

Employment Status for Instrumental and Vocal Teachers

Musicians'
Union



March 2021

Contents

- **Foreword** *pg3*
- **Introduction** *pg4*
- **Part 1 – Employee status** *pg5*
 - Principal statement
 - Benefits and rights
 - Variable hours contracts
 - Fixed term contracts
 - Misinterpretation of employment status
- **Part 2 – Worker status** *pg7*
 - Inappropriate use of zero hour contracts
- **Part 3 – Self-employed status** *pg8*
 - Self employment as a sole trader
 - Self employment as a limited company
 - IR35
 - Agencies
 - Co operatives
 - Retail sublets
- **Appendices** *pg11*
 - A Employee, worker and self employed benefits, rights and protections
 - B – Case studies
 - References and further reading

Foreword



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Welcome to this guide to employment status for instrumental and vocal teachers.

Employment as an instrumental teacher used to be simple. You were either 'employed' by a music service, school, college or university, or 'self-employed' – working at home, visiting pupils' homes or teaching in a private studio.

Today, years of local authority cuts, the academisation of schools, new tax rules, private-sector competition and other factors have combined to create a confusing and uncertain working environment that is often characterised by bogus self-employment, the inappropriate use of zero-hour contracts and other questionable practices.

Employment conditions may deteriorate further in the coming months and years as public funding reduces due to Covid-related economic challenges, and as employment legislation evolves following Brexit. The latter is because EU-derived rights such as parental leave, protection against discrimination, holiday pay, TUPE, working time regulations, GDPR and rules relating to agency workers can now be changed by domestic legislation.

It is therefore essential that instrumental and vocal teachers understand the fundamentals of employment status and, in doing so, become empowered to ask the right questions, challenge contracts as appropriate and, if necessary, walk away from an offer that potentially exploits their professionalism and skill.

This is not a definitive guide but it should, I hope, point you in the right direction for further research. If in doubt, contact the Musicians' Union.

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Introduction



There are three forms of employment status drawn from three main sources of employment law (UK common law, statute and European law). These are:

- **employee** – see Part 1
- **worker** – see Part 2
- **self-employed** – see Part 3

The employment status that you hold determines your statutory rights, such as the right not to be unfairly dismissed, the right to a pension, the right to holiday pay, the right to equal pay, and more.

There are two types of contract in terms of employment:

- **Contract of service or employment** – for employees and workers
- **Contract for services** – for self-employed sole traders or limited companies

It is now a legal requirement for an employee (full time or part time) or a worker to have a contract in place prior to work starting, and good practice to have a contract for services agreed before work commences. Contracts require special attention. For help and guidance, MU members can make free use of the MU's [Employment Advice & Assistance](#) service.

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Pt 1 Employee status

The Employment Rights Act 1996 states that an employee is an 'individual who has entered into or works under a contract of employment'. But the situation is complicated, and there is no simple test for determining whether an individual works under a contract of employment or otherwise. Only an employment tribunal can decide this.

An individual may be an employee in terms of employment law but have a different status for tax purposes. Employers are required to work out each employee's status in both respects.

If you answer 'yes' to most of the following questions, then you are likely an employee:

- Are you required to work regularly?
- Are you expected to work a minimum number of hours and be paid for time worked?
- Do you report to a manager or supervisor who has control over your work in terms of what you do, how you do it, where and when?
- Are you expected to do the work yourself or can you send a substitute?
- Does your employer deduct tax and national insurance at source via PAYE?
- Do you receive paid annual leave or holiday pay?
- Do you have access to statutory sick pay, maternity and paternity pay?
- Do you have access to a company pension scheme?
- Does your contract include redundancy, disciplinary or grievance policies?
- Are you required to work at a location specified by the organisation?
- Does the organisation provide materials, tools and equipment to deliver the work?
- Does your contract use the terms 'employer' or 'employee'?
- Is the organisation your only employer?
- Do you have access to overtime pay?
- Is there a bonus scheme?

If you answer 'no' to most of these questions or they don't apply, you may be a worker or self-employed (see below).



There is no simple test for determining whether an individual works under a contract of employment or otherwise



Principal statement

Employers are required by law to provide written particulars (also known as the 'principal statement') from day one of an employee's contract, whether the contract is full time, part time or variable hours (see below). Previously, employers had two months to fulfil this obligation.

