

PCG takes action to stop agency 'FUD'

Submitted by: SHA

Tuesday, 20 February 2001

The Professional Contractors Group (PCG) has reported a recruitment agency, Computer People, to the Advertising Standards Authority for claiming that potential clients can avoid employment issues surrounding IR35 if they put an agent between themselves and any contractors.

The Group believes that some agencies are using the confusion and uncertainty surrounding the controversial stealth tax IR35 to their own advantage by making claims aimed at scaring clients and contractors into using an agent as the 'middleman' in any contract deals.

Many contractors are now seeking work directly from clients, rather than, as was usual, contract via an agency. The IR35 legislation says that contractors are at risk of being treated as 'disguised employees' of their client for tax and NIC purposes, but confers no employment rights directly.

Computer People is now using as a 'salespitch' a claim that if clients put an agent between themselves and the contractor, there is no risk of employment rights. However, the PCG believes that the use of an agent has no bearing on this.

Director of the PCG, Ian Durrant, said: "The Government's legislation has created a mine-field of real confusion and chaos in the contracting sector.

"However, some agencies are now capitalising on this fear, uncertainty and doubt (FUD) to make dubious claims for their own commercial advantages. It is bad enough that our members have to contend with the real problems that this legislation has brought, without Computer People and others using this climate to try to 'scare' clients away from contracting directly. The agency regulatory bodies should make a clear statement about this practice and condemn the use of such claims to build a business."

IR35 was announced in a press notice after the March 1999 Budget. It treats small businesses in the knowledge-based sector as 'disguised employees' for tax and NI purposes, thereby preventing them from operating on similar terms to their larger competitors.

Notes to editors.

1. The Professional Contractors Group was formed in May 1999 to lobby against the Government's IR35 proposals. It is a non-party political group and its patrons are cross-bench peer, Lord Weatherill, former Speaker of the House of Commons and industrial guru Sir John Harvey-Jones. Since its formation it

has evolved into the representative body for independent contractors from many disciplines including IT and engineering on many issues affecting the knowledge-based sector. It is the fastest growing trade association in the country and now has more than 11,000 members. The PCG is challenging the validity of IR35 in a judicial review in the High Court on March 13-15 2001.

2. The PCG's aim is to work for proper recognition of independent contractors as a genuine and valuable sector of the economy, generating wealth and employment, providing industry with a flexible workforce. The internet has been the primary resource, providing fast, effective communication.

3, Letter to ASA attached

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Text of letter:

Advertising Standards Authority

2 Torrington Place

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Dear Sirs,

I am writing to make a complaint against a company named Computer People Limited who have been making claims in advertising material which we believe are untrue and which, we believe, tend to disadvantage our members.

The Professional Contractors Group represents 11,000 small businesses in the Knowledge-based sector, primarily engineering and information technology. A few are self-employed but the vast majority are

incorporated under the Companies Act (Incorporated businesses which provide consultancy services are sometimes referred to as "Service Companies").

Our members market their businesses in a number of ways and often obtain business through personal recommendation. Many members prefer to work as direct contractors whereby they sign a contract directly with the client. However, sometimes they will use 'agencies' such as Computer People to find work. When an agency is used the member's company will sign a contract with the agency and the agency will sign a contract with the client to whom the member will supply the consultancy services. There will be a difference in the fee rate between the two contracts, which represents the agency's mark-up.

In order to avoid the agency mark-up, many members tend to work as direct contractors to the client where possible. It has recently come to our attention that the agency, Computer People have been distributing the enclosed advertising material in an attempt to persuade clients not to do business directly with contractors. This advertising material makes claims, which we do not believe can be substantiated.

The material states that if a contractor is engaged "directly, or via the contractor's Service Company" and "works under the day to day control of or is supervised by individuals within the hiring Company" or "takes little or no commercial risk in undertaking project work" or "does not use his/her own equipment" or "is performing the same task for more than one month", then there is a "significant risk that the individual may be considered in law as an employee of the hiring Company". This statement is broadly correct: there have indeed been cases where a Court or Tribunal has decided that an individual who works as if he were an employee of the hiring Company (i.e. the client), actually is, in law an employee of the client even though he is paid not directly by the client but through another company.

The material then goes on to say that if the individual contractor is deemed to be an employee of the client then various legal responsibilities will be imposed on the client and the individual contractor will be covered by, for example, employment and discrimination legislation. This too is correct.

However, the material then goes on to state that the answer to this risk is for the client to change the direct relationship between the client and the contractor's Service Company by inserting an agency into the contractual chain because

"contractors working through an Agency are not deemed to be employees"

It is this assertion, that the involvement of an Agency eliminates the risk of employer liability that would otherwise exist, which we believe to be misleading.

Where a contractor's Service Company contracts direct with a client the Courts sometimes have and sometimes have not (depending on the way the contractor works), held that the individual contractor is an employee of the client. But in no case, so far as we are aware, have the Courts held that the presence of an agency between the Service Company and the client affects the decision.

In Davidson and Melville Craig Group Ltd v Motorola Ltd (available at www.employmentappeals.gov.uk) the Employment Appeal Tribunal upheld the earlier decision of an Employment Tribunal that Mr Davidson was an

employee of the client Motorola, despite the fact that he was paid through an agency, Melville Craig Group Ltd, because it was “clear that the control of what Mr Davidson did on a day-to-day basis lay with Motorola”. And in MHC Consulting Services v Tansell [2000] I.C.R. 789 at 797 the Court of Appeal held that the presence of absence of an agency between the Service Company and the client “makes no difference” to the application of disability discrimination legislation.

Our complaint is that the statement made by Computer People in their advertising material that any risk of employer/employee liabilities can be “eliminated”, by the use of an agency between the contractor’s Service Company and the client, is not true and fails to comply with the Authority’s Code which requires that:

Before submitting an advertisement for publication, advertisers must hold documentary evidence to prove all claims, whether direct or implied, that are capable of objective substantiation.

I attach a copy of Computer People’s advertising material, which is currently being sent out by email and also a copy of an earlier circular letter dated 15/3/2000.

Further information can be found at the Shout99 website. (Shout99 is a news site which has an informal connection with the PCG) at:

www.shout99.com/contractors/showarticle.pl?id=6894

Please do contact me if you require any further information from us at this stage.

Yours Faithfully

John Antell, LLB CEng MBCS barrister

Legal Advisor, for and on behalf of PCG