

## Contractors and employment rights: a huge can of worms

Contractors don't need employment rights, but situations do arise where a long-term relationship between a contractor and a client starts to resemble having a job. If you are inside [IR35](#), there is a real chance you may have employment rights. But obtaining employment rights opens a legal hornets nest though, so contractors should beware.

The first thing that contractors should know about employment rights is that they don't need them. The second thing is: trying to obtain them opens "a legal hornet's nest," as Kate Cottrell, a principal with the Westoning, Beds-based tax consulting firm Bauer & Cottrell points out.

### Contractors Don't Need These Protections

Contractors earn more than full-time employees, and they enjoy a more flexible lifestyle than employees do. What's more, a really good contractor with good marketing skills, can enjoy far greater job security than a full-time employee who depends entirely on one company and one budget.

With demand for contractors on the rise in the UK, Europe, in the Middle East, and in Asia, a contractor can look forward to a few years of steady work, and growing income.

With all these advantages, you have to wonder why contractors would even think about pursuing the rights of a full-time employee, particularly since acquiring employee status means losing the right to claim a certain number of [expenses](#), and going inside IR35.

“ Trying to obtain them opens a legal hornets nest ”

Kate Cottrell Bauer and Cottrell

### But Anything Can Happen

Well, anything can happen. A contractor can get involved in a project, and wind up running it far longer than was originally intended. A project could become so time-intensive, that the contractor can't work for other clients.

When this happens, and conflicts arise between the contractor and the client or agency, a contractors have been known to claim employee rights in order to resolve the difficulties. These rights are laid out in full under the [Employment Rights Act 1996](#), in which there are sections that apply to workers as well as employees. Under the terms of this law, a 'worker' will have various rights akin to a full employee, including rights to not to have unlawful deductions made from earnings, and to be protected against detriment for making a protected disclosure (whistle blowing) etc.

Explains James May of the Hove-based legal consultancy [Lawspeed](#): "But whether a contractor falls within the definition of a worker is determined by whether there is an express or implied contract to perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual."

"A contractor (if seeking to operate outside IR35) is unlikely to be agreeing to provide a service personally, and will also wish to represent that their services are pursuant to their profession or business undertaking - in which case they will not be a 'worker' for the purpose of claiming worker's rights/entitlements. Limited company contractors do also still have rights not to be discriminated against."

"Other than that," May continues, "a contractor could still rely on the Employment Rights Act for all employment rights and entitlements if they can establish that they (as an individual) are actually employed by their respective agency or client - this will usually require there to be an implied contract of employment in accordance with principles established in *Dacas*, and in *Cable & Wireless v Muscat*."

“ But whether a contractor falls within the definition of a worker is a complex issue ”

James May Lawspeed

### The Muscat Case

This judgement of reference, called "Cable and Wireless v. Muscat" which came down in March, 2006 is the judgement of an appeal made on a case referred to as "Dacas" which dates from 2004.

May explains further: "in the case of *Cable and Wireless v Muscat*, the Court of Appeal has robustly supported the statements and guidance made in *Dacas* in 2004, finding that Mr Muscat was an employee of Cable and Wireless under an implied unwritten employment contract. Mr Muscat was a £65,000 p.a. executive operating through a limited company and supplied by the agency Abraxas to Cable and Wireless, the contract he was hired on being a contract for services. More recent lower level cases have however limited the scope for these principles to be applied."

### Don't Miss the Point: Many Tests

So it is possible to claim such rights in very specific circumstances.

"But when you do, you are opening up a huge can of worms," says David Royden, a lawyer with the firm [Layton's Solicitors](#) in Manchester. Royden points out that, subject to a number of tests, notional contractors may well be able to argue that they are effectively full-time employees, and that they thus have all the privileges and protections of the Employee Rights Act of 1996 (with the consequence that they cannot be unfairly dismissed, etc.

### Inside IR35

Royden explains that being inside IR35 puts a contractor in a position that is very like that of an employee. In fact, the contractor is already paying tax like an employee. "The same series of tests that apply to IR35 status are applied to those trying to prove that they are in fact employees and not contractors.

The point not to be missed here is the 'series of tests.' The burden of proof is on you when you are trying to prove that you are an employee, and you will have to convince the Employment Appeals Tribunal. You'll have to show compliance with tests which involve concepts like relative control on the part of the client, and a lot of hair splitting which the lawyers will fight over like cats and dogs.

In general, contracts with clients and agents should take these possibilities into account. It is crucial that there be a clear understanding of the worker's position at the outset. Employers need to ensure that the agency has created an effective relationship with the worker and that their own agreement with the agency does not impart any contractual obligations to the worker. The agency should be responsible for all payment arrangements and, preferably any formal disciplinary action. Employers must ensure that they do not act in any way that would, over a period of time, change the relationship and so give rise to the creation of an implied contractual term.

It is in the contractor's interest to define his agreement with a client as clearly as possible, so as to avoid finding himself acting like an employee when he only wants to be what makes him happy: a contractor.

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