The principal statement should include:

- the employer's name and address
- the employee's name, job title or a description of work
- employment start date
- employment end date (fixed-term contracts only)
- date on which continuous employment began
- where the employee will be working and whether they have to relocate
- length of notice the employee is required to give to terminate the contract
- rate of remuneration or the method of calculating pay
- intervals at which remuneration is paid, e.g. weekly, monthly or other specified periods
- hours and days of work and if (and how) they may vary, including the requirement to work weekends or nights
- length of probationary period
- details of any training the employer requires the employee to complete
- how holiday pay is calculated
- information on sick pay, maternity/paternity pay and pension
- disciplinary and grievance processes
- any other benefits, e.g. private health, childcare vouchers, lunch, gym etc.

If an employee is required to work outside the UK for more than a month, e.g. a private school operating in another country, the principal statement must include:

- how long they'll be abroad
- what currency they'll be paid in
- what additional pay or benefits they'll receive
- terms relating to their return to the UK

While the Employment Rights Act 1996 states what should be included in the principal statement, employers may refer to an employee handbook or other policies for precise operational details. This may include procedures in relation to disciplinary action, grievances, collective agreements, commission schemes, booking holidays, sickness, retirement and more.

The terms and conditions set out in the principal statement are known as express terms. If there is nothing clearly agreed between you and your employer about a

particular matter or issue, it may be covered by implied terms. These may include statutory rights, such as the right to equal pay, duty of care, mutual trust and confidence, good faith and fidelity, or the expectation of a Christmas bonus which, over time, has become the norm.

In certain situations, a party may seek to argue that the express terms of a contract do not adequately reflect day-to-day operations or the contract entered into. In this scenario, an employment tribunal may be asked to fill in the gaps with implied terms. However, we would always recommend that all terms be confirmed in writing where possible, ideally in the principal statement or at least by email or letter.

Benefits and rights

Being an employee provides access (subject to qualifying conditions) to various statutory rights, occupational benefits and protections. These include:

- the right not to be unfairly dismissed (after two years' service)
- the right to receive a written statement of terms and conditions
- statutory redundancy pay (after two years' service)
- statutory minimum notice
- paid annual leave (holiday pay)
- statutory maternity, paternity, adoption leave and pay
- time off for trade union activities
- and more – please refer to Appendix A

For further details on employee benefits, please refer to the government's [guidance on employment rights](#).

Variable-hours contracts

Even in an employed situation, whether full time or part time, the availability of work for an employee may fluctuate according to demand. In this situation, the use of a variable-hours contract (also known as annualised hours) may be appropriate.

A variable-hours contract allows for a total or minimum number of hours (rather than days, weeks, etc.) to be agreed between the employer and employee. This allocation is then provided in variable quantities over the year, allowing flexible working patterns to be used. This works particularly well in an educational context where teaching is bunched into three separate terms.

Some music services and other providers are now using annualised contracts. If the teacher exceeds the number of hours allocated, an adjustment to pay is made in months 11 and 12 (within that financial year),



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Fixed-term employees must not be treated less favourably than permanent employees doing the same or largely the same job – including pay and conditions

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and vice versa if the hours provided fall below the original forecast. The minimum number of hours is reviewed annually. This arrangement provides a degree of security for both the employer and employee, who are bound by the terms, benefits and rights of employment.

Fixed-term contracts

A fixed-term contract (FTC, also known as a single assignment contract) is a way for employers to resolve a staffing shortage caused by maternity leave, long-term sick leave, where the work is grant funded or short term, etc. Fixed-term contracts can also be used when the demand for labour exceeds normal staffing levels, or when specific skills are needed on a temporary basis.

Fixed-term employees must not be treated less favourably than permanent employees doing the same or largely the same job – including pay and conditions, employment benefits, information regarding in-house vacancies, and protection against unfair treatment – unless the employer provides a clear business case. Furthermore:

- fixed-term employees who work continually for the same employer for two or more years may have the same redundancy rights as a permanent employee
- employees on a fixed-term contract for four or more years may automatically gain permanent employee status unless the employer provides a coherent business case to the contrary
- contracts will normally end automatically when they reach the agreed termination date*

*If the work ends before the agreed end

date and the contract allows the worker to be dismissed, the employer is required to provide the appropriate notice. Failure to do so may be a breach of contract.

