

Feedback submitted to Revenue on 28 March 2024 on the draft Tax and Duty Manual (TDM) – ‘Revenue Guidelines for Determining Employment Status for Taxation purposes’ which was circulated to the TALC Direct/Capital Taxes Sub-committee on 4 March 2024. The Appendix lists our comments on specific paragraphs and examples in the draft TDM.



**ITI submission to Revenue on the draft
Revenue Guidelines for Determining Employment Status for Taxation purposes
which was circulated to the TALC Direct/Capital Taxes Sub-committee on 4 March 2024**

28 March 2024

We have included detailed comments on the draft TDM *Revenue Guidelines for Determining Employment Status for Taxation purposes* in the attached document. In addition to those comments, we would make the following general points regarding the draft TDM.

1. Relevance of written contracts

On page 6 of the draft TDM it is stated that:

“[The judgment] has clarified that the terms and conditions set out in a written contract will not in themselves determine the status of the relationship, rather the facts and circumstances of that relationship will do so with the substance of an arrangement taking precedence over the written terms of a contract.”

In our view, this statement is misleading as it suggests that the conduct of the parties to the relationship can take precedence over the written terms of a contract when analysing whether a contract of service exists in all circumstances. We consider that this statement is contradicted by various statements made by Justice Murray in his judgment as outlined below.

- At paragraph 241 of the judgment, Justice Murray is clear that previous decisions made by the Irish courts have not adopted the position that provisions of a detailed written contract of employment that define the legal rights and obligations of the parties can be disregarded where those provisions are inconsistent with the manner in which the parties have conducted themselves:

“241. The issue of whether the court can disregard provisions of a detailed written contract of employment that define the legal rights and obligations of the parties (as distinct from purporting to describe the legal consequences of those rights and obligations) where those provisions are inconsistent with the manner in which the parties have conducted themselves, raises more complex questions. As I have noted earlier in this judgement, the United Kingdom Supreme Court has decided in Autoclenz that it can and, in an appropriate case, should do this. This court has never adopted this position, and neither Henry Denny nor Castleisland should be understood as having so decided. In neither of those cases was it expressly decided that the substantive terms of the parties’ written agreement (as distinct from the

conclusions of law they sought to include in their contract) could be overridden simply because they were contradicted by the parties' conduct.

- At paragraph 241 of the judgment, Justice Murray also clearly states that the manner in which the parties conduct themselves can only override the express terms of a detailed written agreement in very limited circumstances. Furthermore, he clarifies that in the present case it was not necessary to look to the conduct of the parties so as to deem provisions of the written contract to no longer form part of the contractual arrangements between the parties.

“While, even apart from the doctrine of sham, or application of well established rules regarding mistake, the law of contract allows, in certain very limited circumstances, the parties to an agreement to waive terms by conduct or, for that matter, while in some situations one party may be estopped by their conduct from relying upon provisions of a written agreement, the conditions under which this can occur are wholly exceptional. Generally, the variation of a written contract requires a fresh contract supported by consideration, and usually the court is not entitled to look at how the parties conducted themselves with a view to interpreting a written instrument. In this case, as I explain, the question of looking to the conduct of the parties so as to deem certain provisions of a written agreement to no longer form part of the contractual arrangements between the parties does not arise, as the points at which the parties' practices were found to be inconsistent with the written agreements were of limited significance.”

- At paragraph 243 of the judgement, Justice Murray notes that there may well be cases where the parties have elected to describe their relationship in a particular way in order to circumvent or even frustrate the operation of some statutory provision. However, he states that *“outside that situation whether, and if so when, it is possible in Irish law to otherwise allow evidence of the conduct of the parties to override the consequences of detailed and written contract, have to await a case in which that question is properly in issue, and is argued in full.”*

It is important that the relevance of the written contract is clarified in the TDM prior to publication.

2. Presumption of a contract of service

The judgment sets out the decision-making framework that should be used to determine whether a worker is an employee or otherwise. This framework makes clear that various tests and analyses must be undertaken prior to determination that a worker is an employee. Therefore, there is an important presumption in this framework that a worker should not be an employee unless identified as such under the decision-making process outlined.

However, the draft TDM makes the following suggestions that a presumption of employment is appropriate in a broad range of circumstances:

“Indeed, the consideration of the judgment regarding the work/wage bargain would strongly suggest that the default position is that there is likely to be a contract of employment unless it can be clearly demonstrated otherwise.¹”

“In particular, it is difficult to envisage how unskilled workers, or any worker providing labour only services, would be anything other than an employee.²”

We do not consider that such a presumption towards a worker being an employee is aligned with Justice Murray’s judgment and the decision-making framework set out therein.

