SQUIRE SANDERS

# Workplace View

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## '1-2-3-4 let's go door-to-door' – chanting stops for employer after independent contractor finding

The engagement of door-to-door sales representatives as independent contractors has proven to be a costly mistake for one insurance company. In this recent decision, the Federal Court of Australia found that the totality of the relationship between the sales representatives and the employer was one of employment and has awarded half a million dollars in accrued annual and long service leave payments to the employees.

### Background

The five Applicants were engaged by the insurance company as sales representatives, signing contracts that provided they were 'contractors' and understanding throughout their time with the company that they were 'independent contractors'.

The main role of the sales representatives was to travel door-to-door collecting insurance policies from customers whose policies were up for renewal and seeking to sell new policies to new customers.

As most of the employer's customers were located in rural areas, the sales representatives were allocated to teams, with each team targeting a particular rural area each month.

Typically, the policies written in one particular area would be due for renewal six months later which would be when the sales team returned to that area.

The employer would keep track of which customers' policies were coming up for renewal in any particular month and also generate 'leads' for the sales team through customers whose policies had been cancelled as well as customers from the Employer's other insurance division.

Each week the sales representatives would attend a 'warm-up' meeting which consisted of rhythmic chants ('1-2-3-4 let's go door-to-door') and motivational songs. The sales representatives would also attend a 'cash in' or 'check in' meeting where all the policies they had sold that week were given to the team leader.

### Contractor vs. Employee

The central issue before the Court was whether the sales representatives were employees. In reaching its decision, the Court restated the common law test which requires an examination of the 'totality of the relationship' and the weighing up of several indicia of employment.

One of the key indicia identified by the Court was in relation to goodwill and the finding that there was only one business operating, that of the employer. The Court found that the inability of employer's agents to generate goodwill was due to the fact that the only work that they undertook was the work of the employer. They did not generate a client base but instead increased the client base of the employer. There was therefore no separate business that the agents could sell.

Control was another significant factor in this case with the Court discussing the various elements of control the employer had over the sales representatives. This included:

- the employer dictating how and where the agents performed their work, issuing scripts in respect of how sales should be made, providing detailed training and giving direction and undertaking performance management;
- the agents acting on leads provided to them by the employer;
- the agents forming part of a hierarchical structure, with agents at each level being dependent upon the other for their work; and
- whilst not strictly relevant to control, the agents were also ingrained within the culture of the organisation, singing company songs and being involved in company wide sales competitions.

### Implications for employers

This decision highlights that employers need to be very cautious when engaging agents as 'independent contractors'. Employers must ensure that the totality of the relationship does not give rise to one of employment. With this case placing greater emphasis on control and goodwill, employers can minimise risks by ensuring representatives engaged as independent contractors have full control over their work, such as the freedom to determine how, when and where the services will be performed and permit representatives to engage in alternative business activities.

## "Why me?" – FWA Full Bench clarifies the role of selection process in genuine redundancies

The Full Bench of Fair Work Australia **(FWA)** has clarified the principles involved in assessing whether or not a redundancy is 'genuine' under the *Fair Work Act 2009 (Cth)* **(FW Act)**. The Full Bench considered, in the context of an unfair dismissal claim, the relevance of the selection process where one of three employees who occupied the same role was to be made redundant. The Full Bench found the process used by an employer in choosing which employee is selected for redundancy is not relevant when determining whether a dismissal was a case of genuine redundancy.

### Background

The employee was a warehouse picker who brought an unfair dismissal claim against his employer after being made redundant due to a slow-down in business. Prior to making its decision, the employer had consulted with two other employees, letting them know that one of the three would lose their jobs. The two other employees then made representations to the employer and provided evidence that, they claimed, proved the third employee was the least efficient. Following this, the employee decided to make the third employee redundant.

The dismissed employee applied to FWA claiming unfair dismissal. At first instance the Commissioner held that the redundancy was not genuine because the employer had failed to consult with the employee as required under the relevant modern award.

The Commissioner then considered the factors under s387 of the FW Act in determining whether the dismissal was unfair, and in particular whether there was a valid reason for dismissal relating to the employee's capacity or conduct under s387(a) of the FW Act. In finding the employee had been unfairly dismissed, the Commissioner decided the reasons for the employee's dismissal did relate to

the employee's capacity, and were not valid reasons as they were not *'sound, defensible or well-founded'.*

## Selection process is not relevant, but consultations are

The employer appealed the decision to the Full Bench of FWA. The majority of the Full Bench agreed that the redundancy was not genuine because of a failure by the employer to consult as required by the modern award. However, while also finding the employee had been unfairly dismissed, the Full Bench found the Commissioner had erred in his reasoning.

The Full Bench confirmed that that the process in which an individual is selected for redundancy is irrelevant in determining whether the redundancy is genuine (save for where a person is dismissed for a prohibited reason under the general protections provisions found in Part 3-1 of the FW Act, for example a discriminatory reason).

