

## Independent Contractor or Employee?

General Practitioners are often engaged to work for practices as either an independent contractor or an employee. These engagements can be for short periods of locum cover, or permanent positions.

An “employment agreement” should be used for an employee and a “contract” should be used for an independent contractor. This article explains the difference between employees and independent contractors and sets out the pros and cons of each type of relationship.

### What is the difference?

In legal-speak an “employment agreement” is a “contract” of service while an independent contractor is a “contract” for services. The easiest way to explain the distinction is by way of example. An employee could be someone such as the nurse who is engaged to serve the practice by doing specified work. An independent contractor could be the cleaning firm which contracts with the practice to provide all cleaning services. It is then up to the cleaning firm to find people for each area of the cleaning agreement.

It can make quite a difference to a person if he or she is an employee or an independent contractor. For this reason, the Courts have looked at the distinction between employees and independent contractors in a number of cases. The leading New Zealand case is *Cunningham v. TNT Express Worldwide (New Zealand) Ltd.* In this case the Court of Appeal was faced with an owner/driver courier under contract to a courier company. There was a written contract containing the terms of agreement and labelling the courier as an independent contractor. The courier's contract had been terminated and the courier argued he could bring a personal grievance action in the Employment Tribunal because he was an employee. The courier company argued that he was an independent contractor.

The Court of Appeal decided that the courier was an independent contractor. While the label of ‘independent contractor’ was not conclusive, the terms of the contract were. The test for determining whether or not a person was an employee or an independent contractor was:

*Is the person who has engaged himself to perform these services performing them as a person in business on his own account?*

An independent contractor would be in business on his or her own account. Some of the relevant factors Courts look at to decide the status of the person are:

- The degree of control the ‘employer’ had over the ‘employee’.
- The equipment the person is required to provide, including a vehicle.
- The method of tax payment.
- The wording used in the “agreement”.

Applying these factors to a General Practitioner, a GP may be an employee if:

- There is a clause in the “employment agreement” stating as much, or clauses which are tantamount to such a clause (e.g. giving the GP the right to be paid annual leave under the Holidays Act 2003 or to bring a personal grievance under the Employment Relations Act 2000 (ERA)).
- The GP’s rate of pay does not relate to the number of patients the locum sees (in other words, the locum takes no financial risk in the job).
- The GP is subject to a significant degree of supervision by a principle GP/manager.
- The GP pays PAYE.
- The GP can claim his or her expenses from the practice.
- The GP provides little of his or her own equipment and reference material.

Furthermore, the greater the latitude that GPs are given to make their own decisions about such things as hours of work and case management, and the lesser the amount of direct supervision by principle GPs/manager, the greater will be the prospect of them being held to be independent contractors if the issue ever comes to be tested by the Inland Revenue Department (IRD) or in the Employment Relations Authority.

### **The benefits of being an employee**

1. One of the most important benefits of being an employee is that employees have access to the ERA and the rights contained in it. For example, an employee can claim compensation for an unjustified termination of an “employment agreement”, can claim for unpaid wages and holiday pay, and enforce compliance with the terms of an “employment agreement” etc.

The only option an independent contractor has if he or she is unhappy with his or her treatment is to sue in the District or High Court for breach of “contract”. The damages available are more limited and the procedure more difficult than for an employee.

2. Employees are statutorily entitled to paid holiday pay and special leave (for example, sick leave and bereavement leave).

An independent contractor has no right to paid holidays or sick leave - the contractor will have to take unpaid time off. Likewise, a contractor will have no right to parental leave, whereas an employee will have such a right.

3. Employees pay PAYE. An independent contractor will be obliged to charge the principal GST, and will be responsible for his or her own tax. This can be an advantage or disadvantage, depending upon the person's preference.

4. In limited circumstances an employee whose “employment agreement” is terminated at the end of a fixed term will be in a better position than an independent contractor at the end of a fixed term “contract”. An employer can only terminate an employee's fixed term “agreement” at the end of that fixed term if there was a genuine need for the fixed term “agreement” and the termination is also genuine. This would usually mean an employed locum could only have his or her employment validly terminated after a fixed term if the medical practitioner's return was imminent. For example, legally it would be tenuous to place an employee locum on a three month “employment agreement” if the partner is to be away for twelve months, and then not renew the locum's “agreement” simply because he or she was not fitting in. A stronger reason would be needed. In practical terms therefore the locum's employment would be protected in such a situation.

An independent contractor cannot object to termination of a fixed term “contract” unless the practice has breached the “contract”. If the period of the “contract” has expired, that will often be the end of the matter.

### **The benefits of being an independent contractor**

1. One of the most important benefits of being on an independent “contract” is flexibility. An independent contractor usually provides his or her own vehicle and reference material. Because the contractor will also take on the financial risk of the “contract” he or she tends to have the opportunity to receive greater financial benefit than an employee.
2. There are likely to be added tax advantages to being an independent contractor. For example, certain expenses can be claimed against one's tax. An employee cannot do this.

### **Reclassification**

Under the ERA a contractor has a right to seek to be reclassified as an employee. The Court and the Authority have the power to decide that someone engaged as a contractor is instead an employee. A contractor may ask the Authority to decide the matter or alternatively a Union or labour inspector can ask the Court for an order declaring that the contractor named in the application are in reality employees.

In determining “the real nature of the relationship” the Court or Authority will consider all relevant matters including the intention of the parties.

The Authority or Court can also consider what is common practice in the industry. Within General Practice, independent contractors are common. But common practice alone will not override the examination of the real nature of the relationship. It is possible that many GPs currently employed as independent contractors would be found to be employees if the Authority were to consider the relationship. If you were engaged as a contractor and were later reclassified as an employee, you would be entitled to the protections and rights of the ERA.

### Sample Agreements

The NZMA has sample independent contractor and employee agreements available to members.

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### Need more help?

Contact the NZMA:

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