How could Atholl House and Uber tribunal decisions affect IR35?

Two tribunal decisions emerged last month that could both have an important bearing on IR35. First, in the case of Uber BV and others v Aslam and others, the Supreme Court confirmed the decision to award 'worker' status and the accompanying rights to three of the ride-hailing firm's former drivers.

On the same day in the IR35 Tax Tribunal case between Atholl House Productions and HMRC, the Upper Tribunal (UT) upheld the decision finding television presenter Kaye Adams to be outside of IR35 throughout engagements with the BBC between 2015 and 2017.

The judgment in Adams' case offers valuable insight into the tribunal decision-making process while exposing a fundamental flaw in the Off-Payroll rules. And although strictly an Employment Tribunal (ET) case, experts note that the Uber ruling could provide some good news for firms engaging contractors outside of IR35.

Freedom of contract underpins Uber defeat

The workers' rights afforded to the former Uber drivers were confirmed by the Supreme Court following careful consideration of the facts of the engagement in relation to the statute. Notably, the contract was set aside due to a principle established in the landmark Autoclenz v Belcher ruling.

The principle permits the courts in ET cases to depart from certain contract law doctrines, including freedom of contract. In short, freedom of contract dictates that if parties enter a written contract, the courts won't assess any factors beyond the terms of the contract, even if it appears to be unfair on one of the parties.

Being able to disregard this rule is therefore crucial to prevent exploitation of vulnerable workers and protect the statutory rights and protections afforded to them. However, doing so is only permitted where there is an imbalance of power between the two parties. With the Uber case, the ride-hailing company's bargaining power was far greater than that of its drivers, as is the dynamic in most employment-type relationships.

"In cases like Uber, workers say that they are really employees or statutory workers but are denied their rights because the contract says that they are self-employed," writes Alexander Wilson, barrister and chartered tax adviser at ETC Tax, in his own analysis of the case.

"Considering the provision of rights as a matter of statutory, rather than contractual, interpretation, is important to ensure that rights aren't unilaterally denied to workers by employers exploiting their bargaining power to impose terms allowing them to circumvent their legal responsibilities."

Wilson adds: "Departing from the doctrine of freedom of contract enabled the Supreme Court in the Uber case to take the purposive approach and construct the contractual relationship in question accordingly."

Should Autoclenz carry weight in tax tribunals?

So, what could this mean for future IR35 cases? Wilson teases the question of whether tax tribunals should be able to cast aside freedom of contract to help secure tax revenue. ContractorCalculator CEO Dave Chaplin suggests not, pointing towards the UT ruling in the Atholl case as evidence of the lack of weight afforded to Autoclenz in tax tribunals where contracts are not found to be a 'sham'.

Last month, the UT found presenter Kaye Adams to be outside IR35, after disregarding certain HMRC arguments centred on the First-tier Tribunal's misapplication of the Autoclenz decision, explaining: "Autoclenz involved neither the intermediaries legislation nor the creation of a hypothetical contract within the meaning of that legislation."

Ultimately, Autoclenz was deemed irrelevant and inapplicable to the Atholl case because of the context, as Wilson and Chaplin both highlight:

"Employment tribunals ignore freedom of contract in order to protect the statutory rights of individual workers," says Wilson. "Tax is not such an area where individuals are afforded statutory rights, and HMRC can hardly be seen as a weak and oppressed person, deserving of the court's intervention to protect her fragile rights."

Chaplin adds: "Unlike the employment law court, the tax tribunal does not have the backdrop of employment rights statute upon which to rely and justify setting aside the contractual paperwork. While employment tribunals considering 'worker' status will use statute as a starting point, the first port of call for tax tribunals will always be the commercial agreement.

Does Uber ruling narrow HMRC's window for tax tribunal success?

This doesn't necessarily mean that the Uber outcome has no ramifications for IR35. As the Supreme Court in the Uber case reiterated, parties are free to choose their economic structure and experience the tax consequences that follow without the courts' interference, excluding instances of 'abusive transactions'.

For Wilson, this contributes to a compelling argument concerning how tax tribunals should treat engagements: "It should follow from this that if the parties involved prefer self-employment because that is more attractive from a tax point of view, unless that relationship constitutes an 'abusive transaction', the tax tribunals should have no business in going behind what was agreed."

But what constitutes an abusive transaction? In the Autoclenz decision, Lord Clarke identified 'sham' clauses, which he outlined as existing where "parties had a common intention that the term should not create the legal rights and obligations which it gives the appearance of creating."

