RDA
Resident Doctors' Association

CONTRACTOR OR EMPLOYEE

(AKA Contract Of Service or For Service)

As GPEP 1's start to consider options for GPEP 2 (and possibly beyond), a frequently asked question is "Am I going to be a contractor or employee?". Some of you might not even know to ask this question so what follows is a look at what the difference is.

Before we do that, **NZRDA is available to check your contract offers and help you with "what next" as you go through this process, and we advise you take us up on that offer.** Whilst our collective agreements hog much of the limelight, we also have a wealth of experience managing IEAs and specifically those for our GPEP 2 and 3 members. As you will see from the following, many "contracts for service" will sit in a grey zone to the untrained eye: even with the information provided here, you should get them checked out. Having a look at what is on offer generally will also assist us as we pull together a template IEA for use by GPEPs which we plan to have available from next year; so you will be helping those that come after as well as ensuring you personally get good advice.

So back to "Contractor" versus "Employee"

The technical terms are contract for service – which is a contractor, versus contract of service, which is an employee.

The main driver to identify which one applies is IRD, which may surprise you however their interest is tax. If you are an employee PAYE applies; if you are a contractor the whole GST, provisional/terminal etc. tax comes into play. IRD clamped down on the distinction a few years back when too many people were claiming to be contractors so as to avoid PAYE.

So message number one, **it is important to be very clear on what you really are: not what we might like to think we are!** It's never a good idea to get on the wrong side of IRD, so be warned.

- We will start with a quick check list of what to look out for.
- We will then look at a GPEP 2 contract we recently reviewed and what made it an employment contract (contract of service) rather than what the practice believed was a contract for service (independent contract).
- Finally for those who want to know more about what lies behind these issues, we have looked at the legal tests, including the only legal case in NZ relating specifically to a doctor (who was not a GPEP we might add!). Given the distinction is a matter of (employment) law, please excuse the inevitable legalese: let us know if there is anything you don't understand.

At a glance

Provisions indicative of an **employment relationship** include:

- Where the Practice controls the hours of work, so that you are not free to come and go as you please:
- Payment at an hourly rate or on some other time basis;
- If the substance of your functions and responsibilities are prescribed in some detail in a job description:
- If you assume no financial risk in the enterprise and/or have no opportunity to profit from the work done (other than wages):
- Contractual provisions which prevent you from delegating the work to others:
- Provisions which restrain you from competing with the business, or from undertaking other work without consent.

Provisions indicative of an **independent contractor relationship** include:

- Payment for completion of a job:
- If you utilize your own tools and equipment and/or premises:
- If you are responsible for your own GST and income tax, and claims deductible work expenses in your income tax return. However as stated below the courts have warned that some care needs to be taken with these factors, because they may simply be consequential upon the way in which the relationship has been structured including labelling it as an independent contractor agreement.

Looking specifically at a GPEP contract

The following contract had elements of both “of” and “for” service so we will go through what we found to give you an idea of how we assess matters.

1. The contract was structured and labelled as an independent contract; not as an employment (contract of service) contract. It could be presumed therefore that it was the common intention of the parties that it be an independent contractor relationship. First problem with that was that the GPEP didn’t know the difference – was just handed a “standard contract”; fortunately however they sought further advice. Second the parties’ common intention and the label they attached to their relationship, are not determinative (see below). Nor are these elements to be accorded any particular primacy. At the end of the day, they must yield to what is considered to be the real nature of the relationship.
2. There was some evidence of an industry practice within the region in which the Practice was located, and of GPs being retained as independent contractors. Whilst industry practice may throw light upon the intention of the parties, it took us no further forward than to reinforce what was known already about the common intention of the parties, so was a factor accorded little weight.

3. The GPEP was responsible for the payment for GST and income tax, and for levies such as ACC, which is consistent with status as an independent contractor. So too is the fact that the GPEP was to claim their own work expense deductions, as minimal as they might have been. This takes us to the independent contractor side of the equation.
4. Consistent also with the existence of an independent contractor relationship, is that the GPEP was not entitled to any kind of leave, be it sick leave, special leave, annual leave, or public holidays. Nor was the GPEP entitled to redundancy compensation, or to the payment of overtime. These are all the usual elements of an employment relationship. (We are not commenting here on the paucity of terms and conditions this contract had over an employment relationship, other than to say if you are not getting any of these types of provisions, the payment for the contract should be adjusted 15%-20% upwards to compensate you accordingly!)
5. There were some aspects of the relationship which would also be consistent equally with an employment relationship or with an independent contractor relationship. An example is the contractual requirement for the GPEP to maintain an APC and professional medical liability insurance.
6. On the side of the contract being an **employment relationship** however were:
    a. The contract was personal to the GPEP: they could not delegate or assign the provision of the services to anyone else:
    b. The GPEP was effectively locked into working for the Practice being obliged to work four days a week, Monday to Thursday. There were substantial contractual impediments to their ability to work as a GP outside of those agreed hours:
    c. The GPEP was obliged to participate in an on-call, after-hours roster:
    d. They were substantially integrated into the business, obliged to see the Practice's patients in their premises, and to be available to do so Monday – Thursday:
    e. The GPEP was also obliged to provide the services at such other locations as the Practice directed, such as the local hospital and local rest homes:
    f. The GPEP used Practice equipment, including their electronic system for recording and maintaining patient notes:
    g. The contract reserved to the Practice ultimate control or authority over the work of the GPEP. Given the very nature of our profession, whilst the GPEP had unfettered autonomy over the patients in their care, ultimately they were answerable to the Practice for the standard of care and skill applied to their performance and obligations. These standards were prescribed in some detail in a schedule to the contract:
    h. The contract also provided that the GPEP must support and promote the Practice's philosophy and values, and

