

John Turner FCA - 9 December 2008

Dragonfly Consulting Limited and IR35

There was no mention of IR35 in Alistair Darling's Pre-Budget Report delivered on 24 November 2008. However, HMRC's recent High Court success in the Dragonfly case has highlighted the need to look again at IR35 issues, especially if you have been working at the same client for a long time without reviewing your contract.

Case Summary

Mr Bessell ran an IT testing business through his own company, Dragonfly Consulting, and had a contract with the AA motoring organisation. He personally carried out work for the company for around three years. The taxman decided his status would have been that of an employee, had he not been operating through a limited company, and so invoked the IR35 rules. Thus tax and national insurance became due under the PAYE rules on most of the company's net income, whereas Mr Bessell had taken the majority of his income from the company in the more tax efficient form of dividends. One of the major problems which arose in this case was that Dragonfly had obtained work with the AA via an agency. There were differences between the contract that Dragonfly had with the agency and the contract that the agency had with the AA.

To avoid coming inside IR35 you should consider the factors set out below. The list is not intended to be exhaustive but should encourage you to think about the major areas. The aim is for you to be clear in your own mind that, in the event of an enquiry from HM Revenue and Customs, more than 50% of the evidence supports the case that you are in business on your own account (self-employed) rather than being an employee in all but name.

- Ensure your contract includes a clause allowing you to send another worker in your place (a substitution clause). Even if conditions apply, this should be a genuine arrangement with a real possibility of being put into effect. This was where Mr Bessell's case largely foundered. His employer stated in court that, although Mr Bessell's contract with the agency contained a substitution clause, the contract between the agency and the AA did not. The AA then confirmed that they would not, in practice, have ever accepted a substitute.
- Your contract should stipulate that you are delivering whole projects rather than being paid for days or hours worked over a specified period. For convenience the contract might state an hourly or daily rate for payment purposes, and you may assure your client that you will complete the work properly and on time.

- You should retain overall control on how to do the job with minimal reference in your contract to supervision by your client. It is the right to control which is relevant. So even if you are a skilled worker who will not be subject to day to day supervision, you need to ensure that there is no right of control by the end client.
- To what extent are you "part and parcel" of your client's organisation, for example featuring in staff directories or regularly attending staff meetings?
- Do you provide any of your own equipment?
- Do you take out your own insurance, including professional indemnity?
- Do you seek a range of clients by advertising? Have you set up a website for your business?
- If you make mistakes do you have to correct them in your own time and at your own expense?
- If a client failed to pay you would you bear the cost of the bad debt?
- Are you able to terminate your contract with your client with minimal notice?

Having considered the above, don't hesitate to get in touch if you have IR35 issues you would like to discuss with me. If you do operate via an agency, it is important to try and find out if the contract the agency has with the end client mirrors that which it has with you.

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