

Determining Employment or Self-Employment Status of Individuals

In these recessionary times as the unemployment rate remains high and new hiring is lethargic, to say the least, many individuals have decided to go it alone and become their own boss. Some erstwhile employees having been made redundant are seizing an opportunity in becoming self employed. There is no doubt there is a marked increase this year with the increase in the number of company or business name registrations with the Companies Registration Office indicating a surge in entrepreneurship. Correspondingly, many employers when examining budgets are choosing to outsource functions to their previous employees believing it to be a financially better solution rather than leaving them on the pay roll - but what's in it for the employee? While it may appear to be an attractive proposition for an employee to become self employed there are some serious disadvantages that should be considered before crossing over. Likewise an employer must be careful to ensure that the employee is truly independent contractor and not just an employee with a different badge. By transitioning to a contractor an employee for example will sever the service they have acquired and thus depriving themselves of a redundancy lump sum. This could be a substantial payment. They will also be responsible to VAT returns, public liability insurance as well company law obligations and more onerous tax obligations all requiring investment and expense. They will jettison employment law protection and social welfare entitlements.

Contractor or employee?

The classic a conundrum is expressed as whether the individual is performing a contract for service (contractor) or a contract of services (employee). This dispute as to whether a contractor is an employee crops up time and again in the courts. An intemperate termination of an employment contract in the classic employer/employee arrangement without fair procedures could, for example, end up costing an employer up to two years salary in compensation for unfair dismissal or a redundancy payment when brought in the employment Tribunals.

The test

The legal test to establish if the claimant is an employee or a contractor has been the promulgated in the 1995 supreme court case of Henry Denny & Sons (Ireland) Limited trading as Kerry Foods. This involved supermarket merchandisers appealing a Department of Social welfare finding that they were deemed contractors and thereby not an insurable person entitling them to social welfare. In this case it was held that the common mistake of putting clauses in agreements to the effect that party undertaking the service "pays their own taxes" or is deemed to be a "contractor" have no legal effect. The court stated regard should be had to all the circumstances surrounding the demonstrators' employment and not what was written in to the contract. In general, a person will be regarded as being employed under a contract of service and not as an independent contractor where he or she is performing services for another person and not for himself or herself.

The proper test is the economic test. Put simply the test will always be whether the person performing the work does so as a person in business on their own account. Is

the person a free agent with an economic independence of the person engaging the service? This economic test is paramount.

When contemplating hiring a party to provide services it is worthwhile taking time out to consider the best way of framing the relationship. Consideration should be given to say awarding a fixed term contract which may be best suited to the employee rather than an as a contractor.