Landmark tribunal judgement tells us who is an employee

On February 7, 2007, UK the **Employment Appeal Tribunal** handed down what lawyers are calling a **landmark decision**: who is a worker (and so entitled to employment protection, minimum wage, etc.) and who is not?

For Mr. Justice Elias, personal service is the key to determining whether a contractor is a worker--that is, effectively an employee--or whether the contractor is simply providing services. And the absence of **mutuality of obligation**--that the worker cannot refuse work or that the employer can refrain from supplying it on a given basis--has been more clearly defined than ever before in UK law.

Personal Service is Key Factor

Says David Royden, a lawyer specialising in labour issues with the Manchester office of Layton's Solicitors: "The EAT in handing down its detailed analysis of the meaning of the word 'worker' has arguably gone further in clarifying the issues than it has ever done so before. Although the decision is in the context of minimum wage legislation, it clearly has significant relevance for many other areas of employment law."

Royden continues: "The central question is whether the obligation for personal service is the dominant feature of the contractual relationship or not. If it is, then the contract lies in the employment field..."

Was the Appellant, P. James, who worked as a courier for the Appellant company, providing her own vehicle, a worker or home worker within the meaning of ss.54(3) and 35 respectively of the National Minimum Wage Act 1998? The Employment Tribunal held that she was not.

> **"Is the obligation for personal service the dominant feature or not"**
>
> David Royden-Laytons

The Tribunal Concluded

The Tribunal concluded: "Overall the circumstances of the arrangements between the Claimant and the Respondent point overwhelmingly to a Contract for the provision of services. The document supporting the arrangement specifically refers to the Claimant as self-employed, and, notwithstanding minor inconsistencies of language used in the agreement, the Claimant in her evidence has not displaced that description. The Claimant may not have considered herself as conducting a business or as the Respondent as a customer of that business but, when she entered into the contract with the Respondent, that is essentially what happened between the parties and the absence of some of the trappings of a business, such as the employment of accountants, does not alter that fact."

Relevance for IR35

While the entire question of **IR35** is not raised in this case, there is obvious relevance here to the issue that arises so often between the contractor and the Inland Revenue, about whether or not the contractor is in fact, an employee? "It's crucial to the definition of being caught or not," Royden adds.

There are two issues here. The first is that of personal service. The woman working for the courier service in question could take the parcels herself, or she could have her friend take them for her. There was no obligation for personal service, so she was not an employee. Another reason why contractors should employ **right of substitution clauses** in their contracts.

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The second issue is that of mutuality of obligation. This is the clear fact that the woman working for the courier service didn't have to take on a given assignment in order to keep working. She could work or not work as she chose, and then start again when she chose. That made her a business, and not an employee, according to the EAT. Many contractors enjoy this same right.

This court case will make it easier for contractors to frame contracts that clearly lie outside IR35. Of course, no court decision is without ambiguity, so a contractor should always consult carefully with professionals when preparing or **reviewing a contract**. This is a critical issue for contractors, and one they ignore at their peril.

Published: Wednesday, February 28, 2007