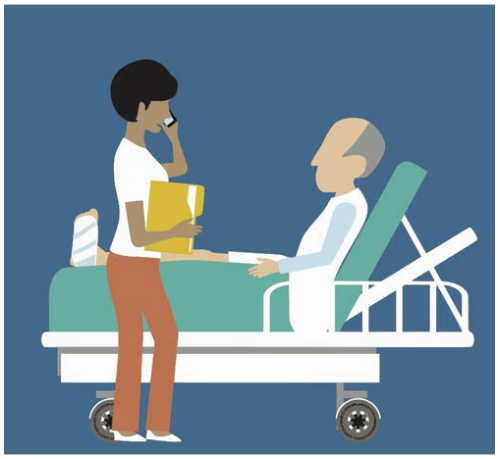
STEVENS & ASSOCIATES LAWYERS

August 2020

A VISION IN THE WORKPLACE

Our August edition of Vision includes:

- A summary of the paid pandemic leave that aged care workers will receive;
- A case demonstrating the risks of misclassifying independent contractors;
- FWC commending an employer for their procedural treatment of a worker who kept contravening WHS rules; and
- An insight into classifications of workers in a multiparty arrangement.



Aged Care Workers Across Australia to receive Paid Pandemic Leave

Aged care workers across Australia will be given the right to paid pandemic leave to encourage them to stay home if they have any symptoms of the coronavirus after the recent surge of coronavirus cases in Victoria. The Full Bench of the Fair Work Commission determined that aged care workers, including nurses, should be given paid pandemic leave, but casuals will only qualify if they work "*regular and systematic*" shifts.

The Commission is yet to decide how the paid pandemic leave would work, but signalled that the provision would likely entitle employees to take up to two weeks' paid leave each time they are required to self-isolate because they display symptoms of COVID-19 or have come into contact with a person suspected of having contracted it.

The Full Bench also acknowledged that by granting paid pandemic leave, it would have a "*significant effect*" in residential aged care and social and community services, causing financial difficulty particularly for employers in the subsidised aged care and NDIS-funded disability sectors.

"*The overriding factor we have taken into account is that, in the current circumstances, the degree of success in controlling the COVID-19 pandemic means that the elevated potential risk to health and care workers of actual or suspected exposure to infection has not manifested itself in actuality*," the Full bench said early this month.

This begs the question: if the coronavirus continues to expand will we see paid pandemic leave implemented in other employment sectors and job classifications?

Unpaid pandemic leave of up to 14 days is still available for 99 Awards, as introduced by the Fair Work Commission on 8 April 2020.

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We will keep you updated with all developments with respect to paid pandemic leave. In the meantime, if you have any employment law questions regarding any employment action due to COVID-19 please do not hesitate to contact Nick Stevens, Jane Murray or Bernard Cheng.

Truck Driver mis-classification proves costly for employer

In a case that demonstrates the pitfalls of misclassifying employees as independent contractors, the Full Federal Court has upheld an appeal by two truck drivers pursuing unpaid leave and superannuation entitlements after working exclusively for a company for almost 40 years.

Originally, the trial judge held in 2018 that the two men were contractors and not employees of the company, applying the multifactorial test on employment relationships.

Full Federal Court Decision

However, the Full Federal Court overturned this decision, emphasising the importance of the Court "*most fundamentally",* an employment relationship could not be characterised solely "by reference to the terms of a written contract".

"*An evaluation of the totality of the relationship between the parties in the present case requires the court to assess what the parties in fact did over the nearly 40 years of their relationship*," Justice Anderson said.

In doing so, His Honour found that the business was the sole source of income for these workers, whereby they worked, for labour, more or less regular hours with a constant set of duties and working arrangements. These factors led Justice Anderson to determine that the mere fact the contracts did not expressly forbid the workers driving their trucks for additional customers on weekends was of minor significance.

Regarding the multifactorial employment test, Justice Anderson acknowledged that the drivers "*possess*[ed] *a degree of freedom over the operation of their day-to-day activities*".

However, that needed to be balanced against the drivers having to work for the company from 6am to "*at least*" 3pm each day – leaving little opportunity to work for anyone else – and carrying the company's logo on their trucks and clothing uniform for most of the relationship.

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Employment Relationship more indicative than Employment Contract?

Justice Anderson emphasised that the key differentiating factor was that his approach is based on prioritising the substance of the working relationship as a whole rather than certain contractual obligations, and legal structures through which the drivers were engaged.

"*To my mind,* [the Trial Judge] *concluded as he did by giving primacy and excessive weight to contractual labels and theoretical possibilities and insufficient weight to the reality and totality of the working relationship between the parties, as demonstrated by the way they actually conducted themselves over many years."*

The contract was held to be indicative of independent contractors, who in turn contracted with the company through their partnerships, which supplied the vehicle for their work.

However, these factors were outweighed by an analysis of the actual employment relationship that the Full Federal Court held existed between the parties. The relevant factors were that: the drivers had worked full-time for nearly 40 years, the work was labour and the sole source of income for the entire period and that they did not drive or deliver goods for any other entity/business. Therefore, Justice Anderson concluded that the drivers could not be characterised as engaging in entrepreneurial or profit motivated activity, which is indicative of an independent contractor relationship.

