Employment Newsletter

August 2019

BACKHOUSE JONES

Does IR35 make as much sense as a message from Mars? If you use agency workers, read on to find out how this might affect your business - written in Human

What is IR35?

IR35 is a piece of tax legislation that aims to combat tax avoidance that can occur when a worker supplies their services to a customer through an intermediary (often a limited company) when ordinarily they would be an employee of that customer.

When will any proposed changes come into effect?

Changes are due to take effect in relation to IR35 - Rules for off-payroll working from April 2020 to allow businesses to prepare.

How will this affect me as an operator?

There will be an impact on the HGV and PCV sectors as these industries traditionally rely on agency drivers. IR35 will change how these are treated and the obligations on operators.

Operators might think they are hiring a self-employed driver who would normally be responsible for their own income tax and national insurance contributions. However, often a slightly more complicated structure will be being used by the driver whereby they will offer their services through a Personal Service Company (PSC) and an umbrella company known as Managed Service Company (MSC). The reason they do this is because it can be more favourable to them from a tax and national insurance perspective.

Why is paying someone through a PSC or a MSC an issue?

For the HMRC, this is an issue because it means that normally less tax and national insurance is being paid by the worker. Whilst this is not illegal, the impact on businesses is acknowledged by the government to be significant. Consequently, the HMRC are keen to close this loophole. This was done in the public sector some years ago and the purpose of IR35 is to extend this to the private sector.

How will this affect me if I use drivers in this way?

It is proposed that workers through their own PSC will fall within these rules:

- the party paying the worker's PSC (the 'fee-payer') is treated as an employer for the purposes of Income Tax and Class 1 National Insurance contributions;
- the amount paid to the worker's intermediary for the worker's services is deemed to be a payment of employment income, or of earnings for Class 1 National Insurance contributions for that worker;
- the party paying the worker's intermediary (the 'fee-payer') is liable for secondary Class 1 National Insurance contributions and must deduct tax and National Insurance contributions from the payments they make to the worker's intermediary in respect of the services of the worker;
- the person deemed to be the employer for tax purposes is obliged to remit payments to HMRC and to send HMRC information about the payments using Real Time Information (RTI).

Although this is yet to be tested in court and there may be some grey areas, the above proposals appear to broaden the definition of "employment" as it is defined in current law.

The legislation will effectively curtail the present position and this type of working meaning that instead of the individual choosing their own status the onus will shift on to the hirer or engager of the service – the operator. The operator will also have more obligations and liabilities regarding income tax and national insurance contributions as detailed above. It may even be correct to say that these drivers will be treated as employees for income tax and national insurance purposes.

What can I do about it?

If you think you might be affected by IR35 and are not clear about how this may affect your business, give a member of our employment team a call on 01254 828300 for more advice.

Are Agency Workers entitled to equivalence of hours same as permanent core staff?

Dominik Kocur v Angard Staffing Solutions Ltd and Royal Mail Group Limited.

The Facts

The Appellant Agency Worker argued that he was entitled under agency worker's right to equal terms relating to 'the duration of working time', as compared with directly employed workers. It was argued on his behalf that Agency Workers are entitled to be allocated an equivalent number of weekly hours of work.

The Appellant constructed his case based on the Equal Treatment Directive arguing over the definition of 'duration of working time'.

The Court of Appeal unanimously disagreed in answering that question and dismissed the appeal. The Court made it clear that the Agency Worker Regulations do not entitle agency workers to work the same number of contractual hours in comparison to a directly employed permanent core staff.

Commentary

The core findings relate to the whole point of having Agency Workers is so that a workforce and the hirer of those services can have flexibility. A requirement of equivalence between the agency worker's hours and those of the employees of the hirer would entirely remove the flexibility inherent in the agency/hirer relationship.

The Court expressed at paragraph 35 of its judgment that "... The purpose of the Directive is plainly to ensure the equal treatment of agency workers and permanent employees while at work, and in respect of rights arising from their work; but there is nothing in either the preamble or its actual provisions to suggest that it is intended to regulate the amount of work which agency workers are entitled to be given. And of course a provision with the effect contended for by the Claimant would be contrary to the whole purpose of making use of agency workers, which is to afford the hirer flexibility in the size of workforce available to it from time to time – a purpose which the Directive expressly recognises and endorses..."

The first Supreme Court case on Restrictive Covenants in 100 years

In the case of *Tillman v Egon Zehnder Limited*, the Supreme Court held that words could be severed from a restraint of trade clause in a contract of employment in order to rescue an otherwise invalid restrictive covenant against the employee.

The Facts

Upon the Claimant leaving her role as Senior Executive from the Respondent, an Executive Search firm, she sought to untangle herself from the non-compete restrictions from which her ex-employer (Egon Zehnder Limited) asserted she was bound. The covenant stated that she should not "within the period of six months from the termination date… directly or indirectly engage or be concerned or interested in any business carried out in competition with any of the businesses of the company … which were carried on at the termination date or during such period".

Following the termination of her employment, Ms Tillman wished to take up employment with a competitor within 6 months. She argued that the clause restricting her from (amongst other things) being interested in a competitor business had the effect of preventing her from even holding any shareholding in a competitor, and so the clause was therefore an unreasonable restraint of trade.

The Court of Appeal quashed an injunction upholding the covenant and held that the word "interested" in the covenant prohibited her from holding even a minority shareholding and that accordingly, the covenant exceeded the Company's need to protect its interests and

was an unreasonable restraint of trade. The Court of Appeal refused to sever the words "or interested" rendering the covenant void, leaving the Claimant free to take up employment with a competitor.

The Company appealed the decision to the Supreme Court. Whilst the Court agreed with the Court of Appeal's construction of the clause, it held that the words "or interested" could be severed from the offending clause set out above which would remove the unreasonable effect. In doing so, this rendered the remainder of the covenant enforceable.

