Rough Tax Justice: 'Team RALC' dissects its IR35 Tribunal victory

Chris Leslie of Tax Networks Ltd and ContractorCalculator CEO Dave Chaplin dissect Team RALC's IR35 Tribunal victory over HMRC.

Following a five-year investigation, and having incurred considerable expense, IT contractor Richard Alcock recently succeeded in his appeal against HMRC at an IR35 Tax Tribunal. In another IR35 case which raises questions over the taxman's judgement and conduct, Alcock's two-man defence team - led by Chris Leslie of Tax Networks Ltd and aided by Dave Chaplin of ContractorCalculator – proved enough to topple HMRC's seemingly infinite resources. In dissecting their victory, two members of 'Team RALC' – named after Alcock's limited company RALC Consulting Ltd – reveal how the outcome was never in doubt.

Background to the case

In September 2016, some two years after HMRC had opened an IR35 enquiry, Richard enlisted the services of Chris, an expert tax defence specialist with decades of experience dealing with HMRC. Following an exhaustive fact-finding effort and an HMRC Internal Review, Chris then teamed up with Dave in March 2018, with the case at this stage inevitably proceeding to tax tribunal. Dave assisted in the Appeal Hearing and crucially the pair worked tirelessly on the closing submissions to the Tribunal on 26 September 2019. A month later, the judge released his Decision and allowed RALC's appeals, with HMRC stating to the press that it intended to appeal the outcome.

- September 2014: HMRC Opens IR35 Review
- March 2017: Taxman issues extended time assessments
- November 2017: HMRC Internal Review finds for its Own
- September 2018: HMRC Solicitor's Office ignores invitation to abandon its case
- October 2019: Team RALC secures a conclusive tax Tribunal victory

HMRC compensates for weak evidence with army of lawyers

The case was particularly notable for the disparity between HMRC's legal might and the strength of its evidence. The taxman appeared to be compensating for a lack of evidence by expending a lot of taxpayer money on a large legal team. This was under the apparent assumption that they would conjure up a convincing case from the cross-examination of our witnesses, and that we would have neither the legal firepower nor the nous to fight back effectively. But whilst we were just a band of three against a considerable number of barristers and HMRC Solicitor/seniors, we were always confident of overcoming the inequality of arms, due to the evidenced facts surrounding RALC's

engagements.

We were appealing HMRC's IR35-caught assessments covering a series of engagements entered into by RALC between 2010 and 2014 with two clients: Accenture and DWP. Whereas our appeals were supported by witness statements from seven individuals, including representatives from both clients in question, HMRC provided no cogent witness evidence at all. This was astonishing, given the weight normally placed on oral evidence provided under cross-examination.

Instead, the taxman's IR35 opinion relied on the contents of an HMRC-written note from a short teleconference with a former deputy director at DWP who Richard briefly reported to during one of his contracts. The deputy director left the DWP shortly thereafter. The telephone call with HMRC was held in January 2016 with the intention of explaining the operation of the contract. However, despite being asked on three occasions, the deputy director never signed-off on the notes.

HMRC's evidence was also significantly undermined because the deputy director didn't provide a witness statement and was unavailable for cross-examination, thereby reducing the reliance the court could place on the contents of HMRC's note. The fact that there was no verbatim transcript of the call further weakened the evidence in the eyes of Tribunal Judge Rupert Jones, who noted that the evidence was hearsay "filtered through the medium of an HMRC note taker."

Instead, the Tribunal placed more weight on the evidence describing Richard's engagements with DWP from evidence presented by Team RALC. This included witness statements provided by seniors from DWP and Accenture, witnesses attending court, and a recording of a DWP teleconference. All of this in addition to the eight hours cross-examination of Richard Alcock himself by one of the barristers instructed by HMRC.

The unnecessary struggle to obtain key evidence

Where Richard's work with Accenture was concerned, evidence provided by them to HMRC was also in our favour, although getting our hands on it proved rather difficult. HMRC had used a Schedule 36 information request to ask a shopping list of questions concerning RALC's engagement, to which an Accenture managing director responded in May 2016. The same person gave witness evidence under cross-examination.

Accenture's letter was not initially disclosed to us until HMRC let slip in a December 2016 meeting arranged by RALC. Later that month, an IR35-caught opinion letter from HMRC regarding the Accenture contracts contained numerous references to the contents of the Accenture letter. Consequent requests for a copy of the letter were rebuffed by HMRC on the grounds of confidentiality.

Eventually, following Accenture's mandate to HMRC, the taxman was compelled to release the letter to RALC in March 2017, plus additional notes of an April 2015 meeting between HMRC and Accenture. Contrary to HMRC's interpretation conveyed through its IR35 opinion letter, the contents of the Accenture letter were strongly supportive of RALC's case being outside IR35. Meanwhile, HMRC's April 2015 meeting notes - taken by the same caseworker who spoke to the DWP deputy director in January 2016 - conveyed, in our view, an extremely inaccurate representation of the facts.

To help remedy this, the Accenture director wrote to HMRC in early 2017 to clarify a number of its assumptions. This letter corrected HMRC's assertion that regular contact between an Accenture programme manager and Richard was to check on his work, instead highlighting that it was to "check on progress against the project plan and to help mitigate any risks". It also noted that Richard worked outside of office hours occasionally when the project demanded so, but was not contractually obliged to do so.