Some employers have argued that a temporary cessation of work – teachers stopping work during the school holidays, for example – is sufficient to avoid permanent employed status. However, there is no definition of what constitutes a temporary cessation of work, and the law does not place any limit on the length of cessation, although this is usually measured in terms of weeks rather than months. The only rules are that:

- there must be a cessation of work – not simply a redistribution of work among fewer employees
- the cessation of work must be genuinely temporary
- the employee must be away from work due to the cessation
- the reason for the employee's re-employment must be that the amount of work has returned to its pre-existing level

In the case of *Cornwall County Council v Prater* (2006), Mrs Prater had a number of teaching contracts over a period of 10 years with short gaps in between created by school holidays. The arrangement or custom was that she would resume work at the beginning of the following term. She argued that the pattern of fixed-term contracts over a 10-year period created what is called an umbrella contract**. The court of appeal agreed, concluding that each separate contract was a contract of employment and that any week during which an employee was absent from work because of a temporary cessation of work should count in calculating the employer's period of continuous work.

**An umbrella or global contract is said to be in place when:

- a) the working relationship is longstanding
- b) the working hours are regular, forming a recognisable pattern of work
- c) the employer has come to rely on the worker at set times
- d) the employee has come to rely on the work at set times

Misinterpretation of employment status

Employment can be expensive for the employer considering the additional costs and obligations involved, e.g. employer's national insurance (potentially 13.8% on all earnings above a certain threshold), pension contributions (at least 3% of the employee's salary), holiday pay, travel expenses, etc.

With this in mind, employers may look to alternative employment options such as zero-hour or casual contracts (see Part 2) or self-employment (see Part 3). However, the tug-of-war between service provision at the cheapest cost vs. hard-won employee rights creates the potential for misunderstandings of employment law – or in some cases, deliberate strategies to avoid well-established employment principles in order to save money.

Refer to Appendix C for some example case studies illustrating the complexities of employment status. ■

Pt 2 Worker status

A worker (sometimes referred to as casual, temp or zero-hour) is someone who provides work or services personally for reward (either money or benefit in kind) but on an 'ad hoc' or 'as and when' basis, and where there is no guarantee of future work. Opportunities for employment may be offered when available, and the individual has the freedom to accept or decline work offered, ideal for those with childcare and studying commitments. In some circumstances, the worker may even have a limited right to send a deputy to do the work, subject to the employer's approval.

Zero-hour contracts are useful when work demands are unpredictable or irregular, often driven by external factors outside the employer's control, e.g. unexpected sickness and seasonal demand. This happens a lot in the pub and restaurant industry, retail, care work, supply teaching, etc. It may also be appropriate to use zero-hour contracts to launch a new business or test a new product when there is no certainty that the project will continue.

Workers may have more than one employer and are protected by the [Small Business, Enterprise and Employment Act](#) which prohibits the use of exclusivity clauses or terms in any zero-hour contract. This means an employer cannot stop a worker from looking for work or accepting work from another employer. Nor can the employer pre-empt this by, for example, stipulating that the worker must seek their permission or approval prior to looking for or accepting work elsewhere, unless there are clear and justifiable commercial reasons for doing this.

Workers are entitled to certain employment rights, including:

- protection from discrimination in the workplace
- the national minimum wage
- protection from unlawful deduction from wages
- paid annual leave or holiday pay
- the right to daily and weekly rest breaks
- pension auto-enrolment
- the right to be accompanied at a disciplinary or grievance hearing

Workers may also be entitled to (subject to eligibility):

- statutory sick pay
- statutory maternity, paternity and adoption pay
- shared parental pay

The employer is also responsible for the worker's health and safety and for paying wages through PAYE, deducting tax and national insurance at source.

Unfortunately, workers do not have access to:

- minimum notice periods if their employment is ending
- protection against unfair dismissal
- the right to request flexible working
- time off for emergencies
- statutory redundancy pay
- time off for trade union activities

As of 6 April 2020, workers are entitled to receive written particulars (see 'principal statement', above) from day one of their contract. Previously this right only applied to employees. This does not apply retrospectively, but current workers can request a written statement. Employers are required to respond within one month.

Inappropriate use of zero-hour contracts

Employing casual workers incurs less liability for the employer and is consequently cheaper (see Appendix B comparing the advantages and disadvantages of employee vs. worker status). However, some organisations have applied worker status incorrectly in order to save money, while others have inadvertently drifted into an employment relationship.

