

EMPLOYMENT MATTERS COMMITTEE

18 JULY 2012

USE OF PEOPLE RESOURCES

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Summary

This report provides information on the use of people resources in the Council.

1. Budget and Policy Framework

1.1 The resourcing of work to support the delivery of Council services is a matter for this committee.

2. Background

2.1 There has been media interest recently on the use of external resources in local authorities and the Chief Executive has asked for a report to be presented to this Committee on this issue.

3. Summary of the present position

3.1 The vast majority of Council services are provided by the Council's workforce or are outsourced to independent providers via the procurement process, such as waste collection and grounds maintenance.

3.2 The Council uses its in house temporary agency to provide interim support wherever necessary and possible. The in house agency provides resources to cover a wide range of roles, including administration, domestic, management, driving, library and leisure staff.

3.3 The Council also uses external agencies to provide interim support where the in house agency cannot do so. This is cost effective, as the external agencies do not pay the weekend or unsocial hours enhancements that the Council pays. For example, it is more cost effective to use external agency cover in care homes at the weekend than to use existing staff on extra hours or overtime.

3.4 Both the in house agency and external agency use will be subject to the scrutiny of the new Category Management Team being set up under Phase 2 of Achieving Better for Less from September 2012.

- 3.5 On occasions, the Council uses external consultants for specific pieces of project work.

4. External Consultants

- 4.1 Medway Council, in line with other areas of the public sector continues to use external consultants to advise us and recommend solutions to problems and they clearly add value in specific situations. There are several reasons why external consultants are used. Sometimes it could simply be we have not got the resource or expertise available in-house at that time. Sometimes we know exactly what we want or need to do, but may be in a stronger position if we have an independent view which either supports what we say or gives us one or more new ideas or different options that we may want to consider and implement. They are used for short term projects to complete specific pieces of work.
- 4.2 External consultants need to be accountable and to justify at any time what they are doing, why, and what it costs. They have to be able to support with evidence anything they conclude, any recommendations they make, and any findings. They have to demonstrate why they have drawn their conclusions in a particular way, and why they believe a particular course of action is right. If we looking at management consultants in terms of cost, we should consider the alternative. We could not keep those people in-house, they could not continue to provide the value at the level at which they were being rewarded.
- 4.3 External consultants are typically going to have more experience than someone working in-house. They will have broader experience and be used to addressing a problem quickly, gathering the evidence, assessing the issue and identifying solutions and working with people to find the most practical way of addressing that problem.

5. Risk management

- 5.1 We have a robust system in place to ensure that those who should be on the payroll are on the payroll. Every application for self employed status has to be examined in accordance with the Her Majesty's Revenue and Customs (HMRC) regulations. (See appendix 1 attached). The HMRC guidance on this issue has recently been updated and our guidance reflects this.
- 5.2 Managers are expected to make a decision on the status of employment, not only to ensure that employment rights are attained (if these are applicable), but also to meet the requirements of tax legislation, which require certain deductions to be applied by us at source from the payments that we make.
- 5.3 There is sometimes an assumption that a worker will be self-employed because they operate under a company name. However, each contract is tested to ascertain whether or not the person is engaged to work under a contract of employment, or a contract for services.
- 5.4 Some decisions that we make are reviewed at different stages by external bodies, such as HMRC. In HR we provide managers with professional advice in order to make the right decision before appointing the person to work, as Medway Council will be liable for any underpayment in tax and national insurance, plus interest and penalties.

5.5 A significant number of people who claimed to be self employed have been moved to the payroll, such as School Improvement Officers, Music Teachers, Development Control Workers, Summer School Workers and Interpreters. We are satisfied that the HMRC requirements are being met and regularly remind managers of their responsibilities in relation to this matter.

6. Financial and legal implications

6.1 Agency and external consultant costs are charged to the individual budget headings appropriate to the service being provided and therefore subject to the same constraints as other Council spending.

6.2 Her Majesty's Revenue and Customs (HMRC) have specific rules regarding the taxation status of individuals and 'companies' and the Council has to be cogniscent of these rules or face the possibility of sanction should HMRC determine that there has not been a satisfactory treatment of taxation status.

6.3 The Council needs to be mindful that there could be a challenge from an individual consultant, say for example if their services are no longer required, that they should have been on a contract of employment and therefore eligible for employments rights, such as the right not to be unfairly dismissed or the right to a redundancy payment. In addition, the Council could be held liable for the actions of external consultants for example, for acts of harassment under The Equality Act 2010.

7. Diversity Impact Assessment

7.1 Not applicable.

8. Recommendation

8.1 The Employment Matters Committee is asked to note the information in this report.

8.2 The Employment Matters Committee endorses the provision of further guidance for managers to clearly state how and when to engage consultants and to include in the contract for services clauses such as break clauses, output based specifications and how to manage a consultant.

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Background papers

None

Medway Council Determining Employment Status



Medway Council Determining Employment Status

1.0 Employee or self-employed?

- 1.1 Managers need to be clear as to whether a person working within their service is working under a contract of employment (i.e. an employee) or a contract for services (i.e. self-employed). Whether someone is employed or self-employed depends on the terms and conditions of their engagement.
- 1.2 It is important as it determines who is liable to pay income tax and National Insurance Contributions (NIC), whether the person has employment protection, is entitled to Statutory Sick Pay and other employment rights.
- 1.3 The guidance below has been produced to assist managers in determining the appropriate contract status. Where it is determined that the person is self-employed, the [pro-forma agreement](#) should be used.

