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Workplace View

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Employers Using "Independent Contractor" Arrangements to Avoid Employment Obligations With Expensive Consequences!

Madeleine Smith and Dominique Hartfield

The controversial question of whether a worker is an employee or independent contractor has once again come before the Australian courts. The recent decision of *Balemian v Mobilia Manufacturing Pty Ltd & Anor* [2017] FCCA 743 (***Balemian***) provides a reminder to employers of the potential financial ramifications of getting this wrong, as well as the potential reputational damage where "sham-contracting" arises.

Case Facts

The applicant in the case was engaged in a continuous working relationship with the first respondent (**the "Company"**) and its predecessor for over 21 years. The parties never entered into a written agreement and the applicant received no leave entitlements of any kind. After leaving the Company's service, the applicant claimed that he was an employee covered by the relevant modern award and entitled to receive accrued leave and superannuation contributions. The Company disputed this claim on the basis that he was engaged as an independent contractor.

The Federal Circuit Court considered evidence that the applicant had an ABN, submitted fortnightly "as quoted" invoices for his hours worked (at the Company's request) and had repeatedly described himself as self-employed in taxation returns. Despite this, the Court found there had been an absence of agreement or discussion about the nature of the employment relationship and accepted the applicant's evidence that he was "very naïve" and too "embarrassed" to discuss his working arrangements in greater detail with the Company.

The Decision

The Court considered that the Company had control over important aspects of the working arrangement, including the work the applicant performed and the manner in which he carried out his duties. On the whole, the Court found the applicant for the most part was not free to use his own discretion and the manner in which he performed the work was "*clearly demonstrative of a contract of employment*".

In reaching this decision the Court also took into account the following details:

- The Company's sole director generally supervised and authorised the applicant's work daily
- The applicant was paid an hourly rate and used a Company car
- The Company required the applicant to submit timesheets of his hours worked
- The applicant consistently worked for the Company at least 45 hours per week and was provided with a factory key and an office which he used as his primary place of work
- The applicant informed the Company if he was unable to attend work due to illness or was leaving before close of business and sought approval in advance of planning holidays
- The applicant had no capacity to delegate the performance of his work and did not hold himself out as operating his own business but as a person working for the Company
- Employees were used to the applicant's daily presence in the workplace for over 20 years
- Over time, the applicant's role developed and he was responsible for training new employees in some aspects of the business

The Court found the arrangement set up by the Company and its sole director "at the very least recklessly disguised the true legal nature of the relationship", in contravention of the sham contracting provisions in the *Fair Work Act 2009* (Cth) (**FW Act**). The failure by the Company (and its predecessor) to pay the applicant the correct rate, accrued leave payments and superannuation contributions amounted to breaches of FW Act provisions, the relevant modern award and superannuation legislation, resulting in a financial loss to the employee of approximately AU$230,000 (not all of which was recoverable from the Company under the claim). The decision has been re-listed to determine civil penalties and costs, along with the sum of compensation, in the event the parties are unable to agree upon the compensation payable.

An Unclear Distinction – But An Important One to Get Right

Varying decisions on this issue in recent years show that the distinction between an employee and independent contractor can be complex and often unclear. This is particularly so given there is no definitive definition of an independent contractor. The courts to date have pointed to identifying and evaluating relevant factors arising from the evidence and weighing those factors (with some having greater importance than others) against established principles to see where the balance lies. A court will look behind the wording of a contract and/or the use of an interposed entity to look at the true nature of the relationship; therefore these are not sufficient on their own to establish an independent contracting relationship.

Liabilities for getting it wrong can include compensation and penalties, not only from non-compliance of employment legislation but also tax and superannuation legislation. In the recent case of *Fair Work Ombudsman v Grouped Property Services Pty Ltd* [2016] FCA 1034, the Federal Court directed that the court registrar forward a copy of the judgment to ASIC and the ATO. This may result in further investigations, prosecution and liabilities.

In addition, a misrepresentation of the relationship, or dismissing an employee to engage them as a contractor to avoid employment obligations, will enliven the sham-contracting provisions of the FW Act.

Lessons for Employers

With the evolution of a growing number of non-traditional working arrangements over time, we expect to see even more cases litigating this issue. It is important to ensure a worker's status and the character of the relationship is clarified and well documented with the worker from the outset and reviewed over time.

Employers should exercise caution in characterising working relationships as a contracting arrangement when it is not abundantly clear. In such circumstances, it is important to take legal advice to determine whether a genuine independent contractor arrangement exists (or will exist).

