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HOW SUBSTITUTIONS CAN CHANGE THE EMPLOYMENT GAME PLAN

By Christopher Fisher

The employment status of individuals working in the construction industry often comes before the employment courts. The question is frequently whether the individual is self-employed or a “worker”, someone who is not an employee but does perform work personally for a third party. The distinction is important because, unlike the self-employed, workers are entitled to certain legal rights such as statutory holiday and minimum wage.

The individual’s contract will often contain a “substitution” clause, which allows them to provide someone else to perform the work. The argument runs that, if the substitution clause is genuine and unqualified, then there is no obligation of personal service and the individual cannot be a worker. The courts though are quick to scrutinise the use of such clauses. If the right to provide a substitute is limited in some way, there may still be a finding of worker status. For example, where the substitution right exists only if the individual is unable (as opposed to unwilling) to carry out the work himself.

A recent case involved a dentist but this will set a precedent which will be applied across all industries. His contract said he was self-employed but he claimed he was in fact

a “worker”. The dental centre where he worked argued that he could not be a worker because his contract contained a substitution clause which provided that, instead of working himself, the dentist could arrange for a locum to take his place.

The dentist claimed that the obligation to arrange a locum was in itself a personal service sufficient to maintain his status as a worker but the court disagreed. The substitution clause was unqualified: it could apply whether the dentist was unable or simply unwilling to work himself. This, said the court, was fatal to his claim to be a worker because it meant there was no obligation of personal service. The fact that he was required to arrange a locum substitute did not detract from the fact that he himself was not obliged to perform the work personally.

A carefully drafted substitution clause can therefore limit an individual’s ability to claim worker status, but be careful. A substitution clause must be genuine: the parties must intend it to be used in practice. If it is a sham, the court will ignore it and may still make a finding that the individual is a worker – with all that that entails.



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