O'HANLON TAX LIMITED

Employed v Self Employed: Fallout from the Mid-Doc Case

The Out of Hours Service is based on a partnership initiative between the HSE and General Practitioners in a specific region.

In the Mid-Doc service the HSE provides the funds, administration, transport and premises for the locums. The GPs form a Co-Op. Funds are held in a Co-op account to pay the locums. These funds come from grants from the HSE and not from the GPs themselves.

Revenue raised assessments on Mid-Doc on the basis that it was employing the locums used for the Out of Hours service, and the GPs in the partnership appealed.

Both sides of the case presented a set of facts to the Appeal Commissioners. The taxpayer presented circa 50 statements of fact, all of which were rejected by the Appeal Commissioners. All of the circa 30 statements of fact presented by the Revenue Commissioners were accepted by the Appeal Commissioners, who found that the locums were employees of the Mid-Doc GPs.

The Revenue argued that the GPs were employing the locums and the GPs took a different view, as they had little or no contact with the locums.

Many of the Mid-Doc locums come from South Africa where they have established practices in South Africa, and they use their holidays to come to Ireland and work as locums for a few weeks each year. A business was set up in South Africa to bring South African doctors to Ireland to work in the Out of Hours services.

Some of the key facts are as follows:

- The locums all pay for their own flights and source their own insurance.
- The locums work in pairs and they can substitute for each other without approval from a GP. Non paired locums can also be substituted as long as they are fully qualified and insured.
- There is no obligation on any locum to accept all the hours offered, so by increasing or decreasing the hours worked they can maximise their profit.

Commentators have suggested that as the GPs have no contact with the locums it might be more logical to select the HSE as the locums' employer, if there is an employment, as it is the HSE that provides the administration, grants, transport etc. that allows the Out of Hours Services to function.

The case has now been settled out of Court. Revenue have now issued a letter to the IMO in regard to the tax treatment of medical locums. In this letter Revenue state that in general medical locums are employees and should have their pay subjected to PAYE. Revenue have stated that in exceptional cases they will review matters on a case-by-case basis where terms of engagement are different to the norm.

This is a significant change on Revenue's part as they will now only review "exceptional" situations on a case-by-case basis instead of all matters. Revenue have now narrowed the playing field considerably on the taxation treatment of locums.

Tax Briefing 43

The Employment Status Group was set up because of a growing concern that there may be increasing numbers of individuals categorised as 'self employed' when 'employee' status would be more appropriate.

The findings of the Group were

included as an Article in Tax Briefing 43 and then published as a Code of Practice (see www.welfare.ie/EN/Publications/Documents/code-of-practice-on-employment-status%5B1%5D.pdf).

The Group indicated that the overriding consideration or test will always be whether the person performing the work does so "as a person in business on their own account."

The question is whether the person is a free agent with an economic independence of the person engaging the service?

In a recent article (Tax Briefing 82) the Revenue indicated that the Code will be applied and each case will be decided on its own facts.

The Code of Practice suggests that where there are difficulties in deciding the appropriate status of an individual or groups of individuals, the following organisations can provide assistance, the Local Revenue Office, the Local Social Welfare Office, or the Scope Section in the Department of Social and Family Affairs.

Criteria on Whether an Individual is an Employee

The Tax Briefing Article indicated that while all of the following factors may not apply, an individual would normally be

an employee if some of the factors below apply, i.e. if he:-

- Is under the control of another person who directs as to how, when and where the work is to be carried out.
- Supplies labour only.
- Receives a fixed hourly/ weekly/monthly wage.
- Cannot sub-contract the work. If the work can be subcontracted and paid on by the person subcontracting the work, the employer/employee relationship may simply be transferred on.
- Does not supply materials.
- Does not provide equipment other than the small tools of the trade.
- Is not exposed to personal financial risk on the work.
- Does not assume any responsibility for investment and management in the business.
- Does not have an opportunity to profit from sound management in the scheduling of engagements or performing tasks arising from the engagements.
- Works set hours or a given level of hours per week/month.
- Works for one person or for one business.
- Receives expense payments to cover subsistence and/or travel expenses.
- Is entitled to extra pay or time off for overtime.

The Denny Case

In Henry Denny & Sons (Irl) Limited v Minister for Social Welfare (1997) a supermarket demonstrator who was paid a fee in respect of each demonstration was deemed to be an employee notwithstanding statements to the contrary in her contract. Each demonstrator submitted an invoice and payment was made each fortnight without deduction of tax or PRSI. The contract had a number of statements to indicated that the demonstrator was not an employee:-

"*You are deemed to be an independent contractor",*

"It shall be your duty to pay and discharge such taxes and charges as may be payable out of such fees to the Revenue Commissioners or otherwise",

"It is agreed that the provisions of the Unfair Dismissals Act 1977 shall not apply etc",

"You will not be an employee of this company",

"You will be responsible for your own tax affairs" .

The judge in the Denny case felt that statements in the contract should be disregarded, on the basis that they were the opinion of the contracting parties but were of minimal value in deciding the work status of the person engaged.

The Barry Case

The case of Minister for Agriculture & Food v. Barry & Ors (7th July 2008) contains an analysis of the tests for whether a person is an employee. It dealt with Temporary Veterinary Inspectors (TVI), long believed to have been self employed contractors. Many of the TVIs themselves had their own practices from which they were based.

The issue of classifying themselves as employees arose when the work which they were engaged to carry out ceased following the closure of the Galtee Meats Plant in Mitchelstown. The judge found that the TVIs were engaged as independent contractors, not employees. They were also in business on their own account, and they could and did continue in private practice and undertook temporary work for the Department. Further, the TVIs' remuneration was paid on an hourly fee basis at rates fixed between the Department and their union, Veterinary Ireland.

Employment Law

If a person is an employee for tax purposes there is a risk that he will be an employee for legal purposes, opening up employee rights issues, e.g. redundancy, maternity rights etc.

Revenue has expressed a view that the tax classification is not definitive in terms of employment rights.

Revenue

The administration of tax has been de-centralised to the districts and the classification of locums appears to vary from District to District. We understand that the South West region has taken a very strict approach to the classification of locums, and will nearly always treat them as employees. In other Districts Revenue may look at each case on its individual facts.

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