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REVIEW

Dentists bridge the employment gap

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March 2016

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march 2016

Dentists bridge the employment gap

Advocate John Aycock analyses a recent Manx Employment Tribunal case which ruled that a self employed professional could pursue claims as an employee.

The law relating to whether a self employed professional can be granted worker or even employee status has come under scrutiny in two recent Isle of Man Employment Tribunal decisions involving dentists. The ripple effects of these decisions will mean those who engage ostensibly self employed professionals should review the detail of their working practice.

The first dental case found that an associate self employed dentist working on a British Dental Association ("BDA") standard contract for services had "worker" status which in turn entitled that claimant to some limited protection under the Employment Act 2006. The categorisation of a person's working relationship is highly significant because it determines the extent of their employment law rights. Full blown employees enjoy a wide range of protective rights under statute and common law. The other end of the scale is the self employed person who has much fewer rights because there is no master/servant relationship in place. Worker status sits in the middle of those two categories and allows intermediate rights relating to, for instance, minimum wage protection, discrimination, protected disclosures (whistleblowing) and unlawful deductions from remuneration.

Perhaps the most important employee protection not extending to worker or self employed status is the right not to be unfairly dismissed after one year's continuous employment has accrued. Unfair dismissal claimants whose contractual relationships may not be entirely clear can be faced with an argument that they do not satisfy the definition of employee and therefore have no legal standing to make an unfair dismissal claim.

This is what happened in the second dental case, a December 2015 Employment Tribunal decision involving another self employed associate dentist who asserted, amongst other things, an unfair dismissal claim after her contract for dental services was terminated. The dentist claimed she had employee status enabling an unfair dismissal claim or at least worker status permitting other statutory employment claims. The dental practice countered that the dentist was a genuine self employed contractor who could not pursue Tribunal claims as an employee or worker.

At a hearing of this preliminary issue the Manx Employment Tribunal found that the dentist did have employee status and therefore was able to proceed with her unfair dismissal claim. It follows that the dentist was also able to satisfy the less stringent definition of being a worker under the Employment Act 2006.

This decision might seem surprising given that associate dentists engaged on standard contracts for services are commonplace throughout the British Isles yet there is scant legal authority for the proposition that such

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dentists have employee status. The Manx Tribunal pointed out in its ruling that although the case has the potential to be an important decision such importance is reduced *"because the signposts as to the law turn on a morass of facts that will vary from case to case – even amongst dentists or similar professionals".* The Tribunal noted that when assessing employment status in these circumstances there will inevitably be borderline or marginal cases.

The key drivers behind the Manx finding that the supposedly self employed dentist had employee status related to the *"irreducible minimum elements"* underpinning an employment relationship, namely:

- Mutuality of obligation; and
- A sufficient degree of control by the employer.

In assessing the facts of this case, the Tribunal found there to be sufficiently significant factors which satisfied the mutuality of obligation and control tests, such as the "virtually guaranteed full time work" that was the expectation of the arrangement. The Tribunal rejected the submission that the dentist could have worked an irregular timetable in the way that a self employed person might otherwise do.

It is worth reiterating that tried and trusted legal tests were relied on by the Tribunal and the decision does not purport to make new law. Rather, it assesses a particular set of facts as against the existing legal framework. Factor in that the BDA accepts its templates do not guarantee self employed status and the decision becomes less surprising. The Tribunal cited a 2011 BDA Advice Sheet which prophetically warned that self employed status could be compromised if the contract or actual daily working practices are too prescriptive adding: *"Associates should not be told which treatment to provide, which materials to use or which laboratory to use".*

While initially raising an eyebrow, therefore, this decision does not seek to make new law and should not cause undue alarm amongst firms who engage self employed professionals. But with these two dental decisions it is clear the Employment Tribunal will closely analyse ostensibly self employed arrangements and look beyond the labelling of the engagement as self employed. The fact that the Tribunal will study the actual working practice and assess mutuality of obligation and the degree of employer control means that those who engage supposedly self employed professionals should review their working practices to ensure the key legal principles are not being infringed. Failing properly to tackle this could result in unexpected employment type claims and complex tax and other issues. Dentists in particular may have to drill down into the detail of working arrangements.

John Aycock is legally qualified in three jurisdictions, an accredited employment and workplace mediator and is head of the M&P Legal employment law unit.
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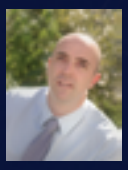

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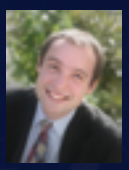

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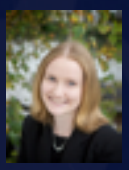

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