Therefore, we would suggest that these statements be omitted or substantially revised prior to publication of the TDM.

3. Obligations on households

As noted above, the draft TDM presupposes that a contract of service will exist in a great many cases, with limited exceptions. Revenue’s view of when a household should register as the employer of a domestic worker (such as a childminder or carer) is specifically considered in Section 5.2.3 of the draft TDM. However, the TDM does not address many of the engagements which households may frequently enter into. For example, where a handyman attends the household at an agreed time and undertakes work at the direction of the householder, or a window cleaner/individual that mows lawns attends the household on a regular, pre-agreed timetable.

As a result, some households may look elsewhere in the draft TDM to understand their tax obligations with respect to all engagements they enter. In this regard, they may look to the following types of suggestions included elsewhere in the document:

- All unskilled workers are employees³,
- A right of substitution that is not exercised is indicative of a contract for personal service⁴,
- Placing limitations on when and where services are performed (or agreement of these factors in advance) is indicative of a contract of service⁵,
- Agreement that work has to be performed to a set standard is indicative of a contract of service⁶, and
- Placing any limitation on who performs the work under the agreement is indicative of a contract of service⁷.

It is essential that guidance is provided for households so that they have clarity regarding their tax obligations. While the TDM will provide guidance for advisors in understanding Revenue’s interpretation of this complex area of law, in our view, it may be more appropriate for easy-to-follow guidance directed at households seeking to understand their tax obligations to be provided on Revenue’s website. Such guidance could address the arrangements which households typically enter into and could also provide the helpful links to other parts of Revenue’s website (e.g. how to

¹ Page 13 of the draft TDM

² Page 24 of the draft TDM

³ See above

⁴ Examples 12 and 13

⁵ Examples 5, 13, and 15

⁶ Examples 7 and 8

⁷ Examples 7, 8, 12, and 13

register and deregister as an employer), so as to facilitate their compliance with real-time reporting obligations.

4. The need for consistent recognition of workers' employment status across State bodies

The introduction to the draft TDM makes clear that Revenue's decisions and views regarding an individual's employment status are non-binding on the Department of Social Protection and the Workplace Relations Commission. We appreciate that it is not within the power of Revenue to resolve this matter unilaterally. However, we would highlight the very significant challenge this creates for impacted businesses, workers and households.

We would urge Revenue to call for and support initiatives that ensure a consistent recognition of workers' employment status across State bodies.



Appendix

28 March 2024

Page	Feedback on draft TDM 'Revenue Guidelines for Determining Employment Status for Taxation purposes'
6	<p>1. Introduction</p> <p>In our view, the judgment is clear that the manner in which the parties conduct themselves can only override the express terms of a detailed written agreement in limited circumstances (see paras. 241 -243 inclusive of the judgment).</p> <p>As a result, as we have outlined in our covering submission, we believe this statement in the draft TDM is misleading and is contradicted by comments made by Justice Murray in the judgment.</p> <p>It would be important that the relevance of the written contract is clarified in the TDM prior to publication.</p>
10	<p>4.1 Work/wage bargain</p> <p>We do not consider that this is a reasonable description of mutuality of obligation as previously understood, which was actually an obligation to provide work on one side and an obligation to accept it on the other side. This is no longer a test of any description, and the work/wage bargain is simply a question of whether a contract (written or implied) exists in the first place, and no more than that.</p>
13	<p>4.1 Work/wage bargain</p> <p>In our view, this statement does not align with the judgment. The judgment focuses on the need to pass various gateways before a "whole of facts" analysis is undertaken to determine whether a work arrangement is an employment. If the default position was that the work/wage bargain results in an employment, the judgment would have suggested this as an approach. However, the opposite approach is taken in the judgment, with various gateways and tests to be passed before a contract is one "of service".</p>
13	<p>4.1 Work/wage bargain</p> <p>We would suggest that this wording is deleted as the issue of whether personal service is present is addressed in the next section.</p>
14	<p>4.2 Personal Service</p> <p>We suggest that the word "permissible" here should be replaced with "consistent with a contract for services".</p> <p>In addition, we would suggest that the following paragraphs of the judgment be footnoted:</p> <p>Para 40, Para 74, Para 224</p>
16	<p>4.2 Personal Service - Footnote 2</p>

