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Contracting Liability Exposed - The contractor/ employee enigma

The decision over whether to engage employees or contractors in business is a complex problem that many struggle over. This article highlights a case that illustrates how getting it wrong can evoke dire consequences.

In 2013 the case of *Ace Insurance Ltd v Trifunovski* came up before the Federal Court. This case dealt with a claim by five insurance agents, who asserted that they were engaged as employees and not contractors. Their payment terms were on a commission basis from premiums they had collected. Each agent carried out their respective duties using their own car, and engaged their own secretarial support. The agents also issued tax invoices for their services and each agent was contracted to the insurer through a company. The insurer deemed them to be contractors, and didn't pay them any leave entitlements.

However, the Federal Court found that each of the agents was an employee. A significant factor indicating employment was that the insurer had control over the agents' work and that the agents were not conducting a business on their own behalf. The Court concluded that all five agents were employees acting for, and on behalf of, the insurer and were not independent contractors carrying on a business of their own.

The finding came as a shock for employers, particularly those within the insurance industry, who regularly engaged workers on a contracted basis. It is clear that the Court will apply a 'substance over form' approach when considering whether workers are legitimate contractors or employees. For instance, merely executing a contractor's agreement will not necessarily guarantee the status of a worker as a contractor. The Court will assess the actual substance of the arrangement and roles of the parties.

On 31 July 2012, the Court awarded each employee an amount which represented the extent of unpaid leave entitlements. An assessment was therefore undertaken by the Court in relation to payment for annual leave and long service leave which ought to have been accrued and been paid out upon termination.

It was concluded that each of the agents were engaged pursuant to the former Insurance Industry Award 1998 which provided for payment of accrued unused annual leave on termination, at the salary rate which the employee was receiving immediately prior to termination. The Court adopted a wide interpretation of what forms part of an employee's salary for the purposes of this award provision, and concluded that it embraces all forms of payments including overtime, bonuses and commissions. This finding was particularly favourable to the insurance agents bringing the claim, since a large part of their remuneration was commission based.

The award of unpaid annual leave in this case demonstrates the severity of the liability that can accrue by incorrectly classifying a worker as a contractor. The amounts awarded to the five employees under this entitlement ranged from $11,416.43 to $69,766.44.

The Court then assessed the employees' entitlement to long service leave. The five employees bringing the claim had ranging periods of service. This entitlement only related to three of the five employees, with amounts awarded in the range of $7,459.87 to $12,564.59.

The Court also imposed a civil penalty of $5,000 against the insurer for breaches of the Workplace Relations Act, which in the context of the other amounts referred to above, was the least of the insurer's concerns.

The total amount payable to the five former insurance agents was in the vicinity of half a million dollars. It goes without saying that a finding of this nature would mean the end for many businesses. Any business that engages independent contractors should seek advice on the legitimacy of the contracting arrangement to ensure there is no exposure to a claim of this kind.

For more information this case, or any workplace relations issues, please contact:

Rohan Kux
Senior Associate
Sladen Legal
03 9611 0107
rkux@sladen.com.au

Sladen Legal
Level 5, 707 Collins Street
Melbourne 3008
Victoria Australia

PO Box 633
Collins Street West
Victoria 8007

T +61 3 9620 9399
F +61 3 9620 9288

sladen.com.au