consultancy [Lawspeed](#) which specialises in contractor affairs.

Significant Implications

Says Lawspeed managing director Adrian Marlowe "We have always said that the way to operate outside IR35 is to be engaged on a project, which must be real, and the project must be identified as the contractor's project. This will inevitably be part of the client's project.

"I can see no evidence in this case that the range and scope of the contractor's project was anything other than for three months supply (at a time) of specialist skills towards STW's project. Each contract was time based, namely 3 months. I would say that from the way the case is described there is no evidence from this that there was a project for the contractor."

No Link To A Project

Marlowe points out that merely linking phases to regular periods of time does not assist. The only reference to a project is that of STW. In addition there seems to be no indication of what happened at the end of the project or any argument about what would happen if the project ended at any stage. Indeed the description of the ingredients of the contract appears to be silent on this point other than to refer to a 4 week termination notice. Again we have long argued that notice periods are evidence of potential employment.

"Once you allow yourself to operate without a defined project you open yourself up to the arguments about mutuality, use of equipment, substitution (which rarely lives in the real world) and so on, as has happened in this case," Marlowe continues.

"I would also say that the fact that the STW Spring contract did not contemplate proper project terms has added to the problem for Island Consultants. All Lawspeed IR35 contracts (as opposed to our standard contracts) that our client agencies use are set up as proper projects and deal with many of the issues raised in this case. Those agencies using our contracts usually operate on our IR35 friendly client terms also."

Contracts Must Represent Facts

"Where both are used I think it far less likely that the problems encountered here would have occurred (on the assumption of course that there was in fact a project – the contracts cannot put someone outside IR35 if they do not represent the true circumstances)," Marlowe explains.

Here there may have been a definable contractor project, but it was not properly set out and the ramifications were not properly considered. In addition the client terms did not protect Island Consultants, although this possibly could have been overcome had the issue been addressed early on.

Don't Count on Substitution

"In terms of the representation, it appears from the judgment that there was much emphasis by Island Consultants on the argument about substitution. Again I would say that the substitution point should never in itself be relied upon, and this is a position that we have taken since 2000 in contrast to some other service providers."

“ We have always said that the way to operate outside IR35 is to be engaged on a project which must be real and the project must be identified as the contractor project ”
Adrian Marlowe-Lawspeed

Marlowe points out that reliance on [right of substitution](#) was too considerable in this case. "It seems that the argument about substitution in this case coupled with the technical argument about the identity of the "client" for IR35 purposes and the failure to rely on solid arguments about a project has resulted in Island Consultants losing the case. That is our reading of it from the way that the judgment is expressed."

Clearly not a case that will change the way contractors operate, but one that shows the importance of solid professional advice on IR35 matters.

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“ An unfortunate but not a precedent setting case ”

John Kell - PCG

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