In deciding these two words could be severed from the clause, the Supreme Court had reversed the Court of Appeal authority which had been applicable for 99 years (Attwood v Lamont [1920]), whereby severance could have only taken place where there were several distinct covenants in the clause and further, that the words to be removed were no more than trivial or technical.

Commentary

Generally, any contractual term restricting an employee's activities after termination is **void** for being in restraint of trade and contrary to public policy, **unless** the employer can show it has a legitimate proprietary interest that is appropriate to protect, and that the protection sought is no more than is reasonable having regard to the interests of the parties and the public interest.

The aim of such restrictive covenants is for businesses to protect themselves from ex-employees who are well placed to take advantage of confidential information, strategic plans, customer and client details or other potentially damaging information belonging to that business should it get into the hands of a competing company. Many contracts of employment, particularly those for more senior roles such as transport managers, directors etc, will contain restrictive covenants such as the one discussed in this case. However, it is always been a balancing act between ensuring the covenants aren't unreasonable so as to render them void and wanting to protect the business's best interests. Employers should ensure that

consideration is given to what specifically they are seeking to protect and the least restrictive way that it can be achieved so that the drafting of the restrictive is no more than is reasonable. Pure non-complete clauses are usually the most difficult to enforce, as it is often thought that other restrictions, such as non-dealing clauses go far enough to protects the Company's interests, opposed to keeping the ex-employee potentially out of work for a period.

In light of the above case, the case law on severing words in potentially void restrictive covenants appears to have somewhat relaxed, which is good news for any Company's looking to enforce restraint of trade restrictive covenants. The guidance provided by the Supreme Court case above suggest that provided the following factors can be satisfied, an offending word or words in a restrictive covenant can be removed, leaving the remaining restraint of trade provisions in play:

1. Application of the 'blue pencil test' – which in summary, means that there can only be removal of words from a restrictive covenant, if upon removal, there would be no need to add or to modify what remains;

2. The remaining terms must continue to be supported by adequate consideration (this is not usually in dispute in a typical situation involving the enforcement of a post-employment restrictive covenant); and

3. Removal should not generate any major change in the overall effect of all the post-employment restraints in the contract. the burden of this criterion falls on the employer.

Can you dismiss for Covert Recordings?

In the case of *Phoenix House Ltd v Stockman & Anor UKEAT/0264/15/DM,* the EAT expressed the view that it would be misconduct for an employee to make a covert recording during an internal meeting, except in the most pressing circumstances, although it does not necessarily amount to a breach of the implied term of trust and confidence.

The Facts

The Claimant, Ms Stockman, worked in the finance department at Phoenix House. When her post was removed, she applied for various internal positions and obtained one of them but it was a more junior role. Ms Stockman complained that the restructure was biased against her and a meeting between the Head of Finance, the Finance Director and one of Ms Stockman's colleagues, who supported her complaints, took place.

Ms Stockman interrupted this meeting, demanded to know what had been said and refused to leave when asked. Ms Stockman was therefore invited to a meeting with HR, which she secretly recorded, where she was told she would be disciplined for her earlier conduct. Ms Stockman lodged a grievance which was dismissed, however she was later dismissed due to the fact that she still "completely believed" that her grievance was well-founded and therefore it was to be assumed that she maintained a distrust of senior management and the employer found that this meant that the relationship had irretrievably broken down.

The ET found that the dismissal was unfair and this was later upheld by the EAT. The employer argued that, had it known about the recording, it would have dismissed Ms Stockman for gross misconduct and therefore her compensation should be reduced to nil.

The EAT held that the ET had been entitled to reduce Ms Stockman's compensation by only 10% because, although it remains good practice for parties to communicate an intention to record a meeting and it would generally amount to misconduct not to do so, it is relatively rare for covert recording to appear on a list of examples of gross misconduct in a disciplinary procedure.

The EAT also expressed that the covert recording of a meeting does not necessarily undermine the relationship of mutual trust and confidence between employer and employee, but it would depend on the circumstances.

Commentary

If an employee is found to be covertly recoding a meeting, the purpose of the recording would be relevant, as might the subject matter of the recording, when deciding whether to discipline the employee. For example, if the employee is recording confidential information of the business, potentially causing damage to the business, it is more likely to amount to gross misconduct than a meeting concerning the employee's own position.

Covert recordings in an employment context are happening more and more frequently now that nearly all employees have access to mobile phones and other portable recording devices.

We advise employers to always assume that they are being recorded when speaking to employees both by telephone or in person and whilst we are all human you should be mindful not to say anything either in content or tone which you would not want to be played in an open court room.

Experience tells us as that usually the first we learn of a covert recording is when the Tribunal papers land and disclosure takes place… we often refer to it as the 'dreaded' pen drive. In the vast majority of cases, despite most people's misconception, the Tribunal will accept covert recordings into evidence provided the contents are relative to the issues in the case.

The former employee would provide the recordings (on a pen drive or disk for example) along with a transcript for approval that the contents are an accurate reflection of the recording which is then placed into the evidence bundle. In some cases, the Tribunal will actually listen to the recording during hearing, if for instance the tone is relevant since that doesn't always come across on paper.

Employers may also wish to review their disciplinary policy and consider including covert recordings of internal meetings as an act of gross misconduct.

FOR ALL RELATED ENQUIRIES, PLEASE CONTACT OUR EMPLOYMENT TEAM ON 01254 828300

Please note: This publication does not constitute legal advice

BACKHOUSE JONES

backhousejones.co.uk

The North
Backhouse Jones

The Printworks
Hey Road
Clitheroe, Lancashire
BB7 9WD

The South
Backhouse Jones

22 Greencoat Place
London
SW1P 1PR