Did You Know…?

Jessica Geelan

Did you know that third party service providers can be found liable under the accessory provisions of the *Fair Work Act 2009* (Cth) (**FW Act**) arising from a client's contraventions?

In April this year, Ezy Accounting 123 Pty Ltd (**Ezy**) (a tax and accounting business) was found accessorily liable for the underpayment of modern award rates and other entitlements by its client, Blue Impression Pty Ltd (**Blue**).

Ezy denied liability, claiming its role as service provider was limited to bookkeeping work and processing Blue's payroll. It submitted that Blue provided hourly rates in respect of each employee and that it was not aware the applicant employee was covered by the *Fast Food Industry Award 2010* (the "**Award"**) and not receiving his correct entitlements.

Under section 45 of the FW Act a "person must not contravene a term of a modern award" and under section 550(1) of the FW Act, "a person who is involved in a contravention of a civil remedy provision is treated as having contravened that provision".

Evidence submitted by the Fair Work Ombudsman (**FWO**) showed that Ezy's principal, Mr Lau, was put on notice by the FWO in April 2014 when he received a letter detailing Blue's contraventions of the Award. Following the FWO's letter, Ezy sought advice from a workplace relations specialist regarding the correct rates under the Award in order to properly assist its client.

Judge O'Sullivan accepted that Ezy had all the "necessary information" which would confirm Blue was in contravention of the Award but had turned a blind eye by not rectifying the contravention in its payroll system.

As Ezy was responsible for producing payroll records and payslips for Blue's employees, the Federal Circuit Court judge found that "even the most basic query would have revealed that employees were not receiving their correct entitlements".

In his capacity as director of Ezy, Mr Lau exercised overriding control of its activities, including its dealings with Blue. Mr Lau admitted he knew of the applicable award and that it provided minimum rates. Due to his "wilful blindness", Ezy was found to be aware of and involved in the contraventions alleged by the FWO against its client. The penalties to be imposed on Ezy are still to be determined by the Court.

Fair Work Ombudsman v Blue Impression Pty Ltd & Ors [2017] FCCA 810 (28 April 2017)

OSH Update

Reliance on Internal Website Training Insufficient for Employer to Ensure Safe System of Work

Employers should take care that their training systems incorporate safe work procedures sufficient to ensure a safe work environment. This includes when utilising online training, ensuring the training provides information on potential hazards and how to work safely, and is complimented by on-the-job training by competent personnel who have received safety training or certification.

In the recent case of *Boland v Kentucky Fried Chicken Pty Ltd* [2017] SAIRC 16, a restaurant chain employer was convicted of an offence under the *Work Health and Safety Act 2012* (SA) for failing to provide and maintain a safe work procedure for filtering oil and cleaning fryers. Deficiencies in the employer's training methods came to light when a 16-year-old worker suffered severe burns after tripping backwards into a tank of hot oil. A co-worker had been teaching new staff to clean the fryers when he left the tank on the floor behind the injured employee without warning.

An Industrial Magistrate found the employer had failed to ensure that staff were adequately trained in how to safely filter and change the oil. The employer had relied on an internal website and limited demonstration to teach employees the task.

The website did not address the potential hazards involved in the task and provided no information on where workers should place the tanks while the oil was being filtered. Further, the worker who left the oil on the floor had not been shown the website information, had never been tested on his competence in the task of filtering oil or required to demonstrate the process to a supervisor. Although he trained other staff members in the task, he had not been given any specific safety instructions about how he should carry out the training.

The employer was ordered to pay a penalty of AU$105,000 and since the incident has overhauled its oil filtering procedures and implemented new competency standards and certification requirements for employees.

The case highlights that employers who use online training methods for work procedures should:

- Conduct adequate hazard identification and risk assessments in the workplace prior to establishing training systems
- Ensure their online training properly covers associated hazards and methods of safe work
- Have systems in place to ensure employees have accessed and understood the information
- Supplement online learning with appropriate on-the-job training by competent personnel and skills assessments

Workplace Quiz

If your employees are covered by an applicable Modern Award, what must you do to ensure employees have access to the Award?

A. State that they are covered by the applicable Modern Award in their employment contract.

B. Show employees a copy of the applicable Modern Award you keep in your office in their induction meeting and tell them they can ask to see it when they want to.

C. Tell your employees they may obtain a copy of the applicable Modern Award from the Fair Work Commission.

D. Have a copy of the applicable Modern Award available to all employees either on a noticeboard which is conveniently located at or near the workplace or through electronic means, whichever makes it more accessible.

