Tailor-made agreements

A properly drawn-up associates contract, although not entirely conclusive, may go a long way to avoid future challenges that a self-employed associate is actually an employee. Tim Lee explains

C ases involving the em-ployment status of ostensibly self-employed asso-ciates continue to come before Employment Tribunals (ET). ETs are “first instance” tribu-nals, so the decision of one ET is not binding on others. However, in practice, tribunals often look to earlier ET deci-sions for guidance (and perhaps sometimes inspiration!).

The higher courts (whose decisions may be binding) have said, time and time again, that decisions involving employment status depend entirely on the facts of each case. The courts stress that a simple “checklist” approach to the problem is not sufficient. Each court or tribu-nal has to look at all the circum-stances of each case.

Grotepass v Singh

In the recent case of Grotepass v Singh (which came before the Southampton ET in July 2009), the Claimant had been an associate of the Re-spondent principal, claimed he had actually been employed. There had been no written as-sociate's agreement.

The ET found that the Claim-ant had been treated as self-employed for tax purposes. Fees were made up of private pa-tient fees per item charge, and monthly Denplan capitation fees. Fees were collected by the Respondent’s reception staff and paid to the Claimant, after de-ducting costs including lab costs and a licence fee of £8 per cent.

Although there was a practice price list, the Claimant had dis-cretion to vary the pricing. As is

often the case, the Claimant nev-er received holiday pay, over-time or sick pay, had complete clinical freedom, dealt with his own complaints, and chose his own dental lab.

There had been negotiations for the Claimant to purchase the practice (which came to nothing) during which the Claimant stated that he would be “purchasing his own goodwill”. Shortly after the breakdown of those negotiations, the Respondent gave the Claimant notice of termination of the associateship. The Claimant took the matter to the ET claiming he had been employed and seeking redundancy payment.

The ET took the view, on the facts of this case, that the Claim-ant was not an employee. The tribunal felt that there had been no “mutuality of obligation” between the principal Respondent and the associate Claimant, for example, that there had been no binding obligation on the princi-pal to provide the associate with any particular amount of work or work of a particular kind.

The ET pointed out that the Claimant had absolute clin-i-cal freedom. The ET also felt that the fact that the Claimant had not been paid a regular annual sala-ry, and had no fixed hours, to-gether with the “self-employed” arrangements for his pay, were all inconsistent with him being an employee.

Kalsoom v Clements & Pema

Interestingly, the finding of the Southampton ET in connection with the “mutuality of obliga-tion” point, was not consistent with the finding of the Birmin gam ET in the case of Kalsoom v Clements and Pema, which was heard January 2009.

As in Grotepass, the prelimi-nary point relating to the em-ployment status of the Claimant fell for preliminary discussion. However, in Kalsoom, the ET also went on to consider whether the Claimant also met an extended definition of “employee” un-der the Sex Discrimination Act, and the definition of “worker” under the Employment Rights Act. A finding that the Claimant fell within the extended defini-tion of “employee”/”worker” for those purposes, might enable the Claimant to pursue claims of discrimination, unlawful de-duction of wages etc. (regardless of the Claimant's status as an employee to seek compensation for alleged unfair dismissal). (I should make it clear that the ET were not considering the merits of the Kalsoom case, simply the preliminary issue).

In Kalsoom, the Employ-ment Judge did find that there was sufficient “mutuality of obligation” to create a contract between the parties sufficient to enable the ET to decide that the extended definition of “employ-ee” applied, to enable the Claim-ant to pursue her claim for dis-crimination. The ET also found the Claimant was a “worker”.

On the facts of this case, the ET did not consider how-ever, that Ms Kalsoom was an employee for the purposes of bringing a claim for unfair dismissal (a similar finding to Grotepass).

What this means

Although the Kalsoom and Grotepass cases provide some guidance, nevertheless the le-gal position on the status of as-sociates for employment law purposes remains murky. The ETs latched onto the fact that, in each case, the Claimant had sole clinical judgement, and thought this to be indicative of self-employment rather than employment. On this point I remain unconvinced.

Where businesses employ highly trained professionals, pro-fessional judgement will frequent-ly be exercised by the individuals involved, without interference by the employer. I remain to be con-vinced that an associate’s freedom to exercise clinical judgement is necessarily inconsistent with them being an employee.

A further point (not picked up in the Kalsoom case) is that under the terms of GDS Con-tracts/PDS Agreements, contrac-tors have certain responsibilities to ensure arrangements are in place for updating/monitoring performance skills, knowledge of employers, etc. This may be more consistent with such per-formers being employees.

ETs might also consider that arrangements, involving the as-sociate receiving a fixed amount each month (less lab fees etc, which is often the case in NHS practices) are more consistent with the status of employment rather than self-employment.

Lessons to be drawn

In dealing with practice acquisi-tions and sales, I am often sur-prised at the number of practices that I encounter where there are no written associates contracts in place.

One important lesson to be drawn from these two recently reported cases, is that a properly drawn-up associates agreement, although not entirely conclu-sive, may go a long way to avoid future challenges that a self-employed associate is actually an employee.

It is important to remem-ber that associates’ agreements are not “one size fits all”. Each situation should be prop-erly and individually consid-ered, taking legal advice where necessary, and ensuring that agreements are tailored to particular circumstances.  

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