

WE KNOW

HUMAN RESOURCES

EMPLOYEE OR INDEPENDENT CONTRACTOR

QUICK GUIDE

This Quick Guide provides summarised information relating to the distinction between two types of workplace relationships and why it is important to understand their differences.

In some circumstances an employer may wish to hire someone as an independent contractor under a *contract for services*, rather than as an employee under a *contract of service*. The difference between these two arrangements can sometimes be difficult to ascertain and will involve an analysis of all relevant matters in each case. The two relationships are treated differently for both tax and employment purposes. With the exception of a homeworker, an independent contractor, for example, is not subject to the Employment Relations Act, the Minimum Wage Act nor the Holidays Act.

THE LEGAL POSITION

The Employment Relations Act makes it clear that in the event of a challenge, the Authority or the Court may find an independent contractor to be an employee even though work is being performed under what the parties themselves have formally described as a contract for services rather than under an employment agreement.

Making as certain as possible that entry into an independent contractor arrangement has been understood and agreed to, and reflects the genuine intention of the parties is important. If subsequently challenged, the employment institutions are required to determine the “real” nature of the relationship between the parties and not just look at the words used in any agreement. To this end they –

- Must consider all relevant factors, including any that indicate intention; and
- Must not treat as determining the matter any statement by the parties that describes the nature of the relationship.

DIFFERENCES BETWEEN CONTRACTORS AND EMPLOYEES

Custom and practice and subsequent conduct may be of assistance in determining the true nature of the relationship, and there are also a number of tests that the courts (both in the employment and taxation jurisdictions) have developed to assist in the process. Some specific tests are

- What degree of control has the employer over the work done and way in which it is to be performed? (The more control, the more likely it is to be an employment relationship).
- Is the person concerned able to make a profit from his/her labour, hire and fire their own employees, subcontract, and invoice the company for work performed? (If yes, this indicates a contractor relationship).
- Is the work an integral part of the business operation? Under a contract for services the work is generally ancillary to the business, rather than an integral part of it.
- Is the person concerned in business on their own account? This involves assessing all practical factors – including the liability for the payment of taxes and ACC levies and the behaviour of the parties before and after entering into the particular arrangement – to ascertain the parties relationship

Relevant factors indicating a contractor relationship are that the contractor:

- Pays his or her own tax and ACC levies;
- Provides his or her own equipment;
- Can hire employees;
- Has a degree of financial risk and responsibility for investment and management; and
- Has the opportunity to profit from sound management in the performance of the task.

AVOID UNINTENDED CONSEQUENCES

The consequences of incorrectly entering into a contract for services (or not recognising when such a relationship legitimately entered into has changed over a period of time) can be costly. An employee incorrectly categorised and treated as a contractor will be entitled to backdated holidays and sick leave and the tax position will require to be reassessed. Furthermore an employee will be entitled to follow all processes available under the Employment Relations Act including the ability to bring a personal grievance.

The above is provided as a guide only, to what has been and continues to be, a difficult and complex area of the law. If in any doubt you are strongly advised to seek further advice from an Adviser at the Canterbury Employers' Chamber of Commerce, email Keith Woodroof; keithw@cecc.org.nz or phone 03 366 5096.