The first correct answer emailed to Isla Knight (isla.knight@squirepb.com) will win an AU$50 David Jones gift voucher (Australia only).

Employer Reminder – Workplace Policies

Connor McClymont

Employers should ensure they have a suite of well drafted workplace policies and procedures in the workplace which are communicated to employees and enforced, to:

- Help set standards, rules and guidelines of expected conduct and performance in the workplace
- Provide protections from legal claims
- Provide consistent methods of resolving common workplace issues
- Create a fair, harmonious and safe workplace

Traditional Workplace Policies

Certain workplace policies have been common place in Australian workplaces for some time including:

- Anti-Discrimination and Equal Opportunity
- Code of Conduct
- Drug And Alcohol
- Email and Internet Usage
- Termination and Disciplinary
- Privacy
- Workplace Health & Safety

While these policies may seem "old hat", employers should never underestimate their importance. This was evident in the recent decision of *STU v JKL (Qld) Pty ltd and Ors* [2016] QCAT 505. In this decision, the employer was found vicariously liable for damages in the amount of AU$313,316 when one of its employees sexually assaulted another employee. The employer did not have a sexual harassment policy in place, leading the Queensland Civil and Administrative Tribunal to conclude that "no reasonable steps were taken" to prevent the assault. The Tribunal stated that "in the very least one would expect a publicly listed company…to have an anti-discrimination policy and education program".

Modern Policies

As the modern workplace has evolved so too have workplace policy requirements. Trends in employment law, workplace disputes and new workplace laws in the last decade have given rise to new workplace policies which are becoming increasingly essential in the workplace, such as those covering:

- Social Media
- Sexual harassment
- Bullying
- Mental health and safety
- Parental leave
- Return to work
- Incident response
- Working from home

Importance of Drafting Properly

Workplace policies have a tendency to become a double-edged sword if not properly drafted. While employment policies allow employers greater control over their workplace conditions, it is important to be wary of the risk of policies giving rise to breach of employment claims against employers, where the policy or certain provisions are deemed to be contractual.

In the case of *Romero v Farstad Shipping Pty Ltd* [2014] FCAFC 177 an employer was found to have incorporated the terms of its Workplace Harassment Policy as part of the employment contract by including obligations in the policy which were mutually enforceable, by requiring employees to read and sign policies in workplace inductions and by stating in a letter of engagement that workplace policies "*are to be observed at all times*". When the employer investigated a harassment claim, without a formal complaint having been made by the employee victim, it was found to have acted contrary to the policy and by extension, the employment contract.

To reduce the risk of employees bringing actions against employers for breaching workplace policies employers should:

- Ensure the language in the policies are not promissory in nature (on the part of the employer) and do not create onerous obligations on employers.
- Avoid making policies contractual in employment agreements. For example, in the employment contract make it clear that employees are required to comply with policies and procedures (as amended from time to time) but that they are not incorporated into this agreement as terms and conditions of this agreement.

If you would like further information or to discuss workplace policies which suit your businesses needs, please contact one of our experienced labour and employment lawyers.

Events Update

Squire Patton Boggs Labour & Employment Seminar Series

Squire Patton Boggs Labour & Employment Group will be holding a seminar as part of its Labour & Employment Seminar Series in **Perth**, on **Wednesday, 24 May 2017** on the topic ***"On-boarding New Employees – How to Get It Right"***.

- **7:30 a.m. registration/breakfast** (for an **8 a.m. start**) at Squire Patton Boggs Perth office, at Level 21, 300 Murray Street, Perth

This seminar, which will be presented by Bruno Di Girolami (partner), Anna Elliott (partner) and Dominique Hartfield (of counsel), will look at the on-boarding process (including the employment contract framework) and provide practical tips on getting the process right, key legal issues to watch out for and steps which can be taken to protect employers' interests.

Should you have any queries or wish to register for the above event, please do not hesitate to contact Isla Knight on +61 8 9429 7624 (Perth).

Contacts

Bruno Di Girolami
Partner
T +61 8 9429 7644
E bruno.digirolami@squirepb.com

Anna Elliott
Partner
T +61 2 8248 7804
E anna.elliott@squirepb.com

Dominique Hartfield (Editor)
Of Counsel
T +61 8 9429 7500
E dominique.hartfield@squirepb.com

Andrew Burnett
Of Counsel
+61 8 9429 7414
E andrew.burnett@squirepb.com