The latter happens when the employer and worker have regularised their working days and times over an extended period of time. In such circumstances, it may be argued that mutuality of obligation has been established, and good practice would be to change the contract from zero-hour to employment (either variable hours, full-time or part-time). Therefore, for an arrangement to be truly zero-hour, an employer must not be under any obligation to provide work, nor should the worker be under any pressure to accept work for any reason. ■

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Pt 3 Self-employed status

According to HMRC, a person is self-employed 'if they run their business for themselves and take responsibility for its success or failure'. You can either work for yourself as a sole trader or as a company limited by guarantee or business partnership. The legal structure you choose will have an impact on your tax liability and take-home pay and therefore requires careful consideration. For further details on the pros and cons of sole trader vs. limited company, read this useful [guide](#) prepared by AXA.

Self-employment as a sole trader

According to the Department for Business, Innovation and Skills, there were 3.5 million sole traders operating in the UK in 2019. The [Self-employed Landscape Report 2019](#), compiled by the Association of Independent Professionals and the Self-employed (IPSE), recorded that the top occupations were construction and building trades (circa 444,000); drivers (circa 337,000); artistic, literary and media (circa 336,000) and agricultural (circa 222,000). The largest growth – 24% in 2019 – was among teaching and educational professionals.

As a sole trader, there is no legal separation between the individual as a business owner and the business itself. Therefore, the sole trader is able to keep all profits from the business after tax but is personally liable for all losses incurred. Consequently, personal property and assets are at risk should the business fail or fall into debt.

The self-employed person has very few statutory rights, occupational benefits and protections. These include:

- protection from discrimination in the workplace
- rights under the data protection legislation (GDPR)
- whistleblowing protection
- health and safety in the workplace

This makes self-employment from an engager's perspective very attractive: it is cheap, has few obligations, and allows the engager to hire and fire at will. This, to a certain extent, is why we have seen an



As a sole trader, there is no legal separation between the individual as a business owner and the business itself



explosion in self-employment and the 'gig economy' in recent years. However, as we have seen with cases like [Uber](#) and [Pimlico Plumbers](#), retaining self-employment status can be difficult if evidence of employment 'behaviour' (e.g. control over the work being done, mutuality of obligation, a lack of financial risk, etc.) starts to emerge.

Teachers might be self-employed in one context, e.g. one-to-one instrumental teaching, and employed in another, e.g. teaching in a classroom at Key Stage 3 or GCSE, where there is a clear line of accountability in terms of delivery and content.

A genuinely self-employed person meets most of the following conditions

- They work under a contract **for** services, not a contract **of** service
- They are responsible for their own business, its financial planning and its success or failure. This includes being registered with HMRC as a sole trader, having a promotional website and business cards demonstrating that the teacher owns and operates a business, having the freedom to determine their trading terms and fees etc.
- They are free to decline offers of work and can determine when, where and how to provide it, including the right to refuse pupils. There is no evidence of control by a supervisor
- They are free to hire someone else (a substitute) to cover periods of absence and are free to profit from this arrangement by paying them less than the agreed rate. The substitute should be paid directly by the self-employed person, who is responsible for resolving any issues arising from this substitution, potentially at their own financial risk and business reputation
- They are responsible for providing their own equipment and resources (including insurance and the cost of repair and maintenance)
- They are free to have multiple clients
- They do not receive any employee-like benefits, e.g. free lunches, an office, etc. (Becoming part and parcel of an organisation is a clear indicator of employment. This can sometimes take the form of personalised ID badges, school email address, being listed on the school's website as 'our staff', being referred to in an employee handbook, or having a job title such as 'head of strings')
- They are responsible for paying their own tax and national insurance
- They are responsible for their own pension
- They are responsible for public, personal and professional insurance

- They are responsible for their own holiday and sick pay provision

Self-employment as a limited company

A limited company or limited liability partnership is a distinct legal entity from the business owner. You serve your business as its director (and employee) and are responsible for the legal and financial decisions your business makes. The organisation's assets and liabilities are totally separate from your personal financial affairs. This means that all profits and losses remain within the organisation.