	In our view, the basis for this comment is unclear as it could easily be that the work is sub-contracted by the principal contractor on similar terms to the head contract, i.e., an unfettered right to substitution.
16	<p>4.3 Control</p> <p>When undertaking an analysis as to whether the control test is met regard should be had to the right, entitlement, or authority to control the worker. This analysis should be performed by reference to the terms of the agreement between the putative employer and worker. Where there is a written agreement between the parties, the terms of this agreement is of primary importance in determining whether sufficient control is exerted so as to give rise to a contract of service.</p> <p>The judgment is clear that it is only in exceptional circumstances (e.g., under the doctrine of sham or mistake, etc.), that the manner in which the parties conduct themselves can override the terms of a detailed written agreement (see paragraph 241 of the judgment in this regard).</p> <p>We suggest that the importance of the written agreement between the parties, if one exists, should be noted at this point in the TDM.</p>
17	<p>4.3 Control</p> <p>We suggest that the following paragraph is inserted after this line for clarity:</p> <p><i>"However, it may be that a business retains a right to control how the work is conducted in order to ensure that relevant laws or regulations are observed. This is not inconsistent with a contract for services [footnote to Para 74]"</i></p>
19	<p>4.4 All the circumstances of the employment</p> <p>We consider this section of the TDM should go further to discuss the types of circumstances that may be relevant to the analysis - e.g., providing own equipment, ensuring own skills up to date, entitlement to holidays / leave, etc.</p>
21	<p>4.4 All the circumstances of the employment</p> <p>We suggest this line is replaced with the following for clarity:</p> <p><i>"However, the judgment is clear that where a detailed written agreement is in place that describes the legal rights and obligations of the parties (as opposed to legal consequences), this is of primary importance and Irish case law does not suggest that this can be disregarded:"</i></p>
21	<p>4.4 All the circumstances of the employment</p> <p>In our view, the previous line in Justice Murray's judgement provides crucial context to the section quoted in the TDM. It would therefore be important that this line (which is set out below) should be included with the existing section quoted in the TDM.</p> <p><i>"Insofar as there are suggestions in some of the judgments in the present case that evidence of the practices of the parties could override the written agreement of the parties, these should not be understood as sanctioning the wholesale replacement of a detailed written agreement with deductions from the manner in which the parties operated the agreement."</i></p>
22	<p>4.4 All the circumstances of the employment</p> <p>For clarity, we recommend that it is clarified here that the degree of control will therefore be a consideration as part of the factual matrix but not determinative.</p>

	<p>Reference could also be made to para. 201 of the judgment where it is stated that <i>"Even if the plumber or taxi driver providing occasional services to one of a number of customers as part of their own trade is for some periods of time under the control of an individual employer, they are clearly persons doing business on their own account. That is the rubric within which the merits of any case involving such persons should be resolved."</i></p>
22	<p>4.5 The legislative context</p> <p>It is not clear from the guidance how this test will be applied. In addition, none of the examples provided specifically address this issue. The inclusion of some relevant examples would be of benefit.</p>
24	<p>5.2 Who is an employee?</p> <p>We do not believe that this statement is consistent with the judgment:</p> <p>See comments regarding Ready Mix Concrete where it was found drivers were providing their services under a contract for carriage, rather than a contract of service.</p> <p>See comments in para. 201 of the judgment regarding taxi drivers providing their services as part of a separate business.</p> <p>In addition, it is not consistent with the following aspects of this draft TDM:</p> <p>Examples on page 13 regarding unpaid workers, Example on page 15 regarding a bar worker, Example on page 16 regarding a landscaper.</p>
24	<p>5.2 Who is an employee?</p> <p>We do not believe there is enough detail provided here to assume that all aspects of the five-step framework are met in either or both scenarios. In particular, the Deliveroo judgment in the UK Supreme Court makes clear that a food delivery worker will not always be an employee.</p>
26	<p>5.2.1 Construction</p> <p>We agree with this but it would be helpful to understand how Revenue also arrived at this position. If the electrician is told when to arrive to perform the work, told what needs to be done, and works alone with the result that no substitution could be expected to occur over the term of the engagement, how does Revenue distinguish this from an ad hoc employment? Similar fact patterns (ad hoc engagement, skilled worker, agreement regarding deliverable, set fee for the work performed, etc.) elsewhere in the document would suggest that Revenue would view this as an employment (see Example 15).</p>
26	<p>5.2.2 Part-time, casual and seasonal workers</p> <p>We believe this approach is too broad and risks almost unlimited individual ad hoc employments arising and ceasing in the Irish economy:</p> <ul style="list-style-type: none"> • Is a comedian a separate employee in respect of each venue they attend? • Is a wedding singer invited to a church to sing an employee in each separate instance? • Is a handyman that attends houses at an agreed time and undertakes work at the direction of the householder engaging in separate employments in each instance?

