

## 403 - Employment Law

With Steven Bruce and Caroline Robertson

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**Steven Bruce** 00:06

Good afternoon, and with no disrespect to my guest today, our lunchtime topic could be seen as just a wee bit on the dry side. I'm sure lawyers get really excited about these things, but medical practitioners, maybe not so much. But it is as I'm sure you know, it is important stuff, whether you're an employer, an employee, an associate, a licensee, or whatever, the contracts do matter, as do a host of other legal issues in business. I know from my own business shortcomings, and it's all too easy to let these things slide, you know, to the extent that months or even years down the line, contracts still aren't drawn up and signed and stuff like that.

So the lady I'm talking to today is Caroline Robertson, who is the CEO of Actif HR, which is a company specializing in all this sort of stuff, as its name suggests.

Caroline, welcome to APM. Good to have you on for your first visit. Now you told me off earlier on because I said you were a lawyer, and you're not a lawyer, right? You were a solicitor. So tell me about Actif HR, first of all,

**Caroline Robertson**

yes, we're based at Silverstone, right near the technology park at Silverstone, very noisy. But actually, I love the noise. I lived in Silverstone for 20 years, so you can't but not like the noise. I'll speak up. So that's how Actif HR was formed. I've run two businesses, employment law, support and Actif HR. And it's about partnering businesses to manage their employees and contractors through the employee and contractor journey.

**Steven Bruce**

We've got a real challenge ahead of us to make this lively and entertaining CPD for a lunchtime session.

I'm intrigued. I mean, the thing that strikes me is that in my own practice, I know we've been guilty on so many occasions of actually not getting employment contracts or the equivalent signed. And I sort of imagine that that's one of the things that you're quite hot on, isn't it?

**Caroline Robertson** 02:04

Yeah, absolutely. And you have to have an employment contract in place from day one now. It used to be a couple of months in, but now you really need it from day one. And for me, it's about proving that we are a professional business, one in five employees leave in the first six months, because, for some reason, it didn't work out, and that's a huge turnover. So

whatever we can do to have a professional onboarding, to look like we are a good, strong business,

**Steven Bruce**

which is very well in the conventional small business, and you deal primarily with small businesses, so you understand the trials and tribulations of small businesses very well. If you are, I don't know, a sports shoe vendor on the high street or whatever, then it's probably a lot more straightforward than it is in a chiropractic or an osteopathic practice, where actually what we're doing is we're bringing in people who are perfectly competent in their profession, and just saying, "treat patients". And for that reason, I suspect that the majority of people watching today will regard themselves not as having employees, but as having associates who are self employed. What dangers does that lead us into?

**Caroline Robertson** 03:20

Yes, so I know the government actually is, really is looking at that now in the employment bill, which came out on the 10th of October, about worker status. So there's various different categories, and it can be a bit confusing. So the government wants to try and make it a bit more simple

**Steven Bruce**

So What is it at the moment?

**Caroline Robertson**

You've got worker, contractor, and you've got self employed. Most people, I'm assuming, such as associates, will be contractors, self-employed people that will perhaps do they they render, use

**Steven Bruce** 03:47

an important word there, you said contractor. Yes, they are self employed, but there should still be a contract in place.

**Caroline Robertson** 03:54

Yes, that's correct, yes. And so a lot of businesses I deal with, they think that if they have contractors, all they will do is get the invoice, or they'll log on to a system, book the hours, and then they'll get the invoice and get it sorted. But have they got insurance indemnity? Do they have their own insurance? Have they been clear about the working relationship? And some people think if we get a contractual agreement in, it ties us in knots. Well, actually, it protects the business. That's the key thing. So you're clear about when you get paid, what the rates are, what your expectations are, should they be carrying on with their CPD, the professionalism and the most key thing for me is confidentiality and not poaching clients, because that's an area that is sometimes be gray, and

**Steven Bruce** 04:42

I wonder, you hit on an area which is very difficult in the sort of businesses that I and our audience today run, because, as I've said, that these people are coming in, they are professionally qualified under the terms of their registration with the general Councils, they

will have to have medical indemnity insurance, and they will have to do CPD. So that's a given. We don't have to worry about that.

But there are other insurances that we do have to worry about, aren't there: public liability insurance, which is the business owner's responsibility.

Somebody's already sent in a question. Phoenix is saying, with employment laws changing, does this spell the end of self-employed associate contracts? And I suspect that it doesn't.

They just got to be written very carefully.

**Caroline Robertson 05:35**

Is this with the employment bill coming in? Yes, hopefully it will be clearer, because there's a lot of confusion about what is a worker status, what's a contractor, and so hopefully that will be clearer. But the moment with these things, we haven't had any guidance, and it's going to take a while to get guidance. The key thing is just have a, even if it's very simple, agreement, where everyone knows where their what their obligations are,

**Steven Bruce 06:07**

what are the key elements of this contract, though, because we had somebody on the show recently, an insurance representative, and I talked about this business that some clinics do employ their practitioners, while others have them as associates, where they regard them as self employed, and his argument was, well, actually, under tax law, you might be regarded as employed, even if, under employment law you're not regarded as employed. That really does muddy the waters.