The tax affairs of a limited company are managed differently from those of a sole trader. As a director or employee of the business, you are responsible for operating a PAYE (pay-as-you-earn) system, deducting tax and national insurance at source. You will also be required to complete an annual self-assessment to report income, dividends, etc.

Limited companies pay corporation tax on their profits and may be required (depending on how much you pay yourself) to make an employer's national insurance contribution and pension (unless opted out). VAT may also apply if the company's turnover is more than £85,000 per year.

For further details on operating as a limited company, read this useful [guide](#) prepared by AXA.

Operating as a limited company has some beneficial tax savings for the director (see this guide to [tax efficient ways to pay yourself through a limited company](#)) despite the uplift in financial administration. Contracting a limited company (using a contract for services) can be more appealing to the engager, avoiding the hassle, cost and obligations of direct employment. However, new tax rules called IR35 have made this option less appealing.

IR35

IR35 – also known as intermediaries legislation – was introduced in April 2000 to stop 'disguised employment' whereby 'employers' engage their 'employees' through an independent 'personal service' company (usually a limited company or partnership). In other words, IR35 is designed to combat tax avoidance by workers supplying their services to clients via an intermediary, where the workers would otherwise be employees of the client (HMRC's guidance note on this can be found [here](#)).

The revised IR35 was triggered in 2012

following revelations that the chief executive of the Student Loans Company was invoicing his employer as an independent contractor through his own limited company, thus reducing his tax liability by around £40k (the full story can be read [here](#)).

In April 2017, the government ruled that the responsibility for determining IR35 status rested with the client rather than with the contractor. This rule was first applied to the public sector but will be extended to the private sector in April 2021. Note, 'public sector' means any organisation as defined for the purposes of the Freedom of Information Act 2000 (or 2002 in Scotland). This includes government departments and their executive agencies, many companies owned or controlled by the public sector, universities, schools, colleges, local authorities, the NHS and parish councils. Academy schools are included even though they are autonomous charitable trusts, whereas independent schools, e.g. Harrow and Eton, are not (until April 2021).

It is the responsibility of the engager to determine the IR35 status of the person (or contractor) providing the service. Failure to do so could lead to a significant fine. If the result is that IR35 applies, the contractor becomes an employee for tax purposes, and the engager is responsible for deducting tax and national insurance at source. However, this does not suggest that the contractor is automatically entitled to employee benefits (pension, holiday pay, unfair dismissal rights, etc.). Only an employment tribunal can determine this. This exposes one of the inherent contradictions of IR35.

In addition to the costs mentioned above, the engager may also be responsible for paying an employer's national insurance contribution at 13.8% of gross pay. Bearing in mind that schools will have little or no contingency to cover this, the price for tuition is likely to increase, or teachers may have to absorb this cost themselves.

There are also concerns that should IR35 apply, claiming tax relief on travel and subsistence expenses may not be allowed, with the only allowable expenses being (i) the direct cost of materials used in performance of the service, and (ii) expenses that would have been deductible if the worker had been the client's employee.

HMRC's consultation document published when launching IR35 clearly stated that there would be an appeal process through a tax tribunal, but as yet, there are very few details on how this might work. Some public sector clients have indicated that they may operate their own appeals system, but until the rules are implemented and tested in the field, we will not know for sure how this will work.



Photo: Shutterstock

There is evidence to suggest that some schools are including self-employment under IR35, which is technically incorrect. It is therefore essential that teachers understand the difference between an 'intermediary company' and being a sole trader – and what constitutes genuine self-employment – in order to defend their status.

You may find it useful to complete HMRC's [online employment status assessment](#). It's important that you answer all questions as accurately as possible, mindful of the points made above regarding genuine self-employment. The outcome is a PDF certificate stating whether you're self-employed or employed. Don't be surprised if this leads to a root and branch revision of all paperwork and operational practices by your engager. Should you have any questions about IR35, contact the MU.

Agencies

Over the years, the MU has supported members with their negotiations and disputes with various teaching agencies. There are some very good organisations providing excellent support and services. Others, however, use business models that are fundamentally flawed and exploitative. The lack of a written contract or agreement is a clear sign that something isn't right. There are two forms of agency, usually owned and controlled by an executive board of directors (potentially just one person) who gain financially from your labour or from introducing you to an employer on your behalf.

1. An employment **agency** finds work for work-seekers, who are then employed and paid by employers. This is often referred to as 'permanent employment' as once the worker has been recruited, they become an employee of the adopted business.

