

PROVISION OF PERSONAL SERVICES THROUGH INTERMEDIARIES:

Would the worker have been an employee if engaged directly by the client?

A broad outline of the new rules which are intended to apply where a worker supplies his or her services to a client through an intermediary such as a service company or partnership was given in a Press release dated 23 September 1999. One of the central questions in deciding whether the new rules apply to an engagement is to establish whether the worker would have been an employee of the client if engaged directly. This article addresses this issue in detail.

Establishing the facts

In deciding whether a worker would have been an employee if engaged directly by the client it is firstly necessary to establish the terms and conditions of the engagement. In a simple case involving one intermediary (e.g. where a worker works through a service company) these will normally be established mainly from the contract between the client and the intermediary. It is that contract that will usually reflect the terms that would have applied had the worker been engaged directly by the client. The contract may be written, oral or implied – or a mixture of all three.

Having established the terms and conditions it is then necessary to consider any surrounding facts that may be relevant – e.g. whether the worker has other clients and a business organisation. In this context other contracts the company has under which the worker's services are supplied and any business organisation of the company which is relevant to the supply of the worker's services will be taken into account as relevant surrounding facts.

Deciding employment status

There is no statutory definition of "employment". However, the question of employment status has come before the Courts on numerous occasions. The approach taken by the Courts has been to identify factors which help to determine if a particular contract is a 'contract of service' (employment) or a 'contract for services' (self-employment). Relevant factors are:

Control - A worker will not be an employee unless there is a right to exercise 'control' over the worker. This may be a right to control 'what' work is done, 'where' or 'when' it is done or 'how' it is done. Actual control of this sort is not necessary – it the right of control that is important.

Where a client has the right to determine 'how' the work is done this is a strong pointer to employment. But it is not an essential feature of employment – many 'experts' who are employees are not necessarily subject to such control (e.g. ship's captain, consultant brain surgeon, etc).

Equally, a right to determine 'what' work is carried out is a strong pointer to employment. It will normally be a feature whenever a client needs a worker to undertake whatever tasks are required at any particular time or where the worker is required to work as part of a co-ordinated team.

A working relationship which involves no control at all is unlikely to be an employment (Ready Mixed Concrete(South East) Ltd v Minister of Pensions and National Insurance(1968)2QB497).

The right to get a substitute or helper to do the job – Personal service is an essential element of a contract of employment. A person who has the freedom to choose whether to do the job himself or hire somebody else to do it for him, or who can hire someone else to provide substantial help is probably self-employed (*Australian Mutual Provident Society v Chaplin*(1978)18ALR385). However, this must be viewed in the context of the arrangements overall. For example, a worker may choose to pay a helper to take phone messages and deal with invoicing and general book-keeping work for the intermediary. But this would not be directly relevant when considering an engagement where the worker is engaged to lay bricks for a client.

Provision of equipment - A self-employed contractor generally provides whatever equipment is needed to do the job (though in many trades, such as carpentry, it is common for employees, as well as self-employed workers, to provide their own hand tools). The provision of significant equipment (and/or materials) which are fundamental to the engagement is of particular importance. For example, where an IT consultant is engaged to undertake a specific piece of work and must work at exclusively at home using the worker's own computer equipment that will be a strong pointer to self-employment. But where a worker is provided with office space and computer equipment that points to employment. The fact that a worker might occasionally choose to do some of the work at home using his or her own computer does not change that (many employees do just that). (*Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance*).

Financial risk - An individual who risks his own money by, for example, buying assets needed for the job and bearing their running costs and paying for overheads and large quantities of materials, is almost certainly self-employed. Financial risk could also take the form of quoting a fixed price for a job, with the consequent risk of bearing the additional costs if the job overruns. However, this will not necessarily mean that the worker is self-employed unless there is a real risk of financial loss (*Market Investigations Ltd v The Minister of Social Security* (1968) 2QB173).

Basis of payment - Employees tend to be paid a fixed wage or salary by the week or month and often qualify for additional payments such as overtime, long service bonus or profit share. Independent contractors, on the other hand, tend to be paid a fixed sum for a particular job. Payment "by the piece" (where the worker is paid according to the amount of work actually done) or by commission can be a feature of both employment and self-employment.

Opportunity to profit from sound management - A person whose profit or loss depends on his capacity to reduce overheads and organise his work effectively may well be self-employed (*Market Investigations Ltd v The Minister of Social Security*). People who are paid by the job will often be in this position.

Part and parcel of the organisation – Establishing whether a person becomes 'part and parcel' of a client's organisation can be a useful indicator in some situations. For example, someone taken on to manage a client's staff will normally be seen as part and parcel of the client's organisation and is likely to be an employee.