**Caroline Robertson 06:33**

Yeah, and that's the IR 35. I'm not a tax specialist, but I do get involved in looking at the contractor agreement to see whether to do a bit of an assessment. Now, the problem is, people will write these contractor agreements so that they hopefully will be a self employed contractor, but it's what happens on the ground, what happens in practice.

So it's all very well writing something, but if it's actually not what you do and HMRC inspect. Well, they may come up with something different. And

**Steven Bruce 07:04**

I think if I'm right, I could easily be wrong on this one. But the reference case for this is still, I think Pimlico plumbers. Their employees, their plumbers were self employed. They were given a Pimlico logoed van. They had Pimlico uniforms, and they had to take work from Pimlico, and that was all well and good for the plumbers and for the company, until one of them got ill and decided that it was much more beneficial if he could be regarded as employed and the courts found in his favour.

**Caroline Robertson 07:38**

Am I right? More or less, yeah, there's been lots of different cases - there's been cases with Uber that probably people would have heard about in the news.

**Steven Bruce 07:45**

So what is it, then, in a in a practice like ours, and you know my practice, because I know that you've had oversight of what we've done there, what is it that we have to have in an Associates contract that clearly makes it known that they are not an employee.

**Caroline Robertson** 08:00

So there's a number of tests, and if you go on the HMRC website, equally, that will point to whether it's an employee relationship or a contractor relationship, and it's often the master and servant type relationship that's the easiest way to explain it.

So if it's a true contractor, they have control over the hours they work, who they see, they don't have to report in necessarily to the master, as in the employer relationship, and that is quite a tough balance. Sometimes they're providing their invoices. So it's really where does that line of the master and servant fall, and if it tips too much into the employer or the company saying, well, we want you to do this, and this is how we want you to do it.

And often we can have a bit of a grey area where they have to sign up, of course, to a lot of our company policies and our ways of working. Of course, they have to, but it depends on, are they going to have a sanction? Maybe? Is it going to end up in disciplinary if they end up doing something not quite right? Well, that could tip into an employee relationship. So it kind of depends on what happens on the ground.

**Steven Bruce** 09:15

One of the areas where we are on safe ground, I think, is that most associates only have to come into work if they have patients. We're not saying you've got to be here from nine until five, regardless of whether there are gaps so that that box is ticked. I suspect that relatively few clinics say that you've got to wear our logo clothing, because, by and large, we either wear white coats, or in some clinics, smart mufti, as it were, so we're not giving them uniforms that they've got to wear.

Yes, they'll have to sign up to our company policies for fire safety, handling patients, whatever.

How about the wording of remuneration? Because it's simplest to think of it as a commission. You get a commission on each patient that you treat, whereas I suspect the law would prefer to see it as I charge you per patient that you treat, so I'm invoicing you at the end of the month.

**Caroline Robertson** 10:10

Yeah. I mean, that's the thing exactly. How much control is the practice having on the whole remuneration policy or how it's paid. I know some places will be on invoice. Some places will maybe just on a software system, and they'll book hours, and presumably it'll just filter through like that. So, it is something you have to think about and be careful about, in terms of whether, which way it could tip hopefully sense will prevail and that, you know, there is enough other things in that test that will point to the fact that this is pure contractor relationship. Is

**Steven Bruce** 10:52

it something we should actually be worried about, though, I don't know if it's ever been a problem in a medical clinic, in an osteopath's or a chiropractor's clinic?

**Caroline Robertson** 10:59

Yeah. Hopefully not. HMRC are appointing lots more tax inspectors to do a lot more audits,

**Steven Bruce** 11:06

But they're getting their tax either way. I suppose the issue is PAYE and National Insurance

**Caroline Robertson** 11:11

Yes. So the contractor, of course, can write off a lot of expenses, whereas you might not get that in the employee relationship. And also, there is a small business exemption. So if you have less than 50 employees, and you have a smaller turnover, you should get the Small Business exemption.

So the employer, the practice, should be okay.

**Steven Bruce**

Exemption from...

**Caroline Robertson**

So there is a small business exemption, which, if you're under 50 employees in a certain income threshold, if HMRC do an audit, you shouldn't be at risk of having to put them onto employee payroll. So that's the key thing for the practice. That's what they need to know about, and that's something they ought to double check with their accountants. But it's more the contractor could be at risk, because if HMRC did an audit of the contractor and said, I actually think there should be a an employee status, it'll be the contractor that has to pay the additional tax.

**Steven Bruce** 12:24

Oh, right, or that's very reassuring.

**Caroline Robertson** 12:26

Before, it used to be that the actual practice was responsible, but they should now get the Small Business exemption, so hopefully that should alleviate any concerns.

**Steven Bruce** 12:37

Yeah, don't know of any clinics that have more than 50 employees. You haven't said what the earnings turnover threshold, is?

**Caroline Robertson** 12:43

I couldn't tell you, off the top of my head,

**Steven Bruce** 12:50

Are we talking 1000s or millions?

**Caroline Robertson** 12:51

I'm sure it's 1000s.