2.0 Guidance Notes

- 2.1 To decide whether or not a person is an employee, the key question is whether they work under a contract of employment or perform work under a contract for services.
- 2.2 Whether someone is employed or self-employed depends on the terms and conditions of their engagement. When a case is in dispute the courts examine each aspect of the relationship and decide on the facts whether there is a contract of employment or a contract for services.
- 2.3 The distinction between a contract of employment and a contract for services is important; it determines who is liable to pay income tax and NIC, whether the person is entitled to Statutory Sick Pay from the organisation, and whether the person has employment protection and other rights of an employee.
- 2.4 A helpful guide to decide employment status is given below:
- 2.5 Answering 'yes' to the following questions point to employee status under a contract of employment:
 - Can the 'employer' dictate what, when, where and how work should be done; or, to put it another way, do they work under the direction and control of the council's management?
 - Is there mutuality of obligation (i.e. do they expect to be provided with work and are they obliged to make themselves available for it)?
 - Are they obliged to do the work they are given?
 - Is it necessary for the work to be done regularly, and possibly within a certain time?
 - Has the relationship between the parties endured for a substantial time?
 - Does the council provide the tools, equipment and/or clothing necessary to do the work?
 - Does the council provide training?
 - Do they attend the council's premises to perform the work?

- If, and when, they are at the place of work, are they regarded as a member of staff (e.g. do they have terms and conditions of employment similar or identical to those of the council's employees; access to the grievance and disciplinary procedure etc?)
- Do they do similar duties to employees of the Council?
- Have they previously been an employee of the Council?
- Do they have to provide the service personally?
- Is there any regular or assured working hours for the individual?
- Is there a duty rota requiring the individual's attendance at certain times on certain days?
- Do they have to ask management for time off?
- Are they entitled to, or do they receive, holiday pay, bonus, or similar payments from the council?
- Are they paid monthly like those employees of the council who work under contracts of employment?
- Are they paid sick pay or overtime?
- Do they have any management responsibilities?
- Is any part of the payments to the individual attributable to a regular basic wage?
- Is the 'engagement' subject to termination by notice from either side?

2.6 Answering 'yes' to the following questions would be more consistent with self-employment under a contract for services:

- Do they do work for more than one company or organisation?
- Has the HMRC accepted (for tax purposes) that the individual is accountable as a self-employed person?
- Has the individual invested their own capital in the undertaking and/or do they stand to gain or lose from its commercial success?
- Is the company or organisation for which the individual is providing work or a service a professional client of theirs?
- Is the individual paid on a fee basis?
- If they cannot attend can they send a substitute?
- If so, would they pay the substitute?
- Do they invoice the council for their services?
- Is the individual recognisable in business on their own account, whether as a person, a partnership or a limited company?
- Are they a registered VAT trader?

3.0 Other Employment Categories

3.1 There is another category of worker classed as "office holder". This type of worker becomes an office holder as the local authority has a statutory duty to appoint. Therefore, whilst these individuals would not be classified as employees they are required under HMRC guidelines to be taxed at source and therefore would need to be paid via our Payroll department. The types of role this would normally cover are independent members of adoption and fostering panels, school improvement partners, Elected Members and Returning Officer.

3.2 Guidance on the meaning of "office holder" is shown below. If you require further information please contact HR Services.

- 3.3 The holder of an office is automatically chargeable under employment income tax legislation on the earnings from it and generally there will also be liability for Class 1 National Insurance Contributions. It is not necessary to show, as for an employee, that an office holder works under a contract of service.
- 3.4 There is no statutory definition of the word 'office'. It has been judicially defined as a 'permanent, substantive position, which had an existence independent from the person who filled it, which went on and was filled in succession by successive holders.'
- 3.5 That definition was approved in the Courts with the proviso that a post need not be capable of permanent or prolonged existence but it must have endurance, at least, beyond the tenure of one person.
- 3.6 An office may be created by a charter, statute, or other document which is, or forms part of, the constitution of an organisation or which governs its operation. For example, a director of a company is an office holder because the Companies Act requires a company to have a board of directors and similarly all companies are required to have a company secretary. There is no statutory definition of 'director' but the term includes executive, non-executive and nominee directors.
- 3.7 But not everyone who carries out duties specified by the law is an office holder. A local authority has a statutory duty to collect refuse but a dustman does not hold an office. On the other hand a Returning Officer does hold an office because not only does he or she have duties, but also the 'post' is established by law.
- 3.8 The appointment of a succession of individuals to a post or job title is not in itself sufficient to establish an office.
- 3.9 An office is a separate and independent position to which duties are attached; an office does not owe its existence to the incumbent or the discretion of an organisation.
- 3.10 For example, the post of manager of a factory or a head of division in an organisation is not an office because such a post will normally only exist as long as the organisation wishes. It will not have the independent existence or endurance required to establish it as an office.