

Government employment rights claim proposal contradicts law, says legal expert



Suggestions from Government that contractors assessed 'inside IR35' by clients under the Off-Payroll legislation launch claims for employment rights via the Employment Tribunal (ET) have been branded "nonsensical" by a legal expert.

A key point of contention with the now postponed Off-Payroll legislation is the fact that it empowers clients to subject contractors to 'zero rights employment', subjecting often legitimately self-employed individuals to employment taxes without providing the requisite rights.

Whereas the self-employed happily forgo rights and protections in favour of flexible working, many believe the provision of rights would help offset the disparity caused by an 'inside IR35' decision.

However, Professor Patricia Leighton, [Emeritus Professor of Employment Law at the University of South Wales](#) and [Professor at the École Supérieure de Commerce à Paris et à Nice](#), warns that Government's suggestion that affected contractors simply bring an ET claim against their clients is not a realistic prospect.

'Take your case to the ET', contractors told by Government

ET claims for employment rights present largely untested waters for 'inside IR35' contractors. However, this factor was apparently disregarded by Financial Secretary to the Treasury, Jesse Norman, when he [recommended this course of action for contractors](#), stating: "Those who wish to challenge their employment status for rights can take their case to an employment tribunal, regardless of their tax status."

In addition to ignoring the blatant contrariety between an individual being provided with employment rights upon entering employment and a 'deemed employee' having to pursue a claim for the same rights via the ET, the suggestion makes little sense to Leighton:

"At the moment, we've only really witnessed individuals successfully claim workers' rights, so I don't know quite what Jesse Norman is going on about suggesting that affected contractors bring forward employment rights claims. As far as I can see, we currently have no authority to say that an individual would succeed in an employment rights claim.

"It seems a rather ill-considered recommendation to distract from the sheer iniquity of the Off-Payroll legislation. You only have to look at HMRC's tribunal record to see that Government doesn't really understand the self-employed, and neither does it appear to want to."

Does AWR offer clients protection against employment rights claims?

Potentially more than just a grey area, Leighton argues that an employment rights claim against the client could be impossible in practice, following the introduction of the [Agency Workers Regulations 2010 \(AWR\)](#), an EU directive that Leighton notes was introduced to simplify access to workers rights for contingent workers:

"It's clear that one of the legal strategies through which the AWR achieves this is by establishing the agency or other intermediary as the would-be employer. Though the employment status of the individual is not specified, regulation 3(1) of the AWR confirms that the employment relationship that a contingent worker has is with the agency.

"So, for 'inside IR35' contractors who agree to engage via an agency payroll or an umbrella company, their claim would be against that entity, while claims made by limited company contractors would be against their own company."

Past ET cases have yielded mixed results for individuals seeking to confirm their status as an employee. However, Leighton notes that many cases that may have been considered persuasive to the ET – such as *Cable & Wireless v Muscat* [2006] and *James v Greenwich* [2008] – predate the AWR, rendering the rulings and any precedents set effectively defunct.

"Since the introduction of the AWR, one thing to stress is that we have virtually no case law upon which to base a prediction as to what the outcome of an ET claim for employment rights would be. However, it's hard to envisage an 'inside IR35' contractor achieving the desired outcome, as the AWR appears to afford clients a significant layer of protection."

'Inside IR35' contractors may be limited to workers' rights claims

"Over the past ten years, I can't recall a single employment rights case involving a self-employed individual reached the ET," notes Leighton. "Although we have seen numerous individuals secure statutory 'worker' status."

As a result, Leighton argues that the options for 'inside IR35' contractors are limited, suggesting the best many contractors can hope to secure is workers' rights from their agency.

"If the nature of the engagement leans towards employment and the contractor is able to prove this, the ET is likely to determine that the contractor meets the criteria meeting the definition of a worker, which is derived from statute and easier to prove. This would secure the individual certain valuable rights."

However, Leighton adds that this outcome is by no means guaranteed, and encourages contractors to weigh up the risk and reward when considering whether to bring a claim:

"We must remember that 'worker' status excludes those who have a clear business-to-business relationship with the client. To me it seems, where the contractor is engaged via a limited company, it would be more difficult to disprove such an arrangement.

"You also have to consider the cost in terms of lost earnings. The problem for those deemed 'employed for tax purposes' is while they're attending the ET they're not earning. Another more subtle penalty on the self-employed is any administrative structure that they have to navigate is going to take time. With delays and deferrals considered, tribunals often last as long as two years.

"I must say that for the self-employed to claim rights based on an IR35 assessment is no easy feat. Tax is viewed as a separate issue and it would take a very creative judge to 'read across' from tax to employment law."

Should contractors have to go to ET to secure justice?

Leighton is keen to emphasise that the majority of the self-employed gladly forgo rights and protections in order to work in the manner that they do. However, she acknowledges that employment rights will be sought after by many contractors who have been unfairly impacted by the ill-considered Off-Payroll legislation:

"There's such a fundamental injustice with the Off-Payroll legislation and in the tax system as a whole. Of course, it's an anomaly to be taxed as an employee without receiving employment rights."

Whereas the provision of 'employment rights for deemed employees' would undoubtedly restore a degree of parity for contractors deemed 'inside IR35' by clients, Leighton suggests that the proposal merely scratches the surface of the self-employment debate:

"We must remember that the self-employed get penalised in so many other ways, such as encountering difficulties securing mortgages, insurance, and so on. To impose employment taxes upon individuals who have to submit legal challenges to secure the requisite rights will severely impact an already heavily hampered sector.

"However, we shouldn't assume there is a quick fix available, specifically regarding the rights available to the self-employed. Though recent workers' rights claims concerning gig-economy workers have often focused on holiday pay, we shouldn't assume that this is sought after by all self-employed. More discussion is needed to better understand the self-employed and help us to arrive at a satisfactory outcome."

How can the UK rectify its flawed approach to self-employment?

Whereas the UK Government has displayed a reluctance to consider the issue holistically, Leighton notes that more progressive approaches being adopted overseas are yielding more harmonious engagements and a happier self-employed population:

“With the current arrangement in the UK, there’s a lack of creativity and a lot of muddled thinking, contrary to the approach to self-employment taken by many European countries. Particularly in the Netherlands and Belgium, there’s quite a lot of dialogue and trade union activity representing the self-employed.

“They see no problem at all with the self-employed enlisting a union or other support structure to help secure protective rights. Especially in the Netherlands, they also see a role for collective agreements between clients and workers to negotiate protections in various sectors. Just as you would do for an employee, the contract would detail the agreed rights provided.”

Leighton acknowledges that Government intervention would be necessary for any similar arrangement to materialise in the UK. This is due in large part to the lack of bargaining power currently held by many vulnerable self-employed, itself a result of a labour market that incites exploitation.

“Unfortunately, change is required from the top down,” Leighton concludes: “Government needs to take a hard look at some very fundamental issues. The differences between employment and self-employment span beyond income and tax. The UK Government’s apparent failure to realise this is where it falls behind many of its peers.”

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