**Steven Bruce** 12:55

That's gonna be worth looking at.

We've had a couple of observations in here. CB says, If I had x people working for me, I would retire much earlier (I think a lot of people think that, but it doesn't always work out quite as straightforwardly as we hope it would) but he or she says, listening to this highlights some of the pros of working on your own, which is, it does simplify things, doesn't it?

**Caroline Robertson** 13:18

It does simplify things. And I have some businesses who I deal with who take home the same amount of pay as they did when they were working on their own, because by the time they taken account of all the overheads and running costs,

**Steven Bruce** 13:35

and the stress. Because most people coming into someone else's practice will expect the patients to be provided for them. Even though we like to think of them as being self employed,

**Caroline Robertson** 13:46

although you hope you have an exit strategy, if you build up a practice eventually, when you want to retire, because you hopefully have an asset and to sell on.

**Steven Bruce** 13:54

I suspect that a lot of people going into this, into many professions or small businesses and so on, they go into it with wonderful altruistic motives, and they want to make a living, but they also want to do some good, and it's only very much later in their lives they start thinking, at some point, I've got to get out of this. And yeah, the exit strategies come rather later than they should.

Philip has emailed in. This is quite lengthy. I started with a company as an employee in March 24 where I initially salary-sacrificed 850 pounds a month.

After two months, I realized nothing had been paid into my NEST pension account. I carried on for another two months with my boss saying it was the accountants not paying it.

Apparently he can't pay it himself, and then his next excuse was that there was a problem with the connection between where the money was held and where my account was. I finally got one payment in September and was told the rest would be paid in instalments every two days, but nothing ever arrived. We had a therapist meeting on Friday where I brought this up again, and my boss again blamed it on the accountants and said, he'd have a meeting with them and NEST today.

I continually see NEST sending messages saying they have reported the company to the ombudsman, but nothing ever materializes.

My question is, what can I do? And could my boss just transfer the money himself or send it to me so I can transfer the money to my pension account? I've stopped the salary sacrifice because I can't afford to lose any more money, but I'm still under auto opt in, and therefore he still takes around 100 pounds a month for my pension, and he's not paying that either.

**Caroline Robertson** 15:28

Goodness, they're very unethical.

**Steven Bruce** 15:33

But also you might need to explain terms like auto opt in, because I don't know what that means.

**Caroline Robertson** 15:37

So we now have auto enrollment of pension schemes, and you have to auto enroll your employees after three months. So I'm assuming your caller has gone over his three months. So the first three months, they don't have to auto enroll you or pay on your pension scheme, but after three months, there should be a total of 8% going into your pension scheme, 3% from the employee and 5% from the business, to take you to your eight

**Steven Bruce** 16:10

Which is in addition to their salary?

**Caroline Robertson** 16:13

Yes. So they can opt out. And there should still be some form of opt out form you can get on the NEST website. If you want to be able to opt out, there must be.

**Steven Bruce**

Is there any reason to opt out if you're an employee?

**Caroline Robertson**

I would always say, Never opt out. Because if you opt out pensions, as we know, they accumulate over time, and if you don't start it early, then you get to that magical date, and it's not what you thought it was going to be. And also, if you opt out, you won't get the 3% employer contribution.

**Steven Bruce** 16:52

Indeed, some people wondering what NEST is, because even though I get regular messages from NEST, and (my wife's going to kill me for saying this) I just delete them. I can't be bothered to log in.

**Caroline Robertson** 17:03

Well, NEST is the government scheme. It's a fallback scheme. I would honestly say that someone said to me that the NEST growth is not worth having. They would rather put their money under the mattress because of the NEST growth. What your employer should really be doing is setting up a scheme which has decent growth.

**Steven Bruce** 17:26

Isn't that risky, by definition, you're taking risks if you go into money making

**Caroline Robertson** 17:31

No, I mean, you just go with a very recognized pension provider, and their growth can be anywhere between 10 and 15% growth, potentially, depending on the market, whereas the trouble with NEST, it's on a very basic growth so you won't get your best investment money, your pension. But, what I say to people is, sometimes people have different pension pots. They might have worked at different employers, and it's worth seeing a financial advisor, because otherwise you might be paying three or four different management charges. So yeah, that's a difficult one. Potentially it's a breach of contract. Potentially it's an unlawful deduction from wage.

**Steven Bruce** 18:12

So after three months, an employer, which means you have to have people who you regard as employees, not your associates, they don't count, has got to enroll you automatically into NEST?

**Caroline Robertson** 18:26

It doesn't have to be nest. It can be any pension, right? Company allocated scheme.

**Steven Bruce** 18:30

So now we dealt with that. We ought to get back to Philip.

**Caroline Robertson** 18:33

Yeah. I mean, the only thing I could probably say it might be worth a call to ACAS, which is the government arbitration service that tries to arbitrate between employees and employers, and they have a hotline. It'd be worth ringing in speaking to one of their conciliation officers, and they will probably ring the company on his behalf and see what is going on, because this doesn't sound right to me.

