

CONTRACTOR OR EMPLOYEE?— HIGH COURT REINFORCES THE IMPORTANCE OF PROPER DESCRIPTION

Many employers consider altering the contractual arrangements for their workers so that the workers become independent contractors rather than employees. Such an arrangement can provide benefits and flexibility to both the company and the workers, but can also be used improperly to reduce employee rights below minimum standards. The *Fair Work Act* contains penalties for improper use of independent contracting (the “Sham Contracting” provisions—there are prohibitions on misrepresenting employment as an independent contracting arrangement, dismissing an employee in order to engage them as an independent contractor, and on making misleading statements to encourage employees to become contractors). The recent High Court decision in *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* on 2 December 2015 is a stark reminder that all employers need to carefully consider the nature of the relationship with their workers, and to accurately describe that relationship, even where the workers may be engaged through a third party.

WHAT QUEST DID

Quest employed Margaret and Carol as housekeepers for a number of years in its accommodation business. Margaret and Carol were covered by an Award under which they were entitled to be paid \$19.26 per hour in addition to penalty rates for work performed outside ordinary hours.

In 2009 Quest entered into an arrangement with Contracting Solutions. Under the arrangement, Margaret and Carol were treated as independent contractors under contracts of service with Contracting Solutions. Quest then had a labour hire agreement with Contracting Solutions, which supplied the services of Margaret and Carol back to Quest. Under the arrangement Margaret and Carol were paid a flat rate of \$19.26 per hour, regardless of when they performed their work.

Quest told Margaret and Carol that under the arrangement they were independent contractors of Contracting Solutions.



NOT CONTRACTORS

Despite the efforts of Quest and Contracting Services, a court found that the arrangement did not have the intended effect and that Margaret and Carol continued to perform work for Quest as employees under an implied contract of employment. (This in itself is a good reminder that the Courts look at the substance of an arrangement and will not be bound by the legal form of the arrangement.)

PROSECUTION

The Fair Work Ombudsman commenced proceedings against Quest alleging a contravention of section 357(1) of the *Fair Work Act*, the section that prohibits a person from representing to an individual that their contract of employment is a contract for services as an independent contractor. Initially, and on appeal to the Full Court of the Federal Court, Quest was successful in arguing that it could only be in breach of the section if the misrepresentation was about its own contract with the individual, not if the misrepresentation was about someone else’s contract (such as the contract between Margaret and Carol and Contracting Services).

THE HIGH COURT FINDINGS

The High Court held unanimously (in a very short decision) that section 357(1) of the *Fair Work Act* applies regardless of whether the party to the represented contract is the employer, a third party or even a fictitious entity. It was held that Quest had contravened section 357(1) by misrepresenting to Margaret and Carol that they were independent contractors when in fact they were classified as employees. Penalties are to be decided later. The maximum penalty for contravening section 357 is \$10,800 for individuals and \$54,000 for corporations.

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LESSONS FOR EMPLOYERS

Businesses must be vigilant to ensure that they do not mischaracterise the nature of their relationship with their workers.

While it is easy to draw up documents that say a person is an independent contractor, it is actually quite difficult to get the arrangement right and difficult in practice to have individuals operate as independent contractors. The decision illustrates that employers who purport to engage individuals as independent contractors or labour hire workers could be liable for not only the ordinary incidents of employment (such as penalty rates under the applicable Modern Award) but also for misrepresenting the nature of that relationship if the workers are found to be properly classified as employees.

Harmers Workplace Lawyers can assist with reviewing your workforce and assessing whether your workers are properly classified.

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