

Why contractors caught by IR35 cannot necessarily claim employment rights

Contractors caught by **IR35** and being taxed as if they were employees are often tempted to go for the 'nuclear option' – trying to claim employment rights from their client. Many contractors see this as a possible way forward if they have been mistreated by the client and/or their **contract has been terminated early**.

However, according to **Roger Sinclair** of contractor specialist law firm Egos, they are unable to do so because of a precedent set by an Employment Appeals Tribunal ruling in 2001. This was the case of **O'Murphy v Hewlett Packard**, the results of which created case law that effectively bars nearly all contractors from claiming employment rights, even when **caught by IR35**. O'Murphy v Hewlett Packard remains the main determinant of 'employment rights for contractors' cases today.

Sinclair explains: "The key to understanding the reasons lies in grasping that there are two fundamentally different tests. The tests to establish (a) whether a contractor is caught by IR35, and (b) whether a worker is in fact an employee (and therefore entitled to employment rights), are fundamentally different."

No contract – no rights

In the late 1990s and early noughties, the decisions being made by employment tribunals granting workers rights seemed to be beginning to erode basic contract law and the O'Murphy v Hewlett Packard tribunal judge, Mr Justice Douglas Brown, halted this with his decision.

"The result of that ruling was that for any claim for employment rights to succeed, the contractor will have to prove (a) that there is a contract between contractor and client, and (b) having first established that there is such a contract, go on to prove that the true nature of that contract is one of employment," says Sinclair.

"The essential elements of forming a contract under the UK's legal code must be present," he continues. "These are that the contractor and client must have agreed (a) all the material terms of the contract, (b) the 'consideration' (which is usually a payment to the contractor), and (c) that they share the mutual intent to be legally bound."

Where there is doubt that the contractor and client actually meant to create a contract between each other, then there will generally be no contract. And, if there is no contract, then there can't be a contract of employment, and so the contractor cannot claim employment rights.

The intermediaries legislation – IR35 – is not contract law

Sinclair explains that the Finance Act 2000, which introduced IR35, has no bearing on fundamental contract law. Further, the notional contract created for the purposes of determining whether a contractor should be taxed as an employee is not relevant to establishing whether a contractor should have employment rights.

"The concept of a notional contract is purely a construct of the **IR35 legislation** and has no bearing or relevance in any other context," he explains. "the fact that a contractor may be considered a deemed employee for IR35 tax purposes will have no bearing on whether the contractor has employment rights against the client."

"In fact," continues Sinclair, "the fact that there is an intermediary, such as a limited company, between the contractor and the client will generally mean that there is no contract directly between contractor and client, nor any intention that there should be such a contract."

'No employment rights means no IR35' does not follow

Can a contractor be caught by IR35 but not be able to claim employment rights? "Most certainly," says Sinclair. "That's because the tests for the two are totally different, and employment rights are a legal consequence of the employment relationship, rather than an indicator of its existence."

It's this point that contractors hoping to claim employment rights, by turning an early termination into an unfair dismissal or redundancy case, frequently miss. Sinclair reinforces the point: "Without establishing that an employment relationship exists, it is not possible for a contractor to qualify for employment rights."

"Plus, the intentions of the parties are significant," he says. "If it is clear that the contractor never originally intended to create a contract with the client and has made strenuous efforts to prove this, then it will be hard to prove not only that there is in fact such a contract, but also that the nature of the contract is that of employment."

Sinclair's words are clear: it is only under exceptional circumstances that contractors will be able to claim for employment rights, even if they are caught by IR35. And when it comes to achieving employment status, they would first have to show that there was a contract, according to the normal fundamentals of contract law.

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