**Steven Bruce** 18:56

I imagine that he's probably treading a sensitive line between trying to behave ethically and not trying to piss off his employer. But again, if the employer is keeping money, which rightfully belongs to Philip, then he's got to do something about it,

**Caroline Robertson** 19:10

And it is breach of contract, and it's a breach of the rules, because you have to all to enroll your employees.

**Steven Bruce** 19:16

we say rules, but these are laws.

**Caroline Robertson** 19:19

Yes, absolutely.

**Steven Bruce** 19:21

again, this is possibly slightly outside your area of expertise or responsibility, but if his employer is a chiropractor or an osteopath, and probably any other healthcare professional, they are required by law to act ethically and to conduct their business in a fair, fashion, in accordance with law, and so they themselves could be reported to their general council for failing to do that.

**Caroline Robertson** 19:46

Yeah, absolutely.

**Steven Bruce** 19:50

Vladimir has said, Can we please touch on repaying costs for CPD as an employed osteopath? How many months or years later can these costs be recovered from the employee who's leaving the business?

Does every cost of a course need its own agreement in order to enter into a loan agreement with a business owner? So I don't know if that's clear. What I think Vlad is saying there is, I



as an employer send you on a CPD course, and I pay for it. What right have I got to recover that cost if you leave my business

**Caroline Robertson** 20:17

He's the employer here, isn't he, rather than the employee? Yeah. So we would do a normal, standard training repayment agreement. You've got to have something contractually. Sometimes I've seen them in contracts of employment. It's better to have it in. It only needs to be a one and a half page, two page letter. You can have a standard letter, but if it's a decent chunk of money that you want to recover, it's good to get them to sign it, because if you haven't got something in writing that they've signed or acknowledged or understand, then it's harder to recover.

**Steven Bruce** 20:52

So if it's a repeating thing, if you're going to send somebody on a CPD training thing every year, you could do that initially, at the outset with your first contract, it could be part of the contract or in a schedule to the contract.

If it's it suddenly occurs to me that I need you trained to use this piece of equipment or to carry out this particular skill, it can just be a letter signed by both of us to say that you're going to do it, I'm going to pay for it. And if you leave within three years, you have to pay back a proportion of the cost.

**Caroline Robertson** 21:17

Yeah, that's absolutely right. And it's usually two years, and it's usually on a sliding scale, so maybe you pay 75% in the first six months of being called, you know, got your training and leaving, and then it scales down, and that's usually found to be reasonable, as long as it's clear, on the face of it, and the onus is always on employers to be clear, and that's why these agreements are really important, whether it's a contractual agreement or employment contract, because if it's gray, often a tribunal or a court will find in favour of the employee, because they'll say it wasn't obvious,

**Steven Bruce** 21:53

yes, and we're and we the employers, are expected to be more able to produce clear contracts than employees.

I'm glad you're not a solicitor any longer, because I can be rude about solicitors, can't I?

**Caroline Robertson** 22:07

Sounds like I've been struck off. I'm a non practising solicitor!

**Steven Bruce** 22:14

I am very cynical about the service that we often receive from solicitors, based on some harsh experience in the past. But of course, an awful lot of the stuff that you see that comes from a solicitor's office is written in such jargon and gobbledygook and convoluted terminology that it's hard for the layman to understand. It's even harder for anyone to imagine that they could write contracts themselves. But frankly, for what we just discussed, the contract is simply the letter that I write saying these are the terms. And it doesn't have to be much more complicated than that.

**Caroline Robertson** 22:46

That is right. The only thing we have to bear in mind is the Employment Rights Act, 1996 and section one, you can just Google that. Section One says, in there the Employment Rights Act, what key terms need to go into a contract? And there's 10 or 12 things. So actually, yes, as long as you've got that covered, yeah, write it clearly. Write it clearly. And it depends how you want to do your contract. I've been moving a lot of contracts to have a term sheet on the front page. And once you've written your contract, and it might be eight or nine pages long, and I like to write them in easy understandable language that anybody can read. Sometimes it might be as easy just to have a term sheet on the front page which has, if it's a contractual agreement, just the key details, so that actually, when you sign somebody up,

**Steven Bruce** 23:36

is this the equivalent of an executive summary?

**Caroline Robertson** 23:39

Yeah, yeah. And then, in theory, once you've got your contractor agreement or your employment contract set and you're happy with the words and your clauses, you could actually just have a front page which says, what are the key points? Which is hourly, wage, you know, job title, whatever you decide, if it's an employee, how many days holiday, all of this, but it doesn't matter which way you go. Sometimes, if they're an agreement where you've got lots of spaces to jump through and fill out, I find that people in a rush sometimes miss things, but it doesn't, doesn't really matter, as long as it's clear

**Steven Bruce** 24:15

okay. And in most cases, neither party is going to want to go to court over this? So as long as it's established, and you can argue this is clearly the intent of this document, it'll probably be resolved amicably.

**Caroline Robertson** 24:31

yeah, and that's where ACAS, if you're an employee, get involved to try and sort it out. If you're an employee, the worst thing you want to be is in grievances and appeals, because it's just such a drain on everyone's time. I always say just if you're struggling, get a mediator in, get somebody or even a third party that you trust to perhaps, if you can't work it out between the two of you, get somebody sensible in to be able to help out.

