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HR Broadcast – Employee or self employed?

The Uber case and some others over the last few months have made the point that even though somebody is described as being self-employed their situation may in fact be something quite different.

In employment law there are two alternative options; the individual may be a full employee and entitled to all employment rights, or he may be in an intermediate category, confusingly called a 'worker'. This category of employment relationship involves people who have some degree of autonomy but in fact tie themselves to a particular employer.

In this situation some employment rights will attach, such as minimum wage and holiday pay.

The consequences can be very significant for employers who may, as a result, need to consider their whole business model.

The other point to make is that there have always been some differences between the way Employment Tribunals approach the question of whether the individual is an employee, worker or self-employed and the way this is approached by HMRC for income tax and national insurance purposes.

It was therefore something of a surprise when, in a very recent case, a Tax Tribunal concluded, against the run of recent employment cases, that an employee, Malcolm Tomlinson (T), (no relation), was self-employed while he was claiming that he was an employee.

Because the definition of 'worker' derives from employment law, this category of employment relationship was not considered in the HMRC case and it was a straight decision between employee or self-employed.

Whether we are looking at the problem from the point of view of employment law or revenue law, both analyse the working relationship by looking at a number of criteria and then forming an opinion whether, on balance, the relationship tends towards one of employment or self-employment.

T was a glazing salesman selling conservatories and double glazing. He worked for a single installer. There were no written terms of engagement. His relationship with the installer had lasted over 20 years.

The business approach was the common one whereby T would take orders and then pass them over to the company surveyor. It was said that he used company software and their laptop for which he did not pay, and he wore the T-shirt. He received 10% commission and had some flexibility on reducing prices thereby reducing his own commission. He did not get paid if an order was cancelled.

He had never received holiday pay, sick pay or been part of a pension scheme. He worked two days each week in the company showroom and also helped out with other jobs such as reception and unloading. There was no limit on the amount of holiday he took but he did advise

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the company when he was to be away. When he was away there was no substitute.

He generated many of his own leads but also received some directly from the company. There was some dispute over the degree of control which the company had over his time, often a significant factor in identifying whether or not somebody is an employee.

He was not reimbursed for the use of his car or his telephone.

This Tax Tribunal looked at several identifying characteristics. They looked at financial risk and concluded that the fact he received a commission only was significant. The more the risk the more likely to be self employed.

They looked at personal service and the fact that he could not provide a substitute pointed towards him being an employee. The Tribunal considered what is known as 'mutuality of obligation'; the more mutual the obligation (to provide work and if provided to accept it) the more likely this man was an employee. This Tribunal said that the words had different meanings in different cases. They identified that if there was no mutuality of obligation there could not be an employee type contract but the fact that there was mutuality did not automatically mean that this would be a contract of employment.

The tribunal then considered employee benefits noting that payment of such things as holiday pay or sick pay would point towards employment status. A lack of such payments would indicate self-employment.

They then applied a somewhat unusual criterion which was whether T appeared to be part and parcel of the organisation.

Finally they looked at the intention of the parties, although the substance of the actual working relationship is the key, not the label.

The Tribunal then considered all of the facts in the round, noting that some pointed one way and some the other, but concluded that, on balance, T really was self-employed. It is perhaps a little strange to have a situation where the Revenue argued that T was not an employee.

It appears that the last 11 years were being reviewed and therefore the potential entitlement to T for holiday pay, for example, would have been very considerable. Presumably his advisers took the view that, although it appeared that his own accounts would have had to be unpicked, it was still worthwhile doing so.

The point is that while the tide is moving against artificial arguments of self-employment all cases are judged on their own merits and certainly, from this tax case, which would only be influential in employment cases, the balance can still be that the individual really was self-employed.