Right of dismissal - A right to terminate an engagement by giving notice of a specified length is a common feature of employment. It is less common in a contract for services, which usually ends only on completion of the task, or if the terms of the contract are breached.

Employee benefits - Employees are often entitled to sick pay, holiday pay, pensions, expenses and so on. However, the absence of those features does not necessarily mean that the worker is self-employed - especially in the case of short-term engagements where such payments would not normally feature.

Length of engagement - Long periods working for one engager may be typical of an employment but are not conclusive. It is still necessary to consider all the terms and conditions of each engagement. Regular working for the same engager may indicate that there is a single and continuing contract of employment (*Nethermere (St Neots) Ltd v Gardiner* (1984) ICR612).

Personal factors - In deciding a person's employment status it may sometimes be necessary to take into account factors which are personal to the worker and which have little to do with the terms of the particular engagement being considered. For example, if a skilled worker works for a number of clients throughout the year and has a business-like approach to obtaining his engagements (perhaps involving expenditure on office accommodation, office equipment, etc) this will point towards self-employment (*Hall v Lorimer* 66TC349). Personal factors will usually carry less weight in the case of an unskilled worker, where other factors such as the high level of control exercised by the contractor are likely to be conclusive of employment.

Intention - It is the reality of the relationship that matters. It is not enough to call a person "self-employed" if all the terms and conditions of the engagement point towards employment. However, if other factors are neutral the intention of the parties will then be the decisive factor in deciding employment status (*Massey v Crown Life Insurance Co* (1978) ICR590).

Approach to be adopted

Given the list of factors mentioned above it is tempting to try to determine a person's employment status by adding up the number of factors pointing towards employment and comparing that result with the number pointing towards self-employment. The Courts have specifically rejected that approach. In *Hall v Lorimer* Mummery J made the following comment which was quoted with approval by Nolan LJ in the Court of Appeal:

"In order to decide whether a person carries on business on his own account it is necessary to consider many different aspects of that person's work activity. This is not a mechanical exercise of running through a checklist to see whether they are present in, or absent from, a given situation. ... It is a matter of evaluation of the overall effect, which is not necessarily the same as the sum total of all the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another."

When the detailed facts have been established the right approach is to stand back and look at the picture as a whole, to see if the overall effect is that of a person in business on his own account or a person working as an employee in somebody else's business. If the evidence is evenly balanced the intention of the parties may then decide the issue (*Massey v Crown Life Insurance Co*).

The examples which follow illustrate this process. These examples are purely illustrative. They do not indicate the IR's view of the employment status of particular groups of workers. The role of the IR is to provide advice and guidance about the employment status resulting from a given set of circumstances, not to impose any particular status. The terms and conditions of any engagement are entirely a matter for the parties involved.

Example 1 – Gordon – an IT contractor working through his own service company

FACTS

COMMENTS

Job description/Control

Client is a large retail concern. Gordon works as part of a support team for the client's payroll system. The team leader (another IT contractor) tells Gordon what work he is to carry out at any particular time (e.g. help-desk work, specific maintenance tasks, etc).

The extensive right of control that exists here is a very strong pointer to employment. The more important features are the client's ability to shift Gordon from task to task and to specify how the work should be done – but in addition the client can control where and when the work is carried out.

The client has the right to tell Gordon 'how' the work should be carried out – although in practice such control is not normally necessary.

Gordon must work a regular forty-hour week on the client's premises.

Payment basis/risk

Gordon's company is paid an hourly rate for Gordon's services. Any extra hours worked (by mutual agreement) are paid at 1.5 times the normal hourly rate. The client makes payment monthly following submission of an invoice by the company.

The company is paid an hourly rate for Gordon's services and the only financial risk comes from invoicing. There is no opportunity to profit from sound management of the work covered by the contract. Overall this points to employment.

Holiday pay/sick pay

No sick pay or holiday pay paid under the terms of the inter-company contract.

The engagement runs for six months and holiday pay/sick pay might be expected had there been a direct engagement. But both parties see the actual company/client contract as a contract for services and this is probably why no such payments are made. A minor pointer to self-employment.

Length of contract and personal factors

- The contract is for six months.
- Gordon uses a computer, telephone, fax, etc at home to seek and negotiate contracts for his company.
- Gordon has worked through his company for two other clients in the last two and a half years – one for three months and one for two years. Prior to that he was a direct employee of another engager.

Gordon's company has a limited 'business organisation' consisting of an office and associated equipment at his home. This is a pointer to self-employment – but not an overly important one in the context of a six-month contract of this sort.