**Steven Bruce** 24:57

I do remember somebody saying that there's this firm that's very happy to look over your contracts and check that they're sound. Are they called Actif HR? I think that's what they were called, that's it. You've done that for us.

**Caroline Robertson** 25:08

Yes, that's correct, yeah

**Steven Bruce** 25:12

I mean, we're very grateful. Your service is outstanding. Otherwise we wouldn't have you on the show here. So we're very pleased about that.

Can I go back to Phoenix, who gave us a question earlier on. Caroline, he or she says, our current situation, as it stands, is that our associate practitioners are self employed. All have other places of work, be it at other practices. So they are working in the same capacity, but in other practices, they treat patients here, and we have a percentage remuneration scheme in place. Could those practitioners be technically classed as employees?

**Caroline Robertson** 25:48

Yes, they could technically because they could just be a part time irregular hours worker, zero hours worker. I know the government's wanting to start phasing that out, but you could just be a part time worker. You could be an employee that comes in two days a week, and then be a contractor elsewhere. Again, it depends on the basis of that relationship, what works, and it always tends to go back to, is it a master and servant relationship? Am I saying to that person, right, I want you in Monday and Tuesday, and if you're not in, you need to ring in sick or whatever. I think that's probably unlikely in this situation.

**Steven Bruce** 26:33

Phoenix has raised this issue that they have a percentage remuneration scheme in place. Now. That could be one of two things. Couldn't it? It could be that at the end of the month, the practitioner says, I've seen these patients at this amount, costing this amount of money, therefore I'm charging you, the business, for this. Or it could be the business saying, I've allowed you to work in my practice, and now I'm charging you this amount of money, again a percentage of what was taken for the privilege of having done that. Does it matter who that contract comes from, which way it goes?

**Caroline Robertson** 27:09

I do prefer the practice to take control and have a contractual agreement in place, because they know the terms.

**Steven Bruce** 27:18

So I as the employee, as the practice owner, I'm charging you at the end of the month for you having worked and seen these patients

**Caroline Robertson** 27:26

Yes, so you'd normally charge, I'm assuming, a set fee, and then perhaps you'll add something or a percentage on top, and it The question is whether you have an invoice from the contractor, or whether it will just go through a software system that that can depend.

**Steven Bruce** 27:42

I think they all go through the software systems. In my own clinic, our policy is that the clinic invoices the associates, so they've taken a lot of money. We've held that money because it's gone through the software system, so what we do is return to them their money at the end of the month, less our invoice,

**Caroline Robertson** 28:02

and I suppose, because the clinic will control the payment from the patient. So that makes sense.

**Steven Bruce** 28:08

And there's nothing untoward legally about that, is there that you know of? Because the money is taken through a central software system. It's, it's held in our bank for a month, and then we return it to the associate.

**Caroline Robertson** 28:20

No, there shouldn't be, as long as it's very clear, and that's it, and that's why it's better to have these things in writing. So no,

**Steven Bruce** 28:26

I'm hammering this home because, I mean, Phoenix made a number of assumptions in there. Our associate practitioners are self employed. Well, that's a matter for, potentially for a court to decide, unless it's written down very clearly in the contracts, isn't it?

**Caroline Robertson** 28:37

Yeah, and it's not just what's in the contract. It's what happens on the ground. So that can sometimes be an issue,

**Steven Bruce** 28:46

what sort of things happen on the ground that could change that issue?

**Caroline Robertson** 28:51

So, a contractor agreement, can say anything it wants to, but if we actually find in practice, that person is coming in five days a week, nine to five, has to ring in if they're taking an afternoon off, and tell somebody exactly what they're doing, then they're not doing what the contractor agreement is saying. They're doing something very different that could tipping potentially into an employee relationship.

**Steven Bruce** 29:18

But even if your associate comes in nine to five, five days a week, they could still be sick. So they could call in and say, I can't have patients. And they've got to be able to tell the practice that they've got to cancel the patients for that day, that period of time where you're still saying that they could conceivably be regarded as an employee.

**Caroline Robertson** 29:37

So if that associate is able to say, right this week, I'm not booking any patients in. I have control. I'm assuming they can, yes, they don't have to send a holiday request form in to a practice and say, I'm off to Spain this week. Is that okay? That's their choice. They'll earn less. I don't know how that will work in terms of the Practice, because they'll earn less. But there is the control is now swinging back to the contractor to be able to make a decision about what they're doing for their week.

**Steven Bruce** 30:10

One of the key elements in that Pimlico plumbers thing was that the plumber did not have the right to appoint a mutually agreed substitute. So if in our practice, it is written into the contract that you as an associate, you can take time off, and if you wish, you can appoint

someone who we agree is suitably qualified to take your patients, that would further cement the idea that they're self employed.

**Caroline Robertson** 30:31

Yeah, absolutely. And that's one of the HMRC things on the checklist. You have a right of substitution, and so it's very rarely used. But that's exactly it. That contractor could say, I'm going off for three months to Australia to do a placement, and here's my substitute who's equally qualified, equally experienced, and they're going to take my seat.

