Employment Status: from Sausage Sellers to Lap Dancers

Paul T Brady BL - CPA Ireland Members Bulletin, July 2015

Introduction

Identifying the dividing line between an employee and an independent contractor is notoriously difficult. Often it suits a business to engage independent contractors – there are clear tax savings and employment legislation is circumvented. Conversely, it may suit individuals to be deemed employees so that they can avail of the associated social welfare and employment law benefits. The issue is important in a Revenue audit context for, if independent contractors are found to be employees, the employer may be required to pay payroll taxes[1] on the grossed up amount of any payments.

Background

Most practitioners will be familiar with the background case law – the issue crops up regularly in text books, tax exams and in practice[2]. The 1997 Supreme Court decision of *Henry Denny v Minister for Social Welfare*[3] is normally taken as the starting point. The case concerned the employment status of Denny supermarket demonstrators. In his judgment, Keane J concluded[4]:

- Generally, each case should be decided in the light of its particular facts.
- One must consider whether an individual performs services for another person or for him or herself.
- One must also consider who determines how the work is to be performed. However, this alone is not decisive.
- In addition, the following are indicators of independent contractor status: providing one's own premises or equipment, employing others to assist, and profit being dependent upon efficiency.

On foot of this, Keane J stated it was open to an Appeals Officer to find the demonstrators were employees.

In a subsequent High Court decision involving temporary veterinary inspectors, *Minister for Agriculture & Food v Barry*[5], Edwards J reviewed the case law and said it was unhelpful to speak of 'tests' (e.g. the control test, the integration test etc) because none of them are truly tests which will resolve the issue but rather they are aides to reaching a conclusion. Ultimately, Edwards J decided no mutuality of obligation[6] existed between the parties and, therefore, the vets were not employees.

The Revenue Commissioners, in conjunction with other interested organisations, publishes a 'Code of Practice for Determining Employment or Self Employment Status of Individuals' [7]. In it, various indicators of employee and independent contractor status are listed (e.g. whether work can be subcontracted, who sets the hours worked etc).The above should be familiar to tax practitioners. However, two factors deserve further attention because of the apparent lack of clarity which surrounds them:

- Should regard be had to contractual statements regarding employment status?
- What is the extent of the mutuality of obligation requirement?

Intention

The Revenue Commissioner’s Code of Practice says that statements in contracts such as *'You are deemed to be an independent contractor'* or *'You will not be an employee of this company'* are:

> *'not contractual terms and have little or no contractual validity. While they may express an opinion of the contracting parties, they are of minimal value in coming to a conclusion as to the work status of the person engaged.'*

However, the statements are contractual terms[8]. Also, it is inappropriate to categorically declare that the opinion of the parties is *'of minimal value'*. In the *Henry Denny* decision, Keane J emphasised that a judge was '*bound to have regard*' to contractual statements.

The issue featured in a recent UK Court of Appeal decision, *Stringfellow Restaurants Limited v Quashie*[9]. In that case, the Court had to consider the employment status of lap dancers in a strip club. Their contracts stated they were independent contractors responsible for their own taxes. Essentially, the club provided a forum and support facilities for the dancers to ply their trade. Elias LJ delivering the judgment of the Court stated:

> '*It is legitimate for a court to have regard to the way in which the parties have chosen to categorise the relationship, and in a case where the position is uncertain, it can be decisive*'.

Consequently, a lower tribunal was entitled to view statements in a dancer's contract as supporting its conclusion that she was self employed.

While decisions of the UK Courts are non-binding in Ireland, they are of persuasive authority, they will be considered here and, in cases where there is little divergence in jurisprudence, they are likely to be followed.

Mutuality of Obligation

The requirement of mutuality of obligation is the requirement that there must be mutual obligations on the employer to provide work for and pay the employee and on the employee to perform work for the employer[10]. If it is not present, the relationship is not employment and there is no requirement to look further. If it is present, all relevant circumstances must then be considered.

On reading recent Irish cases[11], it is not clear whether the mutuality of obligation has to be 'continuing', i.e., for an individual to be an employee, is it sufficient that he or she is engaged on a series of separate short term engagements under which the individual contracts to perform a parcel of work? or must the purported employer be required provide such parcels of work on an ongoing basis?

The High Court cannot overrule the Supreme Court. That implies that sufficient mutuality of obligation existed in the circumstances of the *Henry Denny* case. The facts of *Henry Denny* which are relevant in this context may be summarised as follows:

- Denny had a panel of 70 demonstrators.
- When a retail store required a demonstrator, it would contact a Denny customer service manager.
- The manager would then contact a demonstrator to inquire if that demonstrator was available to perform the demonstration.
- If the demonstrator was available, it was agreed that the services would be provided.

The obligation to provide work was not continuous and only arose when each engagement was agreed upon. This implies the mutuality of obligation requirement is not a continuing one and may be satisfied in a series of separate contractual engagements.

This is exactly what the UK's Court of Appeal concluded in the 2006 case of *Cornwall Co Co v Prater*[12]. That case involved a teacher who was engaged on a series of separate contracts. At the end of each contract, there was no obligation on the Council to provide more work. The Court found that during each engagement there was sufficient mutuality of obligation to permit a finding of employee status.

Prater was cited with approval in *Stringfellow*. In the latter case, the Court of Appeal held:

- An individual working a series of separate engagements *may* be an employee during the performance of each engagement if mutuality of obligation exists;
- To establish continuity of employment, the individual *must* show mutuality of obligation existed between the engagements as well as during; and
- The absence of mutuality of obligation between engagements *may* point to the individual being an independent contractor during engagements.

While this is a UK decision and, thus, of persuasive value only, it should be noted that the reasoning is clear and there is little divergence in thought between the UK and Ireland.

Conclusions
The Revenue Code of Practice seems to be at variance with the case law when it comes to the stated intentions of the parties. It is also silent on the mutuality of obligation requirement. Insofar as the declared objective of the Code is to 'eliminate misconceptions and provide clarity', it should, in my view, be updated in relation to these issues. Those advising from a tax point of view should note that, for payroll taxes to apply, employment need not be continuous.

The nature of work relationships is evolving. Some businesses and organisations paint themselves as mere agencies between service providers and customers. However, there is an evident risk for those entities that such service providers may be reclassified as their employees with significant tax consequences.

Endnotes:

(1) PAYE, USC, PRSI
(2) See 'State agencies to investigate bogus use of contractors', Irish Times, 6th July 2015, and 'HSE failed to deduct tax from nearly 400 contract workers', Irish Independent, 14th July 2015.
(3) [1998] 1 IR 34
(4) reiterated by the Supreme Court in *Castleisland Cattle Breeding Society Limited v Minister for Social and Family Affairs* [2004] 4 IR 150
(5) [2009] 1 IR 215
(6) See below.
(7) http://www.revenue.ie/en/tax/it/leaflets/code-of-practice-on-employment-status.pdf
(8) To hold otherwise was described as an 'elementary error' by Elias LJ in *Stringfellow*.
(9) [2013] IRLR 99 – discussed below
(10) per Edwards J in the *Barry* case.
(11) See the *Barry* case and *Brightwater Selection (Ireland) Limited v Minister for Social and Family Affairs* [2011] IEHC 510(12) [2006] 2 AllER 1013