Conclusive ruling raises questions over taxman's judgement

The absence of mutuality of obligation (MOO) proved crucial in deciding the outcome of the case. Richard's contracts made clear that he was hired on a project basis and that payment was only due for services actually completed. We also demonstrated this in practice, providing evidence of an occasion in 2013 during a contract with Accenture when a programme was cancelled and RALC's contract subsequently terminated. As a result, Richard worked roughly 10 days unpaid.

Ultimately, these facts were too much for HMRC's legal team to overcome, and the conclusiveness of the judgment is best summarised by the fact that Judge Jones accepted the submission on behalf of Richard, which stated at para 451:

'There is a very clear distinction here. And Mr Alcock is clearly self-employed. He agreed the work to be done, and only that work to be done. Then he got to work, and worked very hard indeed to meet the outcome goals. And then he billed only for the work done. His contract specifically states that he can only charge for work actually completed. And to top it off, in one instance they did cut the project short at a moment's notice, and he was not paid.

'There is no question at all that he could charge just for making himself available, and neither was the client obliged to give him work or allocate work – the work has already been agreed upfront.

'So, since there was no minimum obligation to provide work and no ability to charge for just making himself available, it is clear that the

key elements of mutuality, in the work/wage bargain sense, are missing, and therefore he cannot be considered an employee.'

Those who follow the ongoing saga of IR35 and Off-Payroll may be aware that HMRC is entrenched in its flawed view that MOO simply means being paid in return for carrying out work, despite judges consistently rebutting this interpretation.

So, why did HMRC go all the way to Tribunal?

With the evidence stacked heavily in our favour, we were astonished that HMRC pursued the case all the way to the courts. As it happens, we invited HMRC Solicitor's Office to abandon this case on a number of occasions, most recently in September 2018, an entire year before the hearing.

This invitation highlighted numerous points of contention with HMRC's case, including its plan to use its own uncorroborated notes from a teleconference as evidence, which we noted amounted to nothing more than HMRC's assertions. We also flagged the taxman's incorrect interpretation of MOO, and the fact that it had been repeatedly rejected at Tribunal, while demonstrating that Richard was in business on his own account.

Somewhat satisfying was the fact that the Tribunal's reasoning for reaching its judgment bore much resemblance to the arguments that we made in the September 2018 letter to HMRC. However, this is far outweighed by the regret that the case went so unnecessarily to the Tribunal, incurring not only considerable expense for Richard but also for UK taxpayers in funding HMRC's case.

In our view, this outcome resulted largely from HMRC's apparent willingness to ignore any evidence which didn't suit its agenda. Quite rightly, the Tribunal critically evaluated Richard's engagements in the wider context, acknowledging that during the currency of the DWP contract RALC invoiced another company, Travel Vault, for work completed while concurrently engaged by DWP. This is a solid indicator of being in business on one's own account, and something that we had made HMRC aware of during the meeting in December 2016.

During this same meeting, we also shared with HMRC a transcript of the teleconference with DWP seniors that the Tribunal would later find to be persuasive evidence. However, this was remarkably not enough to convince HMRC that its pursuit of Richard had no real prospect of success.

CEST evidence dismissed by taxman

The taxman also dismissed our October 2017 Report which also included the outcome of assessments by HMRC's own Check Employment Status for Tax (CEST) tool. HMRC has stated that it will stand by the results returned by CEST in assessing the IR35 status of contractors, later adding the notable caveat that it may challenge assessments where it believes the information provided to be inaccurate.

This caveat was utilised by HMRC in the November 2017 Internal Review conclusions letter. Referring to our retrospective CEST assessment output to ascertain Richard's position in CEST's eyes, returning an 'outside IR35' determination, the HMRC Internal Review senior officer responded in his November 2017 conclusions letter:

'The tool only provides a conclusive result if based on the correct information. On reflection of the evidence I have seen, I do not agree with this position. The conclusion of the review must focus on the evidence presented and the applicability of the relevant law.'

HMRC's legal counsel would later attempt to have the CEST analysis evidence omitted from consideration during the preliminary Tribunal hearing, arguing: "The form, content and application of CEST to the appellant's arrangements is irrelevant to the issues to be determined by the Tribunal."

The great irony of all this is, while HMRC rejected so much strong evidence over the course of its investigation in favour of its January 2016 telephone note of uncorroborated facts, it asserted that Richard's accountant had been 'careless' in HMRC's bid to justify the extended time assessments reaching back six years.

Latest case signals time for Government intervention

Due to the Tribunal's comprehensive analysis of the evidence at hand, justice ultimately prevailed, but we are concerned at the manner in which HMRC conducted the case. Of particular concern was the lack of rigour and balance applied during the formal Internal Review stage.

These issues culminated in HMRC unreasonably bringing the costly Tribunal proceedings that could have been avoided. We believe it was an unreasonable and speculative pursuit by HMRC and an inequality of arms in a desperate attempt to try and win an unwinnable case.

Where IR35 and genuine small businesses are concerned, the power balance is too heavily weighted in HMRC's favour and increasingly prone to abuse. Once an assessment is made the burden of proof is on the Appellant which puts an inordinate amount of financial duress on a small business. This IR35 appeal case was not just another taxpayer victory, but a case study supporting the necessary introduction of regulatory measures to redress the balance and a more meaningful HMRC Litigation and Settlement Strategy.

Unless protections are afforded to taxpayers as a matter of urgency, HMRC will continue to claim IR35 victims such as Richard, at the expense of both the contractor's business and the UK taxpayer.

This article first appeared in Taxation Magazine on 19th December 2019.

Published: 30 December 2019