2. An employment **business** employs or engages a work-seeker who then works under the supervision of another person (usually the client). This is known as 'temporary agency work' or 'temping' and is used for a short period of time, such as cover for maternity leave or for a specific event. Workers under these arrangements are usually paid by the employment business rather than by the client.

Both forms of agency must comply with two specific pieces of legislation – the Employment (Miscellaneous Provisions) Order 1981 (as amended), and the Conduct of Employment Agencies and Employment Businesses Regulations 2005 (as amended).

The majority of music teaching agencies are, in the MU's view, employment businesses containing some or all of the following characteristics:

- Teachers are supposedly self-employed (open to challenge)
- The rate of pay is set by the agency
- Fees for tuition are set by the agency
- Teaching hours are set by agreement
- The agency attracts clients using various marketing platforms, e.g. website, social media
- The agency prescribes a scheme of work (although not in all cases)
- Exam grades are monitored and may influence the allocation of work
- Teachers are required to wear the agency's uniform and ID badge
- The contract is open-ended, not fixed
- The agency deducts a commission from the teacher's fee
- Teachers are featured as 'our teachers' on the website
- Teacher fees may discriminate between graduates, senior teachers and head of department
- Teachers are not allowed to negotiate fees directly with parents

- Teachers may be charged for the use of a room
- Teachers cannot refuse to teach a pupil
- Teachers are required to visit pupils' homes
- The agency may require written reports after each lesson to activate payment
- Teachers are required to adhere to the agency's policies
- Teachers are expected to provide their own DBS clearance and public liability insurance

Other companies offer web-based services to help teachers develop their private practice, including:

- lesson planning software
- invoicing and financial management
- website profiling
- email addresses
- business cards
- posters
- postcards
- personalised training
- DBS clearance
- Google adverts

These companies are not considered agencies as defined above as they provide a product or service in return for a monthly or annual subscription, leaving the teacher free to determine their own fees, communicate directly with students or parents, etc.

Having considered what constitutes employment, worker or self-employment status, a large number of agencies will fall under IR35 rules. This could result in teachers being considered 'employees' for tax purposes. In this case, the agency is required to deduct tax and national insurance at source via PAYE and, if earnings are above £156 per week, start paying an employer's NI contribution – currently 13.8%. It could also be argued that these teachers have employment rights, which include the right to:

- the national minimum wage
- protection against unlawful deductions in pay
- protection against discrimination
- holiday pay
- sick leave
- pensions
- rest breaks

For further information on your rights as an agency worker, read the [government's guidance](#).

Co-operatives

As local government funding for music services has diminished and in some cases stopped altogether, teachers have taken control of their own destinies by forming co-operatives based on the consortium model (read more in this [guide](#) from Co-operatives UK). There are now music

teacher co-operatives in Denbighshire, Wrexham, Milton Keynes, Bedford, Cornwall, Isle of Wight, Newcastle, Swindon, Salisbury, Grimsby, Gloucestershire and Calderdale, with more emerging.

Members of the co-operative democratically own and control the organisation in accordance with its articles of association, and elect representatives (all unpaid volunteers) to oversee the co-operative's day-to-day business affairs and policies. The organisational structure is completely flat: there are no heads of department, heads of service etc. Teacher-members are free to develop and grow the co-operative in whatever way they choose.

A consortium co-operative is neither an employment agency nor an employment business. Its purpose and function is to provide a portfolio of services (determined by the members) to an association of self-employed sole traders. Membership is subject to interview and bound by a membership agreement and code of conduct, as opposed to an employment or zero-hour contract. Membership (and services provided) may be withdrawn if the teacher-member breaches the code of conduct.

Under this model, teachers remain self-employed but share the cost and burden of administration, training, statutory checks, invoicing (including debt collection), marketing etc. Teachers pay a proportion of their fees (agreed by the membership) for these 'services'. Larger co-operatives, e.g. Denbighshire, Newcastle and Swindon, employ an administrator to do this work, whereas others (Salisbury, Bedford and Milton Keynes) outsource invoicing, for example to private companies through a contract for services.

Being self-employed, teachers are responsible for their own business affairs, holiday pay, pension, insurance, tax and national insurance. They are free to decline work offered and can determine when, where and how to provide it. They are also responsible for providing their own materials, resources and equipment. When necessary, they are free to provide a substitute when unavailable to work (subject to statutory clearances, e.g. DBS).