	<ul style="list-style-type: none"> • Is a window cleaner / individual that mows lawns / house cleaner that attends a large number of houses on a regular timetable under a separate contract of employment for each one?
27	<p>5.2.3 Domestic employees including carers, child minders and au pairs</p> <p>We believe that greater clarity is required given the significance of this point to families that will have little insight on an area of law that is hugely complex.</p> <p>For example, no substantive guidance is provided to help families determine whether a childminder that minds multiple children in their own home should be self-employed. It is merely noted that if the childminder is an employee, PAYE is to be applied to all their income. This is particularly unhelpful as one would expect that an individual that minds multiple children in their own premises, covers overheads with respect to the cost of providing their services such as light and heat, advertises their services, etc. will very likely be self-employed.</p> <p>It is essential that guidance is provided for households so that they have clarity regarding their tax obligations. While the TDM will provide guidance for advisors in understanding Revenue’s interpretation of this complex area of law, in our view, it may be more appropriate for easy-to-follow guidance directed at households seeking to understand their tax obligations to be provided on Revenue’s website. Such guidance could address the arrangements which households typically enter into and could also provide the helpful links to other parts of Revenue’s website (e.g. how to register and deregister as an employer), so as to facilitate their compliance with real-time reporting obligations.</p>
27	<p>5.2.5 Media</p> <p>It is important to distinguish between a worker being under the control of another regarding the manner (how, when, where) work should be performed versus a scenario where there is some level of direction, agreement, or coordination regarding during what time frame and at what location the services should be performed.</p> <p>For example, an electrician working to fix a boiler may not be provided free access to a premises at night while no one else is present. Similarly, as noted in Example 14, an acting workshop for students to be delivered as part of their curriculum will necessarily be provided during school hours or while the students are present at the school. Such factors should not necessarily result in the control test being met.</p> <p>In addition, many media workers are freelancers, especially around the country where they may provide services to different media organisations depending on the need from time to time. As noted in Paragraphs 35 and 184 of the judgment, newspaper contributors and journalists may often provide their work under contracts for services.</p> <p>Finally, cameramen, musicians, etc. will often provide their own equipment, with such equipment being very expensive and in respect of which they carry the risk of damage, obsolescence, loss/theft, etc. In addition, such workers will often bear substantial financing, insurance, and storage costs with respect to such equipment.</p> <p>We do not agree with the stated presumption in this section that such workers should only be considered self-employed in exceptional circumstances.</p>
27	<p>5.2.5 Media</p> <p>Screenwriters and other content creators may undertake work at the request of another party without any element of payment upfront. If the other party retains absolute discretion to refuse the work once presented, it is unlikely that the worker would be considered an employee.</p>

	<p>Even if the above circumstances applied with the variation that the worker received a small element of retainer upfront with the remainder paid on acceptance of the work by the counterparty, the content creator is likely still carrying on a business in their own right, on the basis that they would still bear a great degree of entrepreneurial risk in the agreement and would stand to gain on the successful carrying out of their work.</p> <p>We do not agree with the stated presumption in this section that such workers should only be considered self-employed in exceptional circumstances.</p>
6. Examples	
33	<p>Example 3</p> <p>In our view, it would be helpful if the TDM could reference Section 985D TCA 1997 here. Suggest considering including the following wording to capture the PAYE obligations that could arise for the 'relevant person' in the circumstances of the examples:</p> <p><i>"However, if H Co does not operate PAYE, B Co is obliged to operate PAYE in line with section 985D TCA 1997. For example, as H Co is a foreign company, where it fails to operate Irish PAYE, as the scaffolders are working in Ireland "for" B Co, B Co can be held secondarily liable to Irish PAYE. See TDM 42-04-65 Pay As You Earn (PAYE) system - Employee payroll tax deductions in relation to non-Irish employments exercised in the State."</i></p>
35	<p>Example 5 (no. 3 Control)</p> <p>See Para 74 of the judgment - the exercise of control arising from regulations imposed is not inconsistent with a contract for services.</p>
35	<p>Example 5 (no. 3 Control)</p> <p>We do not consider that this is relevant to the control test.</p>
35	<p>Example 5 (no. 3 Control)</p> <p>It is very difficult to see how this conclusion has been arrived at (see our comments above in this regard).</p>
38	<p>Example 7 (no. 2 Personal Service)</p> <p>See para 226 of the judgment - "A right of substitution limited only by the need to show that the substitute is qualified to do the work is not consistent with personal service".</p> <p>Note that the above is categoric on this point - if the right of substitution is limited only by the need to show that the substitute is "qualified to do the work", this cannot be a contract of service.</p> <p>If the putative employer in this instance has absolute discretion to reject a proposed substitute, inclusive of one that is suitably qualified, then this needs to be specified in the example.</p> <p>Conversely, if the putative employer's authority to reject a substitute is limited to instances where they are not qualified to do the work, this cannot be a contract of service.</p>
38	<p>Example 7 (no. 3 Control)</p> <p>It is an expectation of any contract for services that the work must be performed to a set standard. Where the acquirer of the services is a consumer, this may also be protected under consumer law. Therefore, the fact that the work must be performed to a set standard is not in our view indicative of a contract of service.</p>

