

Contrasting fortunes

4 November 2016

While a freelancer can enjoy significant financial benefits, this may not stop them from later claiming to be an employee. Helen Crossland looks at the issues

The number of contractors or freelancers operating in the UK has surged in the last few years, with construction now the leading sector for engaging individuals on this basis. The construction industry has always been eminently suitable for hiring people as freelancers owing to the obvious flexibility and practical advantages this route can offer. The perception that such an arrangement carries less risk and commitment than taking on employees is also seen as a bonus.

This is likely to remain the case following Brexit where, owing to the uncertain short- and long-term impacts for the construction sector, businesses may favour taking people on under temporary rather than permanent contracts, pending the close examination of the pipeline of work and future costs.

This aside, the decision to recruit individuals as employees or contractors will still largely depend on the circumstances and the role in question. However, it is increasingly common for individuals to demand contractor status because it is financially lucrative, and is seen by many to outweigh the greater legal protection that comes with being an employee.

While this may be acceptable to many businesses, clashes over employment status are increasing in number, even where an individual readily agrees to enter into an arrangement as a contractor and signs up to the company's terms on this basis.

Legally, there is a material difference between being a contractor and an employee that should be borne out both in practice and in documentation. But where aspects of the relationship leave the true arrangement open to question, a contractor's prospects of claiming they are an employee and eligible to enjoy all the perks associated with this status may well be successfully tested.

Contractors or employees?

Potential disputes aside, the pros of using contractors are undisputed. They can be engaged to undertake short-term work, brought in for their specialist skills or to ensure the completion of a project to deadline. They can be hired and laid off quickly as demand dictates, and generate limited administration owing to the lack of PAYE and HR obligations for the business engaging them.

There are cons, however. Contractors can command premium rates of pay to recognise the temporary or specialist nature of the arrangement and can also ? suddenly and without warning ? jump ship to work elsewhere. Long-term or predominant use of contractors can also hamper a business's ability to hone and retain talent, and may cause permanent employees to become disaffected if they consider contractors are on a better deal to carry out similar work.

Employees will generally always absorb more management time as a result of the onus on employers to address HR matters in a particular way, while such staff also carry a greater litigation risk because of the enhanced legal rights afforded to them. That said, the lack of distinction between the ways in which contractors and employees are sometimes treated has created an additional type of risk for businesses.

Determining factors

Table 1 sets out the key factors that distinguish contractors from employees and illustrates the substantially beneficial position of employees in law, particularly at the end of the relationship.

Not included in the table is the additional category of 'worker'. This separate status falls between that of contractor and employee and covers more casual arrangements, such as agency working and zero-hour contracts. Workers benefit from many of the same employment law rights as employees, barring the right to claim unfair dismissal, receive redundancy pay or qualify for most types of family-friendly leave or pay.

Disputes

It is clear from Table 1 why some contractors decide that they would prefer employee status if a working arrangement turns sour, even where they have been better compensated as a freelancer. This is particularly the case at the end of the relationship where an individual's prospects of getting future work are uncertain and so they feel that they may as well explore what they can get out of the 'employer'.

Contractor	Employee
Defining feature	
Contract for services/consultancy agreement ? focus is on the services provided not the person providing them.	Contract of employment ? requires the work to be carried out by the individual.
Important factors	
Contractor can provide a substitute to perform the services, provided the company agrees to their suitability.	Employee has no right of substitution and must undertake the work personally.
Company can decide not to give work and contractor can elect not to accept work.	Employer has an obligation to provide work for the duration of the employment and the employee must carry out that work.
Contractor may work for more than one company at the same time and has more control over when and how they carry out the services.	Employer has significant control over how, when and what the employee does.
Other factors	

Paid an hourly, daily or weekly rate or per job.	Paid a salary.
Works as necessary to complete services or a project.	Works set or core hours.
Paid on submission of an invoice.	Paid automatically on regular date each week, fortnight or month.
Paid gross; responsible for own tax arrangements.	Paid net; employer obliged to operate PAY and deduct income tax and NI contributions.
Not paid for sickness or holidays if not working.	Right to holiday and sick pay(statutory or contractual).
Does not have any entitlement to family-friendly rights (with the possible exception of maternity allowance).	Fully entitled to family-friendly rights subject to statutory eligibility/compliance with employer's procedures.
Contractor is not subject to disciplinary, capability or other HR procedures and their relationship can be terminated as per contract under which they work.	Employee subject to disciplinary, capability or other HR procedures and employment can be terminated as per contract.
Uses or provides their own clothing, tools and equipment.	Employer provides employee with uniform, tools and equipment.
Has no protection against unfair dismissal.	Has full employment law protection including for unfair dismissal if two or more years' service.
Has no protection from redundancy and no entitlement to redundancy pay.	Entitled to redundancy pay if employed for two or more years.
Is protected from both discrimination and harassment.	Is protected from both discrimination and harassment.
Has no protection under TUPE if business or services transfer.	Protected under TUPE on transfer of employer's business or services.
Covered by Working Time Regulations (except the right to paid holidays).	Covered by Working Time Regulations.
Not entitled to the National Minimum or Living Wage.	Entitled to National Minimum/Living Wage.
Receives protection under health and safety legislation.	Receives protection under health and safety legislation.
Company not required to undertake checks to ensure	Employer required to undertake checks to ensure

contractor has right to work in UK.	employee has right to work in UK.
Contractor arranges own insurance.	Employer arranges insurance for coverage of employees.

Table 1: Contractors v employees

Case law on the matter is plentiful, but what has emerged is that while the courts are loath to allow contractors to have their cake and eat it, businesses should beware if they allow ? or are in cahoots with a contractor to allow ? one type of relationship to be a smokescreen for another. The following cases illustrate the litigation risk.

In [Alstom Transport v Tilson UKEAT/0358/09](#) , Mr Tilson was engaged to provide services as an independent contractor for Alstom. During the term of the contract, Mr Tilson twice refused the firm's requests to become an employee, yet on having his contract terminated he decided he was an employee and claimed unfair dismissal.

He succeeded in arguing he was an employee in the first instance but lost on appeal, the court determining "the would-be employee has at all times asserted the opposite, with his eyes wide open and articulately understanding the advantages to be gained from remaining as an independent contractor".

In the converse judgment of [Autoclenz Ltd v Belcher & Ors \[2011\] UKSC 41](#) , a company and a group of car valeters entered into a series of contracts for services on the basis that having the latter work as contractors was the most tax-efficient arrangement for all concerned. The court held that, whereas the valeters had willingly agreed to be contractors, they were employees under the law and both parties knew from the outset the written terms into which they had entered were a sham.

Conclusion

If a contractor chanches their luck at being an employee, the business defending the claim could have contrasting fortunes ? in particular if the company knows that it was complicit in agreeing to an arrangement that may not withstand scrutiny, or where an individual may have legitimately been taken on as a contractor but has become an employee through the course of time. It is imperative that managers do not enable a company to be an easy target, and understand the differences in how contractors and employees should be handled.

A company's position will be almost watertight, however, if there is a contract for services to document the terms, and such terms are enacted in practice. This should also be sufficient to deter a would-be claimant and avoid any unwanted dealings with the Employment Tribunal or, worse, the tax office.

Helen Crossland is a partner at [Seddon's](#)

Further information

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This feature is taken from the RICS *Construction journal* (September/October 2016)