Alternatively, teachers may opt for a worker co-operative. This model shares the same values and principles as the consortium model, but it employs its members instead. This raises a number of concerns in relation to financial planning in an unpredictable business environment. However, there are significant benefits, some of which are highlighted in this [guide](#) from Co-operatives UK. An established consortium, with years of business sustainability, could convert to a worker co-operative, perhaps using an

annualised hours contract to accommodate fluctuations in demand.

For further details on how to form a co-operative, please refer to the MU's publication [All Together Now \(version 2\)](#).

Retail sublets

As the music retail sector shrinks due to less on-street shopping, entrepreneurial businesses have modified spare rooms to accommodate instrumental teaching. These can be rented to genuinely self-employed teachers who can clearly demonstrate that they are in business for themselves, e.g.:

- Tuition fees are set by the teacher
- The teacher promotes their service via an independent website, social media, etc.
- The teacher has the right to organise a substitute when unavailable
- The teacher invoices parents/students directly and manages their own financial success and risk

This rental arrangement (also popular with independent schools) benefits both parties. Retailers get a steady flow of potential customers, especially at weekends.

However, there are some examples where retailers create an impression that the in-house instrumental teaching is part and parcel of the retail business. This includes controlling the rate of pay, tuition fees, marketing and client management (including data control), while charging exorbitant rents to self-employed teachers. With IR35 coming to the private sector in April 2021, we may see this behaviour change. If not, HMRC would have good reason to insist on tax and national insurance being deducted at source.

Members are advised to contact the MU before entering into any lease or rental agreement

Refer to Appendix C for some example case studies illustrating the complexities of employment status. ■

“ As local government funding for music services has diminished, teachers have taken control by forming co-operatives ”

Appendices

Appendix A –

Employee, worker and self-employed benefits, rights and protections

Right/Protection	Employee	Worker	Self-employed
Right not to be unfairly dismissed (after two years' service)	Yes	No	No
Right to receive written statement of terms and conditions	Yes	Yes	No
Itemised payslip	Yes	Yes	No
Statutory minimum notice	Yes	No	No
Statutory redundancy pay (after two years' service)	Yes	No	No
Protection from discrimination in the workplace	Yes	Yes, most	Possibly
National minimum wage	Yes	Yes	No
Protection from unlawful deduction from wages	Yes	Yes	No
Paid annual leave	Yes	Yes	No
Right to daily and weekly rest breaks	Yes	Yes	No
Pension auto-enrolment	Yes	Yes, likely	No
Right to be accompanied at a disciplinary or grievance hearing	Yes	Yes	No
Rights under the data protection legislation (GDPR)	Yes	Yes	Yes
Whistleblowing protection	Yes	Yes	Possibly
Statutory sick pay	Yes	Possibly	No
Statutory maternity, paternity, adoption leave and pay	Yes	Possibly	No
Unpaid time off to care for dependents	Yes	No	No
Right to request flexible working	Yes	No	No
Time off for ante-natal care	Yes	No	No
Time off for trade union activities	Yes	No	No
Protection under the transfer of undertakings legislation (TUPE)	Yes	Possibly	No
Health and safety in the workplace	Yes	Yes, likely	Yes, likely

Appendix B – Case studies

CASE STUDY 1 – MRA

Mr A was appointed by a local authority council as a woodwind coach on an 'as and when' or 'casual' written contract (another name for zero-hour) which included specific duties, hours of work, access to the council's disciplinary and grievance procedure, holiday pay, PAYE, etc. His work was limited to one weekday evening and a weekend morning, leaving time to explore other opportunities elsewhere.

Towards the end of the summer term, Mr A was informed verbally that his services were no longer required. Until then, his work had been exemplary. Having issued an appeal against the council with no redeeming outcome, he filed a case for unfair and wrongful dismissal with the employment tribunal. However, before considering whether he was unfairly/wrongly dismissed, the tribunal needed to establish whether Mr A was an employee or otherwise, which in turn would have a bearing on the application of his statutory rights.

The council argued that Mr A's contract was 'casual' and he was not an employee, so he could not have been unfairly or wrongfully dismissed. However, just because a contract says that the worker is casual or zero-hour does not make it so. What happens in practice, day after day, week after week, may lead to a different interpretation.

