Independent Contractors and Labour Hire – The Dangers

In light of recent AIRC and FWA decisions, all businesses that have a high reliance on independent contractors or labour-hire agencies should closely assess their models to ensure that they are not inadvertently entering into employment relationships with their workers. As this article will demonstrate, classifying workers incorrectly can have a potentially devastating impact.

Benefits of not having employees

The benefits of engaging labour without entering into an employment relationship are many and varied, and include the following:

- Flexibility in bringing the relationship to an end.
- No access to unfair dismissal.
- The ability to engage labour on an 'as needed' basis.
- No requirement to pay superannuation.
- No requirement to pay leave entitlements.
- No requirements to pay WorkCover insurance.
- No requirement to pay payroll tax.
- Company tax rate v income tax rate.

For all of these reasons and more, independent contracting is an extremely popular phenomenon amongst businesses in the highly regulated Australian labour market. On the converse side many workers feel that contractor arrangements are beneficial, in the sense that they are free-agents with a theoretical ability to render their services when and how they see fit.

However as many businesses who utilise the services of 'independent contractors' know, the significant operational and financial benefits they enjoy are much more measurable than the sense of self-empowerment felt by the worker, who often renders services to that business alone. Nothing reinforces this point more clearly than when a business abruptly terminates such an arrangement, leaving the worker

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with no source of income and a bitter taste in his or her mouth. It is in such circumstances that workers apply to courts or industrial tribunals to determine their true status.

Forget the label

It may come as a surprise to some businesses that titles given to workers are largely meaningless in the eyes of the law. In other words, a court will not classify a worker as an 'independent contractor' where the objective criteria establish that the worker is in fact an employee.

The High Court in *Hollis v Vabu* (2001) 207 CLR 21 was asked to determine whether a courier was an employee for the purposes of a negligence claim. In this case an unidentified courier on a bicycle, and wearing a 'Crisis Couriers' uniform, struck a pedestrian causing permanent injury. The pedestrian sued the company rather than the individual, and the company responded that the courier was not an employee. The court looked not to the label given the couriers, but to the 'totality of the relationship' to establish that, in the circumstance, the courier was an employee. This consequence of the finding was that the company was vicariously liable for the injury to the pedestrian.

Hollis v Vabu was reaffirmed and expanded upon in the decision of the Full Bench of the AIRC in *Abdalla v Viewdaze Pty Ltd t/a Malta Travel* 504 (14 May 2003). The Full Bench stated the following at para 34:

> *"The terms and terminology of the contract are always important and must be considered. However, in so doing, it should be borne in mind that parties cannot alter the true nature of their relationship by putting a different label on it"*

In this case, the Full Bench drew on the principles set out in *Hollis v Vabu* to establish the indicia to determine whether a worker is an employee. The indicia are as follows:

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- Whether the putative employer exercised, or has the right to exercise, control over the manner in which work is performed, place or (sic) work, hours of work and the like.
- Whether the worker performs work for others (or has a genuine and practical entitlement to do so).
- Whether the worker has a separate place of work and or advertises his or her services to the world at large.
- Whether the worker provides and maintains significant tools or equipment.
- Whether the work can be delegated or subcontracted.
- Whether the putative employer has the right to suspend or dismiss the person engaged.
- Whether the putative employer presents the worker to the world at large as an emanation of the business.
- Whether income tax is deducted from remuneration paid to the worker.
- Whether the worker is remunerated by periodic wage or salary or by reference to completion of tasks.
- Whether the worker is provided with paid holidays or sick leave.
- Whether the work involves a profession, trade or distinct calling on the part of the person engaged.
- Whether the worker creates goodwill or saleable assets in the course of his or her work.
- Whether the worker spends a significant portion of his remuneration on business expenses.'

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It is important to stress that intention is not mentioned as one of the indicators for whether a worker is an employee or contractor. Therefore clauses to the effect that… *"nothing in this agreement is intended to establish a relationship of employment…"* will have little effect, and in fact may trigger the suspicions of the court or tribunal that there is an employee lurking behind the contractor veneer.

An example of how far courts will go in deconstructing artificial arrangements can be seen in the decision of *Damevski v Giudice* [2003] FCAFC 252. In this decision the Full Court of the Federal Court of Australia overturned a decision of the Full Bench of the AIRC that no employment relationship existed between Mr Damevski and Endoxos Pty Ltd. Mr Damevski had been previously engaged by the company as an employee, however some 3 years into his employment he was informed that due to cost pressures the company had decided to move to a contracting system, whereby Mr Damevski would establish his own business and become a contractor to MLC Workplace Solutions Pty Ltd. Mr Damevski signed documents stating that he understood and agreed to the proposal, and some months later was told that he was being taken off the job. Throughout the period during which Mr Dameski was ostensibly engaged as a 'contractor', he continued to work under the same arrangement and was provided by Endoxos with a van, equipment, and company livery.

