**Notes of Engagement of Self Employed Consultants/Contractors**

**By Lawrence Rodkin, Partner, Simon Rodkin Litigation Solicitors, 32 Bloomsbury Street, London WC1 and 707 High Road, Finchley, London N12**

It is a great temptation when starting off a business to engage self employed consultants/contractors without any formal documentation or simply after an exchange of emails.

There are a number of dangers of doing this.

The most obvious exposure is a risk that the person(s) concerned can in reality as a matter of law be an employee and not in fact self employed.

If such person is as a matter of law an employee this will give rise to potential horrific tax and other legal implications. In particular an employer is obliged to deduct income tax in respect of employees remuneration under the PAYE system and is also liable for employer national insurance contributions of currently 13.8%. The liabilities can mount up over a period of time, and the Revenue may also impose penalties and interest.

It is not possible for the parties to contract out of an employer/employee relationship.

Whether one exists or not is a matter of law for a Judge to decide.

There are a number of legal tests which of course will be adopted by a Judge in deciding whether or not there is an employment relationship.

One of the key elements of any such test is whether there is a right for the Company to require the consultant/contractor to work and whether there is an obligation on the consultant/contractor to provide their work. This is a cornerstone of an employment relationship.

This will be of particular importance where there are a series of engagements with gaps between each engagement.

There are various elements to legal tests to be adopted by the Court as to whether there is subsisting an employment relationship, including in particular the right of the company to direct how the relevant work under the contract is to be carried out and to give instructions in relation to this or whether the consultants/contractors although committing themselves to undertake the work in question are able to use their own skill and experience as to how the work is to be carried out.

You can appreciate that the legal tests are complicated.

The only advice we can really give is that if a consultant/contractor is only or mainly working for your business then there is potential problem. Typically genuinely self employed consultants/contractors work for a number of different clients.

If they work full time for your business then an issue will arise as to their true legal status.

In this scenario it is advisable for the business to seek legal advice.

As a minimum the business should ask the consultant/contractor to sign an engagement letter containing a number of provisions. This will not only include the amount of remuneration or how this is to be computed but also other clauses such as the time period for carrying out the work, a confidential clause and a tax indemnity.

It is amazing how many times I am consulted where there is no detailed agreement in place and in the absence of settlement it will up to the judge to determine the amount of remuneration to be paid to the self employed consultant/contractor.

Another very important clause for certain types of consultants/contractors is a non competition covenant.

Employees have a duty of fidelity to their employer. Self employed consultants/contractors do not have a similar obligation.

Accordingly if they are working with clients/customers self employed contractors are legally able to solicit these clients/customers for their own purposes or for the purposes of a new business, unless there is an enforceable non competition covenant which they have signed.

In certain situations, such a covenant can be very useful in providing protection to the business. A very basic example is if a building company were to use self employed labourers to carry out work for a client/customer. The self employed builder has under the general law no restriction on dealing directly with the client/customer after the end of contract. It is quite legitimate to try to prevent the self consultant/contractor from undertaking work for the client/customer for a specific period of time after the conclusion of the contract.

The business is not able to prevent such dealings forever and restrictive covenants are only enforceable if reasonable. However, it is possible to provide a measure of protection by well drafted and reasonable non competition covenants.

I have in fact prepared a very short form of self employed engagement letter/declaration. This is not a substitute for a detailed agreement but in my experience a new business cannot usually afford the cost of preparing a detailed agreement. This short form is fairly useful second best alternative for use on a short term/ temporary basis.

As an absolute minimum, it is important to document the remuneration of the self employed contractor, how and when it will be paid and also when the work will be carried out.

If after taking legal advice, the person concerned is more likely to be an employee than a self employed consultant/contractor, then the business in such scenario, if they continue to place a self employed label upon the relationship, will be relying upon the tax indemnity (if any) contained in the self employment agreement. There is no PAYE tax indemnity implied in favour of the employer under the general law

This is a not perfect answer to the postion, but it is better than not having any indemnity at all. Generally there is no implied right for an employer to recover tax from an employee when PAYE should have been deducted and it has not been.

The Agreement should also provide for the assignment /use of any intellectual property rights created by the contractor/consultant during the use of an engagement as well as an express obligation on the part of contractor/consultant to undertake their work under the engagement with reasonable skill and care.

This note is no substitute for detailed legal advice and just highlights certain key issues which may arise in the engagement of a self employed contractor/consultant.

**Lawrence Rodkin, Partner Simon Rodkin Litigation Solicitors**

**Tel:** 0207 112 8841

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