

Thousands of NHS locums given hope, after urologist partially wins IR35 tribunal case

NEW IR35 TRIBUNAL CASE: PARTIAL WIN FOR CONTRACTOR IN SPLIT RULING



FIRST-TIER TRIBUNAL
TAX CHAMBER

TC07202

Appeal number: TC/2018/3736

GEORGE MANTIDES LTD

Appellant

- and -

THE COMMISSIONERS FOR HER MAJESTY'S
REVENUE & CUSTOMS Respondents

A split decision in the [latest IR35 tribunal case to emerge](#) has raised further questions over the application of Off-Payroll compliance practices within the NHS, and HMRC's flawed interpretation of mutuality of obligation.

In the case of [George Mantides Ltd \(GML\) v HMRC](#), tribunal Judge Charles Hellier concluded differing outcomes for two engagements undertaken by urologist George Mantides' limited company, ruling one inside ("IR35 applies") and the other outside of IR35 ("IR35 does not apply").

While the Judge agreed that IR35 applied to an engagement between GML and the Royal Berkshire Hospital (RBH) in 2013, the appellant succeeded in challenging a tax bill concerning an engagement with Medway Maritime Hospital (MMH) later that year.

The outcome is particularly good news for NHS locums impacted by the Off-Payroll reforms. Following [reports of widespread blanket decisions within NHS](#) in response to the rules, the outcome reinforces that trusts are wrong to take the default position that locums are caught by IR35, in spite of HMRC's instructions.

HMRC will likely feel relieved that this partial victory has ended a streak of [four consecutive IR35 tribunal defeats](#). However, the significance of mutuality of obligation (MOO) in distinguishing between the two decisions will raise further questions over [the taxman's flawed interpretation of the employment test](#), as well as its decision to [omit MOO entirely from consideration within the Check Employment Status for Tax \(CEST\) tool](#).

According to IR35 legal expert Martyn Valentine of [The Law Place Limited](#) this decision stresses the vital importance of MOO as a determinant of employment status; "in the engagement with MMH the hospital was neither obliged to provide work nor provide notice of termination in excess of an "illusory" one day. As per Ready Mixed Concrete MOO does not exist where there is no obligation upon the individual to provide their own work therefore emphasising the importance of substitution".

GML v HMRC: the facts

Though there were obvious similarities between the two engagements, the Judge highlighted three respects in which Mantides' work for RBH and MMH differed. Firstly, in the absence of a formal contract, it was determined that Mantides was required to provide his personal services to RBH. However, the tribunal concluded that the contract between GML and MMH contained a valid substitution clause, granted any substitute proposed was suitable on the basis of the hospital's usual criteria.

This decision emphasises yet again the importance of a competently drafted right to substitute says Valentine; "in summarising judgments on substitution, the judge stated that 'the more qualified that right the less serious its effect on the overall picture' so it's vital that substitution can

be enforced where the agency or NHS Trust accepts that the proposed substitute is suitable in accordance with accepted criteria. Anything less will be dismissed as a mere option to propose a substitute and fail to defeat an obligation to personally provide the services."

Meanwhile, though the tribunal found that at least a week's notice would realistically have been required from either party for the termination of the engagement with RBH, it was determined that the notional contract with MMH could be terminated on one day's notice.

The judge found that an extremely short period of notice "does not point to employment". However, from a practical perspective Valentine says that "the length of a notice period is of significance to determining employment status where there is an obligation to continue to provide the services and unfortunately this is a cause of confusion for many. In a commercial context a right to terminate should not be treated as a guarantee of income".

Most significantly, the tribunal considered a sufficient degree of MOO present between GML and RBH. This was owing to its conclusion that the hospital would likely have been expected to endeavour to provide 10 half-day sessions of work per week.

However, in relation to the notional contract with MMH, it was considered that the hospital bore no such obligation, with the Judge adding: "There would not have been even a qualified obligation to provide work. That points away from employment."

What does the decision mean for NHS locums and contractors?

For NHS trusts, the decision demonstrates that 'outside IR35' status is clearly achievable. Meanwhile, for locums and other contractors, the ruling reinforces a number of considerations for best compliance practice:

- Do not negotiate termination clauses – agree next day rights to terminate by the client
- Do not agree minimum or guaranteed hours
- Only get paid for work done, and not for making yourself available
- Exercise a right to substitute, should you have one.
- Insist on using written terms which are competently drafted by a lawyer – a suggestion of a right of control and/or a weakly drafted right to substitute is likely to trigger an expensive HMRC inquiry and necessitate a very costly appeal.

The decision also offers further proof as to the unfairness of compliance instructions issued to the NHS by HMRC, in which it has encouraged blanket assessments. As ContractorCalculator CEO Dave Chaplin highlights, locums across the UK will be optimistic that this case could prove a catalyst for fair and accurate assessments within the sector:

"Thousands of locums will be on contracts working in the same manner as Mr Mantides. Some of them in cases where IR35 applies, and some where it does not, as this case has highlighted.

"There have been reports of widespread blanket decisions within the NHS, and it is now clear that [the leaked NHS webinar](#) contains claims relating to IR35 status in the NHS which are woefully inaccurate, and which have now been dismissed by a Judge. If the NHS suffers loss due to contractors now litigating then it could be HMRC getting a knock on the door from the Trust for giving them careless tax advice."

He concludes: "HMRC has obtained a partial win here, but perhaps only because the NHS Trust and agency were lazy in terms of how they chose to engage the contractor. This judgment actually serves as a blueprint for how locums can now be legitimately engaged on an outside IR35 basis."

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