The Full Bench found the reason for the employee's dismissal did not relate to the employee's 'capacity' as determined by the Commissioner. This Is because the evidence established the only reason for the dismissal was that the employer no longer required the employee's job to be performed by anyone because of a change in the operational requirements of its enterprise and it was not reasonable in all the circumstances to redeploy him.

However, it was found if any of the criteria for a genuine redundancy in s389 of the FW Act had not been met this (such as failure to consult) could be taken into account by FWA under s387(h) of the FW Act being, 'any other matters that FWA considers relevant'. The Full Bench found the failure to consult was, in the circumstances of this case, a matter relevant to its consideration as to whether the employee's dismissal was harsh, unjust or unreasonable, notwithstanding the valid reasons for the employee's dismissal and the due weight given to those valid reasons.

## Reduction in compensation

As the redundancy was not genuine the Full Bench had to consider the amount of compensation that the employee should be awarded. In the initial decision the employee was awarded compensation on the basis that the employee would have remained employed at a reduced capacity for a further year.

The majority rejected this approach. The Full Bench found the Commissioner had erred in making this award. In weighing up all factors, they ultimately considered that the employee would have remained in his job for a maximum of two further weeks as this is how long the consultation process would have taken if the employer had complied with the modern award. Accordingly, the amount of compensation payable was reduced to two weeks' wages.

## Implications for employers

This decision is good news for employers. It means that when a position becomes genuinely redundant, employers will not be constrained in their selection of employees for that redundancy, provided the reason an employer makes that selection is not prohibited under the general protection provisions of the FW Act. FWA will not otherwise investigate the selection process when assessing whether or not the redundancy is genuine.

The case also highlights the importance of being aware of the consultation provisions in any awards which cover your employees. If an employer does not comply with these provisions, an otherwise genuine redundancy may become subject to unfair dismissal proceedings, in which the circumstances of the failure to consult are considered, potentially exposing employers to reinstatement of the employee or a compensation claim.

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# Did you know…The Full Bench of FWA has dismissed an appeal against a decision preferring oral testing over urine testing

An appeal by Endeavour Energy against a decision by Senior Deputy President Hamberger (SDP) which found the most appropriate methodology in a proposed new policy on drug testing was on-site oral fluid screening devices, has done little to clarify for employers the preferred drug testing method. It has however provided some comments employers may find useful.

## Facts

The employer sought to introduce a new policy dealing with drug and alcohol testing in the workplace, which included the introduction of urine testing. The unions objected to certain features of the proposed policy and the parties agreed to refer their differences to FWA.

The SDP considered expert evidence. He found the introduction of urine testing would be unjust and unreasonable and the appropriate method of drug testing should be through oral fluid with the testing to be carried out in accordance with Australian Standard AS4760-2006. On appeal the employer sought to challenge the decision that the appropriate method of drug testing was oral fluid.

## The decision

The Full Bench found that no appealable error had been established. It found ultimately the policies to be adopted by employers on drug and alcohol testing in the workplace will depend on what is deemed appropriate according to their needs and circumstances. Having regard to the evidence and submissions presented, it was open and appropriate for the SDP to conclude that oral fluid testing but not urine testing for drugs should be adopted as part of the new drug and alcohol policy of Endeavour Energy.

*Construction, Forestry, Mining and Energy Union v HWE Mining Pty Limited [2011] FWA 8288*

The relevance of the HWE Mining case was raised in the appeal, a conflicting decision in which urine testing was the preferred methodology.

While noting it may have been prudent for the SDP to refer to the decision in HWE Mining, the Full Bench found the SDP was ultimately required to determine the matter which had been referred to him on the basis of the evidence and material before him and noted the circumstances and evidence of the two matters were different.

One of the relevant distinguishing facts of that decision was that HWE Mining involved a determination of whether an established approach to drug testing should be changed, by introducing a programme for saliva testing and a continued role for urine testing. Whereas, this case concerned the appropriate testing methodology to be used in a proposed new policy. Further, the evidence in the two matters of the efficacy of on-site oral fluid screening devices was different. HWE Mining was heard in mid-2010 and involved the studies and experience of the Victorian Police in relation to the devices under consideration in the studies, whereas in the present case the evidence was that there has been significant improvement in the reliability of current on-site oral fluid testing devices.

## Full Bench comments

The Full Bench commented that the question of which testing method must be considered having regard to the purpose of the drug testing policy. In this case the purpose was to prevent individuals adversely hindered by alcohol and other drugs from undertaking work. It was therefore found to be open to the SDP to place significance on the evidence that oral testing was more likely to detect recent drug use and therefore impairment and that a positive test result from a urine test might detect

drug use at a time which in no way affected their current capacity to do their jobs safely.

The Full Bench also indicated that the health and safety obligations under the relevant occupational health and safety legislation did not create an obligation on an employer to apply a particular form of drug testing.

## Implications for employers

It appears from this case that, although each case will turn on its own facts and circumstances, there may be a preference by FWA towards oral fluid testing in cases where employers in particular are introducing a drug testing policy. If you are concerned about your current policy on drug and alcohol use, or you are considering developing a new policy, it is recommended you seek legal advice as the applicable legal principles and appropriate methodology to be applied in your specific set of circumstances.

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