The Full Court ultimately quashed the first instance finding that the Applicant was not an employee, with Marshall J stating at paragraph 58:

> *"Mr Damevski was not carrying on a business of his own. In truth, the relationship between Endoxos and Mr Damevski was one of mutual dependence and involved no one else, other than MLC in a confined capacity which related entirely to the manner of effecting Mr Damevski's remuneration. Mr Damevski had no right to delegate his shifts to other persons. He worked solely for Endoxos. He was provided with equipment by Endoxos to perform work."*

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At 108, His Honour further stated:

> *"The facts of this case also reveal that the contractual relationship that existed between Mr Damevski and Endoxos was one of employee and employer."*

This case emphasises how a court will see through an artifice constructed to evade legal obligations to employees.

Labour-hire arrangements

It is commonly believed that if workers are engaged through labour-hire firms, no contract can exist between the worker and the host company. This principle was established in the case of *Fox v Kangan-Batman TAFE* [Print S0253]. In this decision it was found that as no contractual relationship existed between the TAFE and the Applicant, no employment relationship could exist. Although the worker and the labour-hire company had a contractual relationship on the one hand, and the labour-hire company and the host company had a contractual relationship on the other, the vital contract to establish an employment relationship was not present.

However the current state of the law regarding labour hire is in a state of flux following the decision of SDP Lacy in the matter of *Jamie Orlikowski v IPA Personnel Pty Ltd* [2009] AIRC 565. The decision concerned an application by Mr Orlikowski to join the Australian Quarantine and Inspection Service (AQIS) as a second respondent to his unfair dismissal application against labour-hire agency IPA Personnel Pty Ltd (IPA).

Mr Orlikowski was engaged by AQIS through Workplace International Pty Ltd in August 2004, and remained with the company until his termination in January 2009. In August 2008 IPA successfully tendered for the provision of labour-hire services to AQIS, from which point on the Applicant was engaged through IPA. Throughout the 4½ year period, AQIS exercised significant control over the activities of the Applicant,

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although he was paid through Workplace until August 2008 and subsequently through IPA.

Gerard McKeown of counsel, appearing for the Applicant, submitted that the labour-hire agencies were nothing more than a payment mechanism. In addressing this point His Honour said as follows (at paragraph 42):

> *"The facts in this case suggest the arrangement between IPA and AQIS may have been one of "payrolling"."*

If this were the sum of IPA's role it would seem to follow that AQIS is the true employer. Nevertheless, His Honour admitted the possibility of a 'joint-employment' situation arising when the following condition is met (described at paragraph 42):

> *"The fundamental question is whether two, otherwise unrelated, legal entities share or co-determine those matters governing essential terms and conditions of employment which depend on the control one employer exercises, or potentially exercises, over the labour relations policy of another."*

It should be noted that the decision was not a finding that the respondents were joint-employers, as His Honour was only required to be satisfied that it is arguable that either or both respondents were the employer. However His Honour did make some unfavourable comments at paragraph 42 about the effects of labour-hire arrangements:

> *"While labour hire services facilitate flexibility the process has the potential to undermine collective bargaining, occupational health and safety, vicarious liability, accountability, job security and workplace harmony."*

If the decision in *Orlikowski* is an indication that the *Kangan* defence is no longer impregnable, host employers using labour-hire companies can expect a barrage of claims, and it is likely that the labour-hire industry will fall from favour.

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So what if they're employees?

Having addressed the distinction between an employee and an independent contractor, it is now necessary to look at the consequence of wrongly classifying an employee. Whilst the following list is not exhaustive, these are some of the ramifications:

- Unfair dismissal claims
- Claims for entitlements, including annual leave, sick leave etc.
- Claims for superannuation.
- Penalties from the Workplace Ombudsman for breaches of awards and/or the Fair Work Act.
- Claims under workers' compensation legislation.
- Claims in negligence for damage suffered by third parties (which insurance will not cover).
- Consequences under Occupational Health & Safety legislation.

Practitioners in the Workplace Relations field are experiencing a marked increase in all sorts of cases involving independent contractors. The issue is not going to go away, and all parties involved in the engagement of purported 'independent contractors' need to assess the legal reality of their arrangements.

If you have any questions about employment law or workplace issues please contact Richard Thompson or Josh Strong of Wisewould Mahony Lawyers. There is no charge for an initial discussion about any employment matter.

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