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Tax hope for personal service company workers in hypothetical employment contract fight

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Cases on the IR35 rules appear to be like London buses – you wait a while for one and then several come at once.

Following hot on the heels of HMRC's win in the Christa Ackroyd judgment, (see our post comes the almost identical **MDCA Ltd –v- HMRC** last month, a case which HMRC lost. It is difficult to discern any guiding principles of any use from these two cases, other than that there are few guiding principles of any use. Taxpayers will take some heart from the judgment: HMRC does not after all have carte blanche to pursue IR35 arguments successfully.

MDCA Limited was wholly owned by Mr Daniels. He and his wife were its sole directors and employees. It used him to supervise construction projects during unsocial hours – at nights, weekends and over holiday periods. The first tier tax Tribunal was asked to look at two projects for end-user STL, for which MDCA had been engaged to provide Mr Daniels' services. As with Christa Ackroyd's company, HMRC argued that MDCA should account for income tax and national insurance contributions on all amounts received by it for those projects. It said that the intermediaries legislation (IR35) applied because if hypothetically there were a contract direct between Mr Daniels and STL, there was such a degree of control exercised by it over him that that contract would be one of employment, not self-employment.

The decision was issued on 19 March, just over a month after the Christa Ackroyd case. As both were in the first tier Tribunal, the MDCA Tribunal was not bound to follow the Christa Ackroyd judgment (indeed, it was not even mentioned). Both are, to some extent, particular to their facts, but it is interesting to compare and contrast the two.

In MDCA, a third party agency, Solutions, was contacted by STL to find a suitable night supervisor for STL's site and contacted MDCA. MDCA was paid through Solutions for the work. Mr Daniels had to turn up for fixed shift times to supervise the overnight construction operations. He was given instructions at the start of a shift and was provided with suitable STL-branded clothing to identify him to the other contractors on the role as STL's representative. In evidence it was clear that STL would not have accepted a substitute for Mr Daniels and there was no one else at MDCA who could have acted as a substitute for Mr Daniels anyway. Mr Daniels had no line manager as such – the only

supervision being relatively cursory, once a week for a short period. Once it no longer had need for him at the first site, STL approached Mr Daniels and Solutions to ask whether Mr Daniels would provide his services on another site. As with Ms Ackroyd, Mr Daniels' company bore little financial risk.

The Tribunal concluded that Mr Daniels was not controlled any more than any other contractor. He could refuse to work on other sites (hence STL having to ask) and the flat rate of pay per day with no notice period and no entitlement to employee benefits was inconsistent with employment. Mr Daniels was found not to be integrated into the business as he was not entitled to attend STL staff meetings and other employee events.

So what was the discernable difference between Ms Ackroyd's and Mr Daniels' arrangements? What meant that Ms Ackroyd's company should have applied PAYE to all its receipts whereas Mr Daniels' company could remunerate him partly in more tax efficient dividends?

The similarities between the cases are far greater than the sum of their differences. In Ms Ackroyd's case, the Tribunal found that there was a degree of control contractually exercisable by the BBC (albeit on the facts, few restrictions were applied to her work); in Mr Daniels' case, he was subject to control (albeit on the facts, the Tribunal commented, no more so than any other contractor in a contractor-heavy industry). The length of the contracts should not, as a matter of law, matter (Ms Ackroyd's arrangements lasted for 7 years whereas Mr Daniels' lasted a total of around 9 months), but probably still went to showing a degree of integration on Ms Ackroyd's part not yet present on Mr Daniels'. Both were sufficiently well skilled and qualified that a ready substitute could not be provided.

Overall impressions are however created by individual details. The key details here seem to have included:

- MDCA was engaged for particular STL projects which, though reasonably lengthy, did not constitute the "full time job" which the Tribunal had found in Ms Ackroyd's case;

- MDCA was paid on a per day basis (i.e. no work, no pay) and not via any flat monthly fee comparable to a salary;

- MDCA's contract with Solutions was terminable without notice at any time and he received neither holiday nor sick pay;

- MDCA met Mr Daniels' travel, food and accommodation expenses, not Solutions or STL;

- MDCA had an independent and active existence prior to and after the engagement for STL, reinforcing the argument that Mr Daniels was in business on his own account;

- STL was not interested in Mr Daniels as a person but in the services he could provide – he was not even interviewed by it, since it relied on Solutions to find someone suitable; and

- when looked at in detail, the instructions Mr Daniels received actually constituted updates on the current state of the construction process since it was that, not anything specific said by STL, which dictated what he would be doing each day or week. It wasn't control, held the Tribunal, but just a necessary part of the provision of his services.

- Interestingly, the insertion of another intermediary between Mr Daniels and STL was not seen as material, even to the point that the reported decision gets Solutions and STL confused without apparent ill-effect. The eagle-eyed will also spot some other minor typos, for example at paragraph 50 of the judgment where Mr Daniels appears briefly and inexplicably as “Mr Nicholls”.

We are braced for more IR35 decisions and perhaps some underlying principles will start to emerge but this is clearly an area of much controversy and taxpayers should do all they can now to ensure that their case is not the low-hanging fruit that HMRC might choose to pick.

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