

EMPLOYMENT UPDATE

JUNE 11

HR MANAGER PERSONALLY LIABLE FOR SHAM CONTRACTING

STAY ORDERED ON NINETY MINUTE AFTER SCHOOL SHIFTS

Further to our earlier Employment Update which reported that Fair Work Australia had agreed to vary the *General Retail Industry Award (Award)* from 1 July 2011 to allow for the reduction of the casual minimum engagement period to 90 minutes in certain circumstances, the SDA yesterday successfully applied for a stay of this decision.

The SDA argued that there was no material before Vice President Watson upon which he could be satisfied that it was necessary to amend the Award.

Fair Work Australia ordered a stay of the decision until such time as the appeal is heard.

A RECENT DECISION IN THE FEDERAL MAGISTRATES COURT OF AUSTRALIA THAT FOUND A HR MANAGER PERSONALLY LIABLE FOR SHAM CONTRACTING REINFORCES THE RISKS ASSOCIATED WITH IDENTIFYING THE DIFFERENCE BETWEEN AN INDEPENDENT CONTRACTOR AND AN EMPLOYEE.

In *Fair Work Ombudsman v Centennial Financial Services [2011] FMCA 459 June 22 2011* the HR Manager for Centennial Financial Services was found to have been 'centrally involved' in sham contracting and fined \$3,750. The sole director of Centennial was also fined \$13,200.

The Federal Magistrates Court found the HR Manager to be 'knowingly concerned' in Centennial's contravention of workplace laws when it terminated its sales employees and rehired them as independent contractors after they had obtained ABN's. The effect of the change meant that the workers were paid commission only and were not paid wages and other entitlements pursuant to the applicable Award.

Although the HR Manager insisted that he was simply following the

instructions of the owner of the business, Federal Magistrate Robert Cameron found that, as HR Manager, he was responsible for ensuring that Centennial complied with applicable workplace relations legislation and that he should have 'at least attempted to give advice' on the company's legal obligations to its employees.

So what is the difference between a contractor and an employee?

The determination of whether someone is an independent contractor or an employee is often not a straightforward exercise.

It is also not a case of nomination. Although the intention of the parties will be taken into account, requiring a worker to get an ABN or enter into a contractor agreement in the absence of conduct that otherwise affirms that true nature of the



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principal/contractor relationship, may simply be seen, as Justice Dixon put it in *Cam & Sons Pty Ltd v Sergeant*, as a 'mere cloud of words' designed to disguise the real nature of the relationship.

To determine whether a person is an independent contractor or an employee, a court considers a multitude of factors which look at the entire working relationship on balance.

The following circumstances might point to the existence of an employment relationship:

- the payer has the right to direct the manner of performance of the work on an ongoing basis;
- the worker generally works standard or set hours;
- the worker bears no financial risk (this is the responsibility of their employer);
- the worker is paid regularly (e.g. weekly / fortnightly / monthly) in the form of a salary or wages;
- the worker receives benefits such as annual leave, personal/carer's leave and long service leave;
- the payer prescribes the times and locations for the performance of the work;

- the payer provides the equipment and materials required for the work;
- any use of the worker's own equipment or materials is compensated for by the payer by reimbursement or by an allowance; and
- the worker has no inherent right to delegate his or her tasks to another.

The following circumstances might point to the existence of an independent contractor relationship:

- the worker decides how to carry out the work and what expertise is needed to do so;
- the worker bears the risk for making a profit or loss on each job;
- the worker has their own insurance;
- the worker is contracted to work for a set period of time or to do a set task;
- the worker generally submits an invoice for work completed or is paid at the end of the contract or project;
- the worker does not get paid leave;
- the contract is for a given result (the payer may only terminate the contract without penalty where the worker has not fulfilled the conditions of the contract);
- the worker retains a high level of discretion and flexibility as to how the work is to be performed, even if the contract contains precise terms as to the materials to be used and the methods of performance;
- the worker provides their own equipment and assets;
- the worker incurs his or her own expenses;

- the worker is likely to advertise his or her services to the public at large; and
- the worker has an unlimited power of delegation.

Importantly, no single point above makes a person either an employee or independent contractor. It is a matter of considering the totality of all the factors in order to make a determination.

One of the most important factors is known as the 'entrepreneur test'. In the recent case of *On Call Interpreters & Translator's Agency Pty Ltd v Commissioner of Taxation*, Justice Bromberg highlighted the importance of the entrepreneur test.

The entrepreneur test has two essential elements:

- a) does the person performing the work have a business; and
- b) is the work or the economic activity that is being performed, being performed in and for the business of that person?

If the answer to that question is yes, then in the performance of that particular work, the person is likely to be an independent contractor. If no, then the person is likely to be an employee.

Justice Bromberg held that in applying this test, the workers in question in the *On Call Interpreters Case* had been wrongly treated as independent contractors and had missed out on 5 years' worth of superannuation.

In his decision, Justice Bromberg stated that the entrepreneur test appears to be '*the centre question in*

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the application of the totality test. The question provides the focal point around which the indicia thrown up by the totality test may be examined.

What is a sham contract?

A sham contract is when an employer deliberately disguises an employment relationship as an independent contracting arrangement.

This is usually done in an attempt to avoid paying legal minimum rates of pay, as well as tax and other entitlements such as annual leave and sick leave. If that is the case, the arrangement is not genuine and may be regarded as sham contracting.

The Fair Work Ombudsman has launched recent prosecutions against companies for alleged sham contracting (in addition to the earlier case involving Centennial), particularly focussed on call centre workers and door-to-door salespeople.

What are the consequences for incorrectly classifying workers?

Apart from possible prosecution by the Fair Work Ombudsman for breach of the *Fair Work Act 2009* (Cth) - the penalties for which may be up to \$6,600 for an individual and \$33,000 for a corporation per breach - an employer may also be liable for payments (including interest and penalties) in relation to:

1. PAYG withholding tax;
2. superannuation guarantee payments;
3. payroll tax;
4. workers compensation premiums;
5. underpayment of wages;
6. annual leave, personal/carer's

leave, public holidays and long service leave.

Key points to consider

When distinguishing between an employee and independent contractor, regard must be had to the totality of the relationship, and you must take into account the contract in the overall context of the relationship.

It is not sufficient to simply state in a contract that the parties agree that the relationship is one of independent contractor and principal. It is important to review the terms of the contract to make sure it appropriately and adequately reflects the true nature of the relationship. You then must also examine how the relationship is operating in practice to ensure that it is consistent with a principal/contractor relationship.

Also, asking workers to hold an ABN will not automatically make someone an independent contractor, and in fact, may expose you to possible prosecution for sham contracting.

If you don't get it right, there are significant financial consequences. Importantly, the recent Centennial Case highlights that penalties under the *Fair Work Act 2009* may be imposed on directors and HR Managers for sham contracting.

Given the costs associated with getting this determination wrong, it is essential to review these relationships and make sure that you are not inadvertently treating an employee as a contractor.

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