**Steven Bruce** 30:55

That would work well for both sides, because the practice would be quite happy. We're going to take the same money from this as we would otherwise, and we've got what anyone else in medicine would call a locum coming into substitute

**Caroline Robertson** 31:05

absolutely. So that's the true form of a contractor. If the honest answer is, No, you can't, because it's a contract for personal service, it becomes an employee relationship,

**Steven Bruce** 31:18

In other words, personal service, meaning you, the person have to provide the service

**Caroline Robertson** 31:22

only me. Yeah, yeah.

**Steven Bruce** 31:25

A number of people have been asking if there's an associate contract template, and could the Ashgrove form be made available at the end of the show? I think it's probably a very good idea. I suspect that the contract that we used has been vetted suitably by an appropriate person.

There's a danger in that isn't there, because one contract for one business might not be completely suitable for a different business, but it might be a basis on which to start.

**Caroline Robertson**

It definitely is a basis.

**Steven Bruce**

Better to have something in place than not.

David here says, regarding the training costs and paying them back, if anything like this is signed under a contractor agreement would that push it towards looking like an employed contractor? That's good point.

**Caroline Robertson** 32:04

Yeah, good point. Probably not. Again, it's what happens on the ground in practice. Probably not, because that's absolutely fair. Again, it's another addendum to the contract. Yes, signing up for that fine.

**Steven Bruce** 32:19

So it's much more important that they can take the time off when they decide, and they can appoint a substitute if they if it's mutually agreed and they want to. Okay, well, that's useful. Claire says, I love the idea of a front sheet summary page. I usually summarized verbally. So the points that I think might be different to the associate's expectations are heard at the start, and that front sheet's a great idea. Yeah, I agree with that.

And on the occasions when I have written contracts in the past myself, they're not terribly complicated, but I think I've always tried to set out the overall purpose of this contract, and then try and go into the detail of how we implement that later on.

**Caroline Robertson** 33:03

Yeah, like, here are the key terms, because actually, a lot of people don't even read the contract. So for me, if you've just got a front page, it's very clear

**Steven Bruce** 33:13

a lot of people don't read it for very good reason. They can't understand it. One of the ones that we've got at the moment is - it was written by a law firm, and I don't know which law firm, certainly not yours - some of the sentences are so convoluted, you know, the heretofore type of expressions. And you think, what do they actually mean by this?

**Caroline Robertson** 33:30

And some have, I've seen a contract from a legal firm that had 238, lines in one sentence. They just the sentence goes on with semi colons, and, you know, all of them.

**Steven Bruce** 33:45

And this despite the the Chief Justices assertion some years ago that law should be written in clear English, and there was a big move towards that, wasn't there?. And I've seen some high court findings, which are their models of clear English

**Steven Bruce** 34:06

Hannah says regarding calling in sick, Surely even a contractor still has responsibility to notify the practice and their patients of absence.

**Caroline Robertson** 34:14

Yeah, notification of absence? Yes, absolutely. Yeah.

**Steven Bruce** 34:16

I suppose if we're talking employment law, there are other things that we perhaps want to mention, whether it's sickness pay, whether it's holiday pay, and things like that. What else do we need to be worried about? What are the other costs that come with employees?

**Caroline Robertson** 34:30

Yeah, the big thing for me is what's happening with the employment bill that's coming in. The Labour Government published the employment bill on the 10th of October. And the key one I think, if you're an employer, is the employees will get unfair dismissal rights from day one. So what I mean by that is, currently, any employer has a two year qualifying period for any of their employees. So if it doesn't work out, they're able to say up to two years, this isn't working out for whatever reason, and they won't get an unfair dismissal claim.

They might get a discrimination claim if they have discriminated, because that's a day one right. But not unfair dismissal.

Under the employment bill, they're looking to scrap that, so that potentially employees have their qualifying period to claim unfair dismissal from day one. So what we're hoping is that you can have a probationary period, and we're hoping it's going to be six months. It could be along as 12 months, but we're hoping it's six months. So what I'd always say, the key thing now, moving forwards, if you're an employer and you're bringing someone new on, putting a probationary period in the contract minimum six months, because in that six months, if it doesn't work out...

**Steven Bruce** 35:47

People lie on their applications for jobs! You don't really find out what the person's like until they're in the job. Best behavior until the probationary period ends.

**Caroline Robertson** 35:57

Yeah, absolutely right. And that's where we had the two year rule, and now it's been, you know, that's the thing that will be potentially scrapped. So make sure you have a decent probation period and have a proper review, not right at the end, have a monthly review, sit down and say, Is this actually working, you know? And it's a review with the person, yeah. And set some objectives, set some whatever you want, whether it's training, whatever, and actually assess it and don't let them roll through, otherwise you might be stuck with someone where you're having to performance manage.

**Steven Bruce** 36:31

It strikes me that this is potentially the area where the whole employment, self employed thing could raise its head, because, let's say we've got an associate working in my practice, and I, for some reason, don't like them, and say, right, you're out of work from Friday. I don't want you here now, if they are self employed, I suppose technically, I have the right to do that

**Caroline Robertson** 36:49

Absolutely. Just make sure you have a notice period in your contract, your agreement, because a lot of them don't.