comply with its reasonable and lawful directions (which for the most part, were to come from the Practice Manager):

i. The GPEP was paid by the session, irrespective of the number of patients seen during each session. There was no opportunity for the GPEP to derive financial advantage, for example by seeing more than the average number of patients per session and payment was made to the GPEP's account automatically, without any requirement for a GST invoice:

j. And finally a feature more typical of an employment relationship than an independent contract relationship, was the right of the Practice to suspend the GPEP without pay or compensation in situations such as the commencement of a disciplinary investigation if, "in the Practice's reasonable opinion, [the investigation] concerns possible serious professional misconduct or presents a risk to the Practice's reputation, business or patients." Perhaps symptomatic of the ultimate control or authority which the Practice retains over the GPEP, this provision is much more likely to be seen in the context of an employment relationship.

Despite what it was called and what the Practice thought it was, this was clearly an employment contract.

The legal test

For those of you still with us, the question of whether or not a person is an employee or an independent contractor has been dominated by various tests, called such delightful titles as the "control" test, the "integration" or "organisation" test, the "economic reality" test, and the "intention" test. This is no longer the case however. While considerations of control (and autonomy), organisational integration, and the parties' intent will all be relevant to the assessment, no one test is dominant. Instead, the analysis is an intensely factual one, having regard to the circumstances of the particular relationship, that is to say the terms and conditions of the parties' contract, and the surrounding circumstances. This is sometimes referred to as the "mixed" or "multiple" test.

The key principles are:

- The issue of control will always be a relevant factor. If you have substantial autonomy over your work including how and when it must be done, then generally that will be indicative of an independent contractor relationship. At one end of the spectrum then, a person who is retained to undertake a particular project within a particular timeframe, but with substantial autonomy as to how and when the work is undertaken, would normally be regarded as an independent contractor. That said, the test is whether the business has the right to control the work of the person said to be an employee, not only as to what that person must do but also as to how and when the person's work must be done. In other

words, where does the ultimate authority or control in the relationship lie?

- Whether you are genuinely in business on your own account, or conversely whether you are "part-and-parcel of', or integrated into, the business enterprise. Inevitably this is a matter of degree, to be weighed according to the circumstances of each case. One factor bearing on the issue is whether and to what extent the work done is an integral part of the business, or whether it is simply accessory to the business. Thus work which lies at the core of the organisation's business - for example, medical work in a general practice - is more likely to be regarded as the work of an employee, while work which simply services the business' infrastructure - such as IT support - is more likely to be the work of an independent contractor.

- Next, what is the common intention of the parties albeit having said that while relevant, it is not decisive for, as s.6 (3) of the Act provides, the Court is to consider all relevant matters "including intention". Significantly the subsection does not elevate intention over other matters such as the control test and the integration test. In practical terms, if the real nature of the relationship is clearly that of an employment relationship and the common intent of the parties is that it was to have been an independent contract relationship, the intent won't hold water. Putting that aside, the parties' intent is likely to become a critical factor where the real nature of the relationship is unclear or ambiguous. In such circumstances a finding that the parties had intended their relationship to be one thing, could well be the decisive factor in determining what in fact is the real nature of their relationship, that is to say that they succeeded in structuring it as they had intended. So yes it is important you are clear on what you intend the relationship to be, but if it clearly is one of employment (and most GPEP 2 contracts will be) then don't pretend otherwise.

- A related principle is evidence of a pervasive practice in a particular industry (either to treat workers as employees, or conversely as contractors). This may be compelling evidence of the parties' common intention, for it might be presumed that they intended to structure their relationship in a manner consistent with industry practice. Again however, this factor cannot be determinative. That is because even if the parties' intention conforms to the industry practice, their intention must (again) yield to the real nature of their relationship between them. We ran into this issue where a standard contract was being used across a number of practices covered by the same PHO. The contract had clearly "morphed" over time, however the collective intention that the contract be for service, was not supported by the level of control the practice had over the GPEP.

A real life employment law case

The employment status of a doctor has been considered in only one case in New Zealand, Chief of Defence Force v. Ross-Taylor (2010). At issue in that case was whether civilian medical officer was an employee, or as her contract expressly provided an independent contractor. The Court held that the services performed by the defendant could have been performed either as an employee or as an independent contractor. The decisive factor however was the flexibility which the agreement gave to the defendant to work the hours she chose. Those hours were reflected in a roster which she and the other doctors on similar contracts were left to establish between themselves.

Furthermore the agreement allowed the defendant the flexibility to delegate her services if she wished, to engage in other contracting arrangements, and even to use the Defence Force hospital for her private patients. Moreover the contract was structured to meet the needs of the Defence Force. From time to time, as qualified military personnel who were medical officers returned from assignments overseas, the Defence Force was able to let go the civilian medical personnel, such as the defendant. Whom they were replacing. Because they were independent contractors, this could be done simply on notice. Had the civilian medical personnel been retained on contracts of service, this would not have been possible, or at least not without legal risk. Thus, in all the circumstances, the Court considered that in substance, the defendant was a “free agent” and was intended to be so by both parties.

Consequently the substance of the parties’ relationship accorded with the common intention expressed in the written contract, that the defendant was an independent contractor; not an employee.