Other factors

- The company is contracted to supply Gordon to do the work personally)
) Both point to employment
)
- All equipment and materials are supplied by the client)
Neutral factor (no right to terminate is common in engagements of this length – whether employment or self-employment)
- Neither side can terminate the contract early.
- There is no restriction imposed by the contract that prevents either Gordon or his company providing services to others during the engagement. Mild pointer towards self-employment
- Both parties never intended Gordon to be an employee of the client. Pointer to self employment

Overall picture

The engagement is fairly long term and there is an extensive right of control over Gordon and he must carry out the services personally. The client provides equipment and accommodation and there is no significant financial risk to the company.

The only pointers to self-employment are the minimal financial risk (from invoicing), the ability to work for others (again, a minor point) and the existence of a business organisation/work for other clients.

Standing back from the detail therefore the engagement is one which would have been an employment had it been direct between Gordon and the client. The common intention for self-employment does not alter that. Whilst it would have proved decisive in a 'borderline' situation a review of other factors clearly points to employment here. The new rules would apply to the engagement.

Example 2– Henry – a consultant engineer working through his own service company

FACTS

Job description/Control

Client is a large manufacturing company. Under a previous contract Henry has undertaken a broad review of a 15 year old production line and established that significant improvements could be made to the line to increase productivity. Under the current contract Henry is to produce a further report with detailed and costed proposals on

COMMENTS

A specific task has been agreed and the client cannot shift the worker to another task. Henry has the major say over how the work is carried out and when. The clients does have some right to ongoing control over the work in that regular reports are required and

the improvements and how they might be carried out with minimum disruption to production.

Henry has a free hand over how his work is carried out and when (although there is a deadline of three months for completion). However, Henry is required to keep the client fully informed about progress and the client can require Henry to modify proposals if any aspect seems unsuitable to them.

Payment basis/risk/opportunity to profit

Henry is paid £70 an hour but there is a ceiling of 300 hours on the work. If Henry takes longer than this he will only be paid extra if unforeseen difficulties arise or the client insists on unreasonable changes. If the work takes less than 300 hours Henry is only paid for the hours worked.

Holiday pay/sick pay

No sick pay or holiday pay paid under the terms of the inter-company contract.

Length of contract and personal factors

- The contract has a deadline of 3 months.
- Henry has worked through his partnership as an engineer for many years and it is accepted that the partnership is 'in business'. The partnership has had many engagements similar to the current one and is generally engaged to provide an 'expert' service by clients with little engineering expertise.
- Henry has an office and computer at home which he uses for work extensively.

Equipment

Henry visits the client's factory regularly to examine the production line and processes. The only significant equipment he uses is his own computer (to prepare the report). 70% of the work is done in his office.

Other factors

changes in Henry's proposals can be sought.

Overall, control is limited.

Henry is being paid an hourly rate and there is no real prospect of his making a loss. Nevertheless he is subject to a ceiling and must complete the work in the time allowed for otherwise he will have to finish the work in his own time without further payment. This is a mild pointer to self-employment.

Pointer to self-employment

The company has a business organisation and many different clients. This is a significant pointer to self-employment.

Significant and fundamental equipment is provided by the company as is office accommodation. This points to self-employment.

<ul style="list-style-type: none"> Engagement cannot be terminated ‘early’ other than following a breach of contract There is no restriction imposed by the contract that prevents either Henry or his company providing services to others during the engagement. Both parties intend that the company is engaged to carry out the work and that Henry is not an employee of the client. 	<p>Neutral factor (no right to terminate is common in engagements of this length – whether employment or self-employment)</p> <p>Mild pointer towards self-employment</p> <p>Pointer to self-employment</p>
<p>Overall picture</p> <p>Henry is a skilled worker who has been engaged to carry out a specific task and control over him is limited. He is paid based on an hourly rate but there is an over-riding limit within which the work agreed must be completed. The engagement is for three months and the company has many other clients. Some important equipment is supplied by the company and the work is mainly carried out away from the client’s premises.</p> <p>Henry would have been self-employed if engaged directly by the client and the new rules will not apply.</p>	

<p>Example 3 – Charlotte – an IT consultant working through her own service company</p>	
<p>FACTS</p> <p>Job description/Control</p> <p>Charlotte’s client for this engagement is a software company. She has been engaged for her programming skills to work on a specific project as part of a team developing a new piece of software. She works to the client’s project manager who allocates particular sub programs to Charlotte that she writes. The client expects the project to last for around three months.</p> <p>The manager specifies the way in which the sub-program is to be structured and can require changes to be made to make the work fit in with other parts of the program as it is developed, to rectify overall design faults, etc.</p>	<p>COMMENTS</p> <p>There is an extensive right of control over Charlotte. The more important features are the client’s ability to shift Charlotte from task to task and to specify how the work should be done. In addition the client can control to some extent where and when the work is carried out. But control is not total. Charlotte is engaged to work on a specific project so cannot be told to work on something completely different – and she cannot be required to work elsewhere. Overall, this is a strong pointer to employment.</p>

Charlotte works a set number of hours but actual working times are flexible in line with the company's flexi-time arrangements for its employees. She is required to work at the client's premises.

