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A Review of an English case which has had an immediate impact in the Isle of Man Employment Tribunal

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August 2014

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august 2014

Widening of 'Worker' Status Immediately Impacts on Isle of Man

Advocate John T Aycock reviews a significant legal development which will improve the employment protection rights of some self-employed professionals such as accountants, lawyers and dentists.

The engagement of self-employed professionals has become more complex because of recent clarification as to certain self-employed people enjoying "worker" status in the eyes of the law. In fact, the leading English case that broadened the interpretation of "worker" in employment legislation is already having an effect on Isle of Man Employment Tribunal case law. This will mean partnerships and professional businesses in the Isle of Man need to be careful about their staffing practices and procedures.

The Supreme Court case of Clyde & Co LLP and Another v Bates Van Winkelhof (21 May 2014) concerned a partner in an English law firm structured as a limited liability partnership (LLP). The partner, Ms Van Winkelhof brought a whistleblowing claim against Clyde & Co and in doing so had to establish that she satisfied the definition of "worker" as opposed to simply being a self-employed partner (who would not have the grounding to bring such a claim).

The Court of Appeal in England had earlier rejected her claim on the basis that Ms Van Winkelhof could not be a worker as she was a member of an LLP. The Supreme Court however overturned the decision and declared her to be clearly a worker and therefore entitled to whistleblowing protection. Now the Clyde & Co ruling has been followed in the Isle of Man's Employment Tribunal.

In both English and Manx employment law the employment status of a person is determinative of the extent of their legal rights. On the one hand full blown employees enjoy a wide range of protective rights both under statute and common law whereas at the other end of the scale the self-employed have much fewer rights historically because there is no master/servant relationship between the two parties. Worker status however is an intermediate term whereby such persons enjoy certain core employment rights, for instance minimum wage protection, discrimination rights, protected disclosure (whistleblowing) rights and the right to have no unlawful deductions from remuneration.

In the English case, the court sought to recognise that there are two different kinds of self-employed people: there are those who carry on a profession or business on their own account and make contracts to provide services and there are those who provide their services as part of a professional business undertaking carried on by someone else. In the leading judgment in the Clyde & Co case Lady Hale stated that employment law distinguished

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between the three types of person, namely those employed under a contract of employment, those self-employed people who are in business on their own account and undertake work for their clients and those in the intermediate class of workers who while self-employed do not fall within the second class.

Before the Clyde & Co ruling the legal debate in "worker" cases centred on whether it was relevant as to the worker having a subordinate role. In Clyde & Co, the claimant clearly was not subordinate as she was a partner in a law firm with equal status. Lady Hale however did not view the subordination aspect as material and stated that difficult cases should not be solved by adding some "mystery ingredient of subordination to the concept of employee and worker. The experienced employment judges who have considered this problem have all recognised that there is no magic test other than the words of the statute themselves."

The Clyde & Co case was specifically relied on in a June 2014 Manx Employment Tribunal judgment which had to determine whether a self-employed dentist who operated within a dental practice enjoyed worker status to enable his unlawful deduction claim to proceed in the Tribunal. After referring to Clyde & Co, the Manx Tribunal followed the guidance that subordination is not the guiding factor in establishing whether someone is a worker, it is determined on the wording of the statute. In the Isle of Man's case, the statute is the Employment Act 2006 of Tynwald and specifically the definition of worker contained in section 173 of that Act. It should be noted that the Manx definition mirrors the wording of the definition in English legislation.

On that basis, the Tribunal felt comfortable relying on Lady Hale's very recent judgment in Clyde & Co and permitted the associate dentist to continue with his unlawful deduction claim ruling that he was a worker under the section 173 definition. The dentist's claim that he was an employee was rejected on the evidence before the Tribunal.

The implications of the Clyde & Co case in England are still being felt and we now have its significant ripples in the Isle of Man. Law firms, dentists and other professional services partnerships including those constituted as LLPs will need to reconsider which of their members may be defined as workers because such members could well now benefit from a variety of employment protection rights. In turn therefore such employers should review policies and procedures to ensure the intermediate worker category persons are being treated in accordance with the recently clarified labour law.

The new judicial interpretation of the law does not grant mainstream employment rights such as claiming unfair dismissal to

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self-employed partners. But it does mean that lawyers, accountants, dentists and many other professional workers might now be protected by law if for instance they legitimately blow the whistle on unsatisfactory work practices.

Advocate John Aycock is Head of the Employment Unit at M&P Legal Advocates, Solicitors and Attorneys in the Isle of Man and is also admitted as a Solicitor/Advocate in England and Wales.

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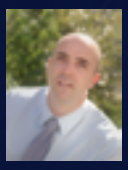

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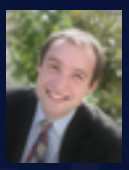

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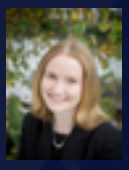

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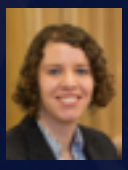

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