40	<p>Example 8 (no. 2 Personal Service)</p> <p>As noted above, the restrictions imposed on substitution here are consistent with a contract for services. However, the key issue in this example is that the substitute is remunerated directly by the practice. For clarity, the reference to the restriction on substitution in this box should be removed.</p> <p>We would highlight that it will always be implicit in a contract under which dental services are provided that the worker delivering those services is a qualified dentist. For example, if a patient has a dental appointment during a period when their normal dentist is not available (sick, on holidays, etc.) it is implicit that the substitute/locum is a qualified dentist and the patient would have the right to refuse to receive services from an unqualified individual.</p>
40	<p>Example 8 (no. 3 Control)</p> <p>As noted above in Example 7, we do not consider this is not indicative of a contract of service, as similar expectations will apply in contracts for services.</p>
43	<p>Example 11</p> <p>We suggest clarifying here that the comments relate to the use of "Irish" employment agencies so as not to disregard the possible impact of Section 985D TCA 1997. Suggest considering the addition of a sentence along the lines of the below to the second last paragraph to cover where the employees work for a 'relevant person' in the State:</p> <p>"However, if the employment agency is a non-resident employer and the employment agency does not operate PAYE, the public sector body is obliged to operate PAYE in line with section 985D TCA 1997. See TDM 42-04-65 Pay As You Earn (PAYE) system - Employee payroll tax deductions in relation to non-Irish employments exercised in the State.</p>
44	<p>Example 12 (no. 2 Personal Service)</p> <p>At various points throughout the judgment (e.g., para 241) it is stated that the conduct of the parties to an agreement can only override the express provisions of a detailed written contract between those parties in exceptional circumstances. In addition, Paragraph 226 notes that "a right of substitution limited only by the need to show that the substitute is qualified to do the work is not consistent with personal service".</p> <p>It appears that the written agreement between Stephen and the Public Service entity permits substitution limited only by the need to show that the substitute is qualified to do the work. As a result, the terms of this written agreement would suggest that this is not a contract for personal service. If exceptional circumstances apply in this example such that the conduct of the parties could be used to override the terms of the written agreement between the parties, this should be clearly specified in the example.</p>
44	<p>Example 12 (no. 2 Personal Service)</p> <p>We do not consider this relevant to the analysis as to whether a contract for personal service exists.</p>
45	<p>Example 12 (no. 4 All the circumstances of the employment)</p> <p>Should this refer to the ePSWT portal instead?</p>
46	<p>Example 13 (no. 2 Personal Service)</p>

	As noted before, para. 226 of the judgment states that " <i>a right of substitution limited only by the need to show that the substitute is qualified to do the work is not consistent with personal service</i> ".
46	<p>Example 13 (no. 2 Personal Service)</p> <p>At various points throughout the judgment (e.g., para. 241) it is stated that the conduct of the parties to an agreement can only override the express provisions of a detailed written contract between those parties in exceptional circumstances. It would be helpful to understand the basis on which Revenue believe that such exceptional circumstances are met in this example.</p>
46	<p>Example 13 (no. 3 Control)</p> <p>The fact that the nature of the work to be performed requires coordination with other parties does not indicate that the control test is met. This is supported by other examples within the draft TDM (see Examples 14 and 16 for example).</p>
47	<p>Example 13 (no. 4 All the circumstances of the employment)</p> <p>Should this refer to the ePSWT portal instead?</p>
49	<p>Example 15 (no. 4 All the circumstances of the employment)</p> <p>We would not agree with this statement. Mary, through carrying out her work to a high standard could establish a name for herself in the industry, expand the number of guest lecture arrangements she is offered, negotiate a higher price for future engagements based on positive student feedback, author and publish materials for third level students of law, tutor law students on a paid basis, etc. Very many businesses have arisen from such small initial engagements.</p>