

## IR35 negotiations - use employment rights to gain client cooperation

Contractors can use the threat of an employment rights claim to secure cooperation from their clients during contract negotiations, or during an [HMRC IR35 enquiry](#). And if they lose an IR35 enquiry due to the client's lack of cooperation, a successful employment rights claim could help mitigate the [financial impact of IR35 back taxes](#) and interest.

[Qdos Consulting](#)'s IR35 expert Andy Vessey explains: "Two key rulings, in the Supreme Court and in an Employment Tribunal, enable contractors to claim worker status and the employment rights – such as holiday pay – that come with it.

"Although [contractors cannot claim employment rights](#), there have been two rulings that support a contractor's bid to be classed as a worker," says Vessey. "A successful employment rights claim and any resulting payout could lessen the impact of being caught by IR35."

But in Vessey's view, the real value of these rulings is in their deterrent effect: "If a client won't play ball over IR35-friendly contract clauses and signing a [confirmation of arrangements](#) during contract negotiations, or if they walk away when the contractor is under investigation, the subtle threat of a claim may influence clients to cooperate."

### Contractors can be workers, and qualify for some employment rights

According to Vessey, as employment law currently stands, there is a third category in addition to the employed and self-employed, that of being a worker. And what the Supreme Court ruling on [Clyde & Co LLP and another v Bates van Winkelhof](#) concluded is that there are two types of self-employed people.

"There are those who carry on their own professional business and enter into contracts to provide services to clients or customer," continues Vessey. "They are what we would understand to be genuine businesses such as limited company contractors.

"Then there are those providing services as part of a profession or business undertaking on behalf of someone else. They are likely to be completely integrated into their 'client's' business, and working only for that client, and not [in business on their own account](#). This type of self-employed person can be a worker."

If a contractor falls into the second category, then they can be classed as a worker. Workers qualify for employment rights. These rights are narrower than those enjoyed by employees, but significant, such as holiday pay, accrued holiday pay, rest breaks, the right to receive national minimum wage (NMW) and the right to be included in pensions auto-enrolment.

### The significance of the rulings

"In the Clyde & Co case, the worker was a solicitor who had been ejected from the limited liability partnership (LLP) for whistleblowing on a colleague," notes Vessey. "The worker was trying to claim the protections provided by employment rights for whistleblowers that did not apply to the self-employed.

"The significance of this case was that, up until that point, members of an LLP were considered, as in all partnerships, to be self-employed. This Supreme Court's conclusion turned this assumption on its head, saying that it is possible under certain circumstances for a self-employed person to also be a worker."

The [Paydens Ltd v Mrs G Wooler](#) Employment Tribunal judgment concerned a self-employed sole trader pharmacist who was also claiming employment rights. The tribunal found that the pharmacist could not be employee, because there was no mutuality of obligation.

"Although the circumstances were different, this case supports the Clyde & Co ruling. The pharmacist was found to be a worker because Paydens required her personal service and therefore she could claim those narrower employment rights that come with worker status. The pharmacist successfully claimed three years of holiday pay, which is likely to have amounted to a substantial sum."

### How contractors can use these cases to their advantage

Vessey believes that what these rulings allow contractors to do is twofold: "Firstly, contractors can use the judgements as a lever to gently persuade their clients to cooperate with them during contract negotiations or during an IR35 investigation. Clients hire contractors to avoid employment rights, but keeping a contractor at arm's length during an enquiry is grossly unfair.

"Secondly, if a contractor is found to be inside of IR35 by virtue of the lack of cooperation or even detrimental or damaging actions of their client, contractors can opt for the 'nuclear option' and use the rulings to mount a retrospective employment rights claim.

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Andy Vessey, Qdos Consulting



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Andy is a Senior Tax professional at Qdos and has a wealth of experience in IR35 and status matters which he guides the firm on.

Qdos Consulting is a leading expert in status and IR35. The company also consults in taxation and employment law and provides low cost business insurance for contractors. [Read Full Profile...](#)

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"A contractor who has been working for the same client for a number of years could reasonably expect to win the case, securing them worker status, and the employment rights that come with it."

Vessey concludes: "If correctly applied, the threat of an employment tribunal and being liable for employment rights can be used by contractors to secure cooperation from their clients."

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