The judgment ruled that Mr A was an employee for the following reasons:

- His hours of work were fixed – he had no control or flexibility over when to deliver the service
- The rate of pay was determined by the council – there was no consultation or negotiation
- Mutuality of obligation existed – both parties relied on work being offered and delivered on an annual rollover basis
- There was a high degree of control exercised by the council over Mr A's work which included performance management and monitoring

- He was required to plan lessons using the council's template documents
- He was required to maintain a record of pupil's progress and provide annual reports
- He did not have an unfettered right to substitution – indeed, substitution was discouraged and he had to provide personal service
- He was given and was expected to use a council email address
- His work (albeit limited in terms of hours) formed a central part of the council's core business in terms of music education
- He bore no financial risk in the delivery of services and was required to use the council's software (provided free of charge)
- Although he was free to determine the content of lessons in terms of repertoire, this was subject to the council's veto if necessary

The case was settled out of court and ended there.

CASE STUDY 2 – MRSS

Mrs S brought various claims against a school to the employment tribunal. As in the case of Mr A, it was necessary to determine her employment status first.

The school engaged Mrs S as a self-employed teacher. Her written contract stated that she could appoint a suitably qualified substitute to teach in her place if it was necessary to do so and that any substitute needed to adhere to the school's 'safer recruitment policy'.

In common with most self-employed visiting music teachers, Mrs S received payment for lessons direct from parents and was from time to time exposed to financial risk if parents failed to pay. She was entirely responsible for her own financial affairs including tax and national insurance.

However, based on the evidence provided, Mrs S was judged to be an employee and worker for different aspects of her work, affording her certain rights and protections such as holiday pay, national minimum wage, whistleblower protections and protection from discrimination under the Equality Act 2010. Six key arguments shaped this judgment:

- She only had a limited right to send a substitute to teach in her place, thus providing personal service
- Her contract with the school placed limits on her independence, such that she could not set her own fees and had pupils allocated to her by the head of music
- The contract also established a level of control over her work affecting her independence, e.g. she could not decide on the lesson length or when lessons were scheduled
- She had to comply with strict absence and safeguarding procedures
- She was fairly well integrated into the school, being listed as a 'member of staff' on the school's website, having a school email address, using its equipment and being insured by it
- Written information provided to parents used the wording 'we offer' when describing instrumental music lessons, denoting ownership and control by the school

Despite the school's endeavours to provide a self-employed contract, the school failed to notice day-to-day operational discrepancies which, in combination, undermined the core principles of self-employment.

Appendix B – Case studies

CASE STUDY 3 – MR B

Mr B was an established teacher at a school in Scotland. The contractual arrangement was one of self-employment which suited all concerned. However, teachers were unhappy that their right to set tuition fees (including the provision of extra work during the holidays) was restricted by the school and in particular by the head of music, who exercised considerable influence.

On closer examination by the MU, it was discovered that the school was imposing a number of controlling measures which fundamentally changed the relationship between the school and teachers. For example, teachers were expected to:

- use the school's official email address when contacting parents or others
- write annual reports using the school's official template, unpaid
- attend parents' evenings, unpaid
- send invoices to parents using the school's letterheaded stationery

- comply with timetables set by the head of music
- submit grade examination results which were monitored by the head of music
- seek permission to be absent with restrictions concerning their right to provide a substitute

The school prepared all communications, website information and leaflets (promoting instrumental tuition) to parents and pupils. The application process was managed by the head of music, who in turn allocated pupils to teachers without consultation.

Finally, despite teachers being considered self-employed, the school operated a traditional departmental structure with heads of strings, woodwind, brass, keyboard and percussion, who were responsible for supervising the work of teachers within each department – all done on what was termed a self-employed basis! Some long-serving teachers were also expected to provide pastoral care (for no extra pay).

Even to the uninformed observer, the above conditions suggest employment or at least worker status, conferring various rights and benefits. However, both parties insisted on retaining self-employment. Negotiations between the MU, teachers and school resulted in a new contract with significant changes to reflect genuine self-employment, the preferred outcome.

Note: even though this appears to be a successful outcome, changes in tax rules, case law (judgments from employment tribunals), and the repeal and introduction of laws may change everything overnight. Teachers should therefore remain vigilant.

References and further reading

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