**Steven Bruce** 36:55

And how long does that have to be? Or can it be anything?

**Caroline Robertson** 36:57

It can be anything you want. It could be a month. Equally, they could only give you a week, potentially. And then you're stuck.

**Steven Bruce** 37:03

Well, let's say, from the employer's point of view, I say (to an associate), right, you're out of work from Friday. And they say, Well, I'm not happy with that. And then they go to a solicitor who says, well, actually, all these little boxes weren't ticked. Then they could say that actually, I'm an employee, and you don't have the right to do that, and therefore it's unfair



dismissal. That's the area where things could get nasty. I imagine that's where it went wrong with Pimlico plumbers.

**Caroline Robertson 37:25**

So that's the thing where we just need to be very careful. You know, now put six month probationary period. Review properly. If it's not working out in that six months, make a decision, however hard that might be, make a decision. And there are some issues with because of the NI increase for employers, I've had some client employers that have just said we're not going to increase salaries this year because we've got an extra hit on NI, or we are, you know, finding a different way to reduce our costs. Some employers are even saying I'm only going to have contractors and they'll not have employees because of the extra employee costs.

**Steven Bruce 38:03**

Interestingly, too, if people are on PAYE and you're paying National Insurance, almost certainly you've then got to pay someone else to administer that for you, whereas, if it's a simple associate contract, you can do all that. It adds to the cost. Sally says, as a practice owner, how do we ensure the whole team don't take their holiday at the same time leaving the clinic and the patients empty? All of her practitioners are associates, so self employed? Yes if can we not dictate when they can take their holiday

**Caroline Robertson 38:38**

Yeah, you can. You can put that in the contractual agreement, because it's a fair business reason to stagger holidays. It's difficult, because what you shouldn't really be doing is approve holidays, because that begins to sound like you could be an employer, but you can be clear in the contractual agreement that you need to make sure that you're not taking holiday or time off when other people are off, and as much forward planning as possible. That's perfectly fair, right?

**Steven Bruce 39:06**

Difficult for you to answer this on the fly, probably. But how would you word that in a contract? Let's say there are six practitioners in a clinic, six rooms, and what Sally is trying to avoid is all six are off at the same time. They're all, let's say, osteopaths. How does the contract read? You have to ensure that you're not off when all the others are off. Or I have to agree that this is a fair period to take off, because you don't want it to sound as though I'm approving,

**Caroline Robertson 39:36**

yeah, I'm wondering if there's some kind of system where you can flag up in terms of booking patients in, and I don't know how far in advance patients book

**Steven Bruce 39:53**

It could be days, but it could be months in some cases.

**Caroline Robertson 39:58**

So I think. It's fair to be able to write, you know that you should be forward planning wherever you reasonably can, holidays, and be clear to check with the practice and other



practitioners when they will be away. That sort of wording, as we can't guarantee all absences. You know, we need to have practitioners in so I'm sure you can write something relatively sensible that makes sense, and remember that it can be in everyday language. I think a lot of people get frightened by these agreements, but actually, you can just write what you would write on an email, in an agreement, it's okay.

**Steven Bruce** 40:43

Well, if you're up for it, you and I can try and come up with some form of words that we can recommend to people afterwards. We will provide it to our members free of charge, just to give them some sort of basis

**Caroline Robertson** 40:57

Yeah. I'm sure I could come up with something.

**Steven Bruce** 41:01

Thank you.

Kathy has an intricate little question. They used the associate contract, which was provided by the osteopaths professional organization, the Institute of osteopathy. The IO used the title assistant, which Kathy, in her practice, changed to associate. Does it matter what you call them? Do they have legal standing, those terms?

**Caroline Robertson** 41:20

Not really. I mean, associate might have legal standing in company law, possibly, you know, lawyers or accountants, they go on the next rung up when they're an associate, but not really.

Associate is a bit confusing, actually, in what it means to a lay person. I guess for everyone on this call it's a term that you know really well.

Assistant doesn't sound quite right, either, to be honest.

So I think you have to think about whenever I would write or come up with a title. Just ask your family members who know, perhaps or a friend. What does that mean to you? Does that make any sense? Or is that, you know, is that the right term you should be using? Yeah,

**Steven Bruce** 42:08

I think it's probably okay for us to carry on using associate in practices where everyone knows what it means and that will reassure Kathy.

Simon says, In a previous career, I had to attend an employment tribunal as the employer. It's really something you don't want to get involved in. The Tribunal found for Simon, but it was a harrowing experience.

Yeah, I find that with a lot of the shows we run here, when it comes to the legal side of things, we talk about the complaints process at the general councils, and we're talking about employment law, and it's the thing you never bother about, you don't take it into account, until suddenly it bites you in the arse, and it is an extraordinarily unpleasant process, especially if you're not prepared for it.

**Caroline Robertson** 42:53

It really is. And weirdly, because I'm not practising solicitor anymore, I do all the HR and employment law, I end up often being a witness because I've maybe run a disciplinary for

somebody, or I've run an appeal or a grievance or an investigation or whatever it is, and it's very unpleasant, you know?