Payment basis/risk/sick pay/holiday pay

Charlotte is paid £3600 every four weeks in return for working a 40-hour week. Extra payments are made at the equivalent hourly rate for any additional hours agreed.

Payment is made 14 days after the company has invoiced the client.

No sick pay or holiday pay is paid Under the contract Charlotte has with her company she is paid an on-going, but much lower, salary which includes provision for holiday pay and sick pay.

It is the arrangements between the service company and the client that are important here. The company is paid the equivalent of a salary - with overtime payments – but no sick pay or holiday pay. Although the invoicing arrangements result in a small financial risk this is minor. Overall there is no significant financial risk and no opportunity to profit from sound management of the task. This points to employment.

Length of contract and personal factors

- The contract is for 12 weeks – but there is provision for an extension if the project over-runs and all parties agree to the extension.
- Charlotte does some work for another client at weekends and has worked for various clients in the past – always through her company and often through employment agencies. Her contracts have usually lasted for between one and three months. Most have been similar to this one but some have involved her in specific tasks for a fixed fee using her own equipment and working at home.
- Charlotte has an office at home and a computer and other office equipment that is used for some of her other work. These contribute to her company's business organisation – which she uses to obtain work, keep records, prepare invoices, etc.

Charlotte and her company have a 'business organisation' – including an office and associated equipment based at Charlotte's home. She has a variety of clients and all her contracts have been fairly short term.

This is a strong pointer to self-employment.

Other factors

- The company is contracted to supply Charlotte to do the work personally)
) Both point to employment
- All equipment is supplied by the client)
- The engagement cannot be terminated 'early' other than following a breach of contract Neutral factor (no right to terminate is common in engagements of this length – whether employment or self-employment)
- There is no restriction imposed by the contract that prevents either Charlotte or her company providing services to others during the engagement. Pointer to self-employment.
- All parties intended that the company/client engagement would be self-employment. Pointer to self-employment.

Overall picture

This is a borderline case. On balance, given all the facts, Charlotte would have been self-employed had she been engaged directly by the client. The new rules will not apply to the engagement.

The following point towards self-employment:

- existing business and a variety of different engagements, some of which would clearly count as self-employed if she had been engaged directly by her client.
- overall business organisation (office and equipment at home, business like approach to obtaining engagements and carrying them out, etc). Charlotte would clearly be regarded as being 'in business on her own account' for those engagements where she carried out of a specific task for a fixed fee using her own accommodation and equipment.
- risk from invoicing
- the lack of an exclusivity clause.

Other factors point to employment:

- There is fairly extensive control over Charlotte. The client can dictate 'what' work is carried out on the project and 'how' the work is done. But control is not total. Charlotte cannot be directed to work on another project or undertake some quite different work. Nor is there control in other areas (e.g. she subject to the clients normal staff rules/disciplinary procedures)
- There is virtually no financial risk in the engagement and no opportunity to profit from sound management of the task
- Charlotte must carry out the work herself
- all equipment and accommodation is provided by the client.

What can then have more significance is the extent to which the individual is dependant upon, or independent of, a particular paymaster for the financial exploitation of his or her talents (see *Hall v Lorimer*). The fact that Charlotte's company is also engaged in contracts

which involve carrying out a specific task for a fixed fee, using her own equipment, suggests that it is a genuine business and neither she nor her company rely on a single client for the exploitation of her talents. These factors balance the control and other employment factors that exist in this particular context and put the matter near the borderline where the mutual intention for self-employment becomes decisive.

However, the overall picture would have been rather different had the engagement been longer. For example, had the engagement been for twelve months the 'personal factors' would have been far less significant and the employment pointers would have predominated. Just because a person has an established business does not automatically make them self-employed for all engagements (see *Fall v Hitchin* (49TC433) – also referred to in *Hall v Lorimer*). Also, if she had not also had contracts of a type which would clearly have fallen within the definition of self-employment, employment pointers would have dominated and the contract at issue would have been one of employment. The same could apply to shorter contracts.