"So, where the parties together decide that they will contract with one another in a form of their choosing, there is a strong case here for arguing that Uber says that the tax tribunal should not interfere unless there is a sham," adds Wilson.

Chaplin agrees that tighter rules regarding the courts' and HMRC's intervention are needed: "The doctrine of 'freedom of contract' and the resulting certainty of a commercial contract are essential for a well-functioning economy. This is why Off-Payroll is so damaging. HMRC has implied that it can simply step in, ignore the paperwork and collect more tax."

Such a precedent could provide welcome relief for parties engaging on an 'outside IR35' basis as it would narrow the scope under which HMRC could successfully challenge a status assessment. As Chaplin highlights, providing contracts are entered into in good faith and are not a sham, contractors, clients and agencies should have little to fear:

"Moving forward, provided the contract reflects the true agreement and is accurately aligned with the working practices, then it's difficult to see how HMRC could convince a judge to overturn an 'outside IR35' determination. The legal mechanisms available are more difficult. All parties will be providing evidence telling the same story, leaving HMRC with the tall order of proving that these parties are being deceitful and pretending that black is white.

"Unfortunately, when faced with a subject one has little knowledge about the path of least resistance is to steer away from it. But as firms are discovering, that is an act of self-harm, with contractors refusing to work for firms that do not treat them fairly."

Atholl offers insights to tax tribunal process

Whereas the Uber decision has potential significance for IR35, the Atholl judgment reaffirms the factors to be assessed and approach to be taken for tribunals to arrive at an accurate decision.

The contract might be the first port of call but, when building the hypothetical contract, the tribunal judges in the Atholl case placed much emphasis on the 'circumstances' of the arrangements. This meant considering how the agreed arrangements work in practice, as opposed to taking a purely literal interpretation of contractual clauses.

The tribunal considered certain “hypothetical flashpoint scenarios” to achieve this, having noted: “There is nothing particularly artificial in this. The fact is that in the real world, when a genuine and not a hypothetical contact is being construed, there will likely be a ‘flashpoint’ where the parties’ intentions will be manifested for the court (as appropriate) to take into account.”

These were intended to assess the likely outcome should a party attempt to enforce a contractual clause, right, or obligation. One such example was the BBC’s rights to restrict Adam’s other engagements, which led the tribunal to consider what might happen if Adams were to have taken on work for a BBC competitor at a time that clashed with an episode of the Kaye Adams Show.

Having determined an accurate approach for interpreting the working arrangement, the tribunal had to consider the correct way to construct the hypothetical contract, as Chaplin explains:

“The tribunal had to decide: Do we immediately build the hypothetical contract considering all known factors and then decide if the hypothetical contract is correct using the ‘circumstances’, or do we consider the factors as we apply them against the backdrop of the circumstances? The tribunal chose the latter.”

Atholl case highlights Off-Payroll fundamental flaw

In evaluating the hypothetical contract, the tribunal applied the three-stage test outlined by MacKenna J in the landmark Ready Mixed Concrete case, which determines whether a contract of service exists providing three conditions are fulfilled:

> 1. The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master.
> 2. He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other’s control in a sufficient degree to make that other master.
> 3. The other provisions of the contract are consistent with its being a contract of service.

While stages one and two are concerned with personal service (including mutuality of obligation) and control, the third stage is about negation and is used to examine whether there is any evidence to suggest that the conclusions drawn from the end of stage one and two are perhaps incorrect. This proved crucial in the case of Atholl House, as Adams’ extensive engagements outside of her contract with the BBC demonstrated that she was in business on her own account, a finding which contributed significantly to the final decision.

As Chaplin highlights, though application of the third stage ensured the tribunal arrived at the correct decision, the same insight isn’t a luxury afforded to companies tasked with assessing IR35 status upfront as a result of the Off-Payroll rules, therefore exposing a fundamental flaw in the legislation:

“The Off-Payroll legislation is asking clients to assess status by looking at a picture which is only partially revealed. The client typically won’t have the information it needs to apply the third stage of the Ready Mixed Concrete test. In many cases, neither can the contractor reveal it due to confidentiality or their own choosing.

“This could mean that many contractors who could be ‘outside IR35’ due to being in business on their own account are judged by clients as ‘inside IR35’ with no route to natural justice. While this ruling provides some certainty on the correct process to assess IR35 status, it has also thrown a massive spanner in the works concerning practicalities.”

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