And I remember recently going down to Plymouth and having barristers cross examining me, tripping me up, and you're thinking, well, I actually know what I'm talking about, but they're making me feel uncomfortable.

I don't think people actually understand the amount of time involved. People always go, it's going to be this costly because of the solicitors' fees. Well, they forget that management time, the stress, employee time. Then they have to get a few employees turning up, or a practice manager turning up as a witness. It's a thoroughly miserable process. So yes, that's why a lot of employers or practices, they deal with it when a crisis happens.

But if you can just get some good policies and procedures, contracts in place, whatever you decide, try and have something as a preventative side. Because it's a thoroughly miserable place to be.

**Steven Bruce** 44:15

Yeah, what are the other employment issues which people need to be aware of?

**Caroline Robertson** 44:20

Data protection is always a bit of a concern, particularly, I think, as a practice

**Steven Bruce** 44:26

Of the employees or associates, rather than the patients, who we do protect?

**Caroline Robertson** 44:30

So hopefully that is the case. So I've had situations where there are these things called data subject access requests, which are essentially when somebody, an or a contractor says, I want a copy of anything that has my name in it. It could be any documents, emails, WhatsApps, emails, everything, and they're a nightmare. And they often happen when say, there's a dispute, and you're arguing about somebody, and then somebody logs in a data subject access request, and you have to go back and trawl your whole system for the last 12 months, and it takes hours and hours and hours, and then they complain to the information Commissioner's Office

**Steven Bruce** 45:15

They're allowed to do it for 12 months? Or can it be longer?

**Caroline Robertson** 45:19

They can say two years if they want. But usually it should be relevant to what we're arguing about. It's fine for the employer to say, or the practice to say, no, the issue we're talking about is over the last six months, so that's what whatever we're going to do, but it's it's a horror.

And then occasionally, I've had one where they've complained to the Information Commissioner's Office, and then they write to you, and you have to explain yourself and I had a one recently where they also recorded everything, but they had it flashes up on them, on the screen, or the software system "we are going to record you for Training and quality purposes only", and the employee or the contractor said, well, they were actually, they were conducting underhand dealings with a competitor, which they shouldn't have done, but

they've done it on their company software system, and it's all been recorded. So they put a data subject access request, and then the husband put a data subject access request, because he was chatting in the background, and it was just a just, you know, absolute chaos.

**Steven Bruce** 46:24

So probably best steer clear of this,

**Caroline Robertson** 46:28

Yeah. So, you know, have a data protection policy.

Harassment is the new one that's just come in. So from 26th of October, we had the prevention of sexual harassment in the workplace, and it's one of the few bits of legislation that have come in which is preventative, rather than how do we deal it when a complaint comes?

So what that means is to distill it down as easily as possible for small businesses is have an anti harassment policy. Doesn't have to be long, three or four pages, because you'll have an equal opportunity policy, at least I'd hope you have an equal opportunities policy, but you should have a standalone anti harassment and bullying policy in the workplace, it's good to do a risk assessment,

**Steven Bruce** 47:13

God, people are thinking, I know, and a fire assessment, and a health and safety assessment...

**Caroline Robertson** 47:21

and explain it to your staff and your contractors. Don't just do it and stick it in a cupboard.

**Steven Bruce** 47:26

How do you explain it to them? Can you just say this is where you find it on the website?

**Caroline Robertson** 47:30

Yes but the problem is, if you get a claim and you've done nothing for five years, and you said initially, here is the harassment policy, and nobody's talked about it until then, the problem is they're now sticking a 25% uplift on any compensation awards if you haven't been seen to actually go through it. It can't just be go through the motions. So you know, I would honestly say if you have a practice meeting once a year, maybe which might involve your contractors. Just put it on the agenda and say, don't forget, we do have a harassment policy. Happy to have a chat about. I always say, Can you see any situations where anybody could be at risk? Could that be when you're dealing with a patient, have you had any experiences where you think it's a problem by having a quick chat? It's a bit like a training exercise. It doesn't have to be long, a five minutes chat, perhaps, but put it on your agenda.

**Steven Bruce** 48:32

Do you offer a harassment policy?

**Caroline Robertson** 48:35

Yeah, so happily for your members, for 200 pounds, I would give anti harassment and bullying policy, a risk assessment form, which is really simple to fill out, really simple and a quick seven steps what you should think about and do. But again, I try and distill it down as just as simply as possible, because we're all busy. Nobody wants to do it.

**Steven Bruce**

I'm hoping that 200 is less than you charge other people.

**Caroline Robertson**

Yeah, I normally charge £450, or £500 so obviously, if your members feel that that's something they can do, I think a nice little package. And hopefully they will think it, look at it, and go, I can do that.

**Steven Bruce** 49:15

Caroline, You've been a great guest. Who'd have thought 50 minutes would flash past that quickly when we're talking about employment law, but it has, and dealt with a lot of questions. Thank you for that. I'll put my suggested, wording for that holiday thing to you, and you can show me whether it makes sense, rather than give you the work to do yourself.