"*The evidence of the totality of the relationship compelled the conclusion that* [the drivers] *were employees of the business at all relevant times*."

The Full Federal Court remitted the case to the trial judge to determine compensation and whether the employer was guilty of any breaches that would attract penalties.

The takeaway for employers

This case demonstrates that misclassification of employees as independent contractors can prove costly for employers. The company were ordered to pay out all of both employees' entitlements for more than a 20-year period as well as fines for any potential further breaches.

The Full Federal Court has also emphasised the primacy of the employment relationship over the contractual relationship of the parties. This means that it is not simply good enough for companies to have well drafted policies and procedures, but they must make sure their engagement of workers accurately reflects their employment classification.

To avoid the issues associated with misclassification please do not hesitate to contact Nick Stevens, Jane Murray or Bernard Cheng.

Procedural Fairness is Paramount! *Fair Work Commission commends employer's handling of unsafe employee*

In a recent unfair dismissal application the Fair Work Commission has commended the employer for its "scrupulously fair" treatment of a labourer who repeatedly failed to follow the most basic safety precautions and procedures. The case demonstrates the importance of maintaining procedural fairness in any

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investigation, performance improvement, record keeping and termination process to ensure that termination of employment outcomes stick. Whilst mistakes are often made, many termination of employment mishaps can be avoided with a little planning and knowledge.

The Company made the decision to dismiss the employee (who had been previous promoted to second in charge of the business only 18 months prior) after he received a number of warnings about his conduct and breaches of the Company's Work Health and Safety (**WHS**) procedures.

The WHS Issues

The Company initially met to discuss potential WHS breaches (**the Meeting**) with the employee including:

- damaged beams at a worksite;
- damaged a car while driving a ute out of the Company's warehouse;
- damaged a shed while driving a ute;
- failed to fill out the log book to record usage of the Company truck;
- failed to conduct plant checks in accordance with Company policy;
- failed to sign a workplace statement acknowledging safety protocols at the workplace;
- drove an electric scissor lift out of the warehouse whilst the electricity cable was still plugged in, posing a serious WHS risk to other staff, where the employee failed to notify anyone of this incident and left the damaged electrical cable where another employee could use it; and
- failed to properly hitch a trailer while driving a vehicle on a public road, posing a serious risk to the public.

At the Meeting, the employee was issued a verbal warning that he had "more issues [than] any other staff combined x 5" and was not listening to or reading safety instructions." To assist with improving the employee's safety performance the Company provided the worker with a series of notes about the WHS issues (prepared by the warehouse manager and safety advisor) telling the employee to review them each morning before starting work.

Unfortunately, following a further final written warning, about the employees' conduct, a customer alerted the Company to an earlier incident in which the employee allowed a power lead, used for hand tools, to run across the ground and a doorway in a high-traffic area for forklifts.

The employee was subsequently terminated from his employment.

The FWC decision

Deputy President Ingrid Asbury of the Fair Work Commission held that the employee's numerous failures

to follow WHS procedures, despite repeated warnings, constituted a valid reason for dismissal.

The Deputy President also accepted that the Company had adequately trained the employee and had appropriate WHS procedures articulated in the workplace.

However, the Deputy President noted that some of the Worker's safety breaches were "*so fundamental that he should not have required training to prevent them*".

Managers "displayed great patience"

The Deputy President recognised that the Company's managers "*displayed great patience with the [employee's] numerous and serious safety breaches and persisted with attempting to rectify his attitude, before deciding to dismiss him*".

The Deputy President indicated that the employee was given sufficient opportunity to respond to the reasons for his dismissal based on his conduct and demonstrates the importance of keeping written records of meetings as an employer.

Despite being a relatively small company, the Deputy President said it dealt with him in a "*scrupulously fair*" manner and went to "*great lengths*" to do so.

Please do not hesitate to contact us if you would like to discuss how the team at Stevens & Associates Lawyers can assist with how to ensure procedural fairness is maintained in the termination process. If you have any questions please do not hesitate to contact Nick Stevens, Jane Murray or Bernard Cheng.

Mr Andrew Hafsteins v Correct Installs Pty Ltd [2020] FWC 2729

Employer or Independent contractor? Court provides insight into classification in multiparty arrangements

A full bench of the Victorian Supreme Court reversed an earlier decision of a single Judge who held that a worker was an employee and not an independent contractor. The Court considered and applied the common law test for an employee in the context of a multi-party arrangement.

The Facts

George Barca (**Mr Barca**) worked as a mechanic and roadside assistance van operator for Eastern Van Services Pty Ltd (**EVS**). The vehicle (**the Van**) Mr Barca used and his uniform were Royal Automobile Club of Victoria (**RACV**) branded and he provided emergency roadside assistance (**ERA**) services to RACV members or customers. Mr Barca had no direct legal relationship with RACV. RACV had a contract with EVS for it to

provide ERA services and, in turn, EVS had a contract with Mr Barca.

In early 2016, Mr Barca lodged a claim form under the *Workplace Injury Rehabilitation* and *Compensation Act 2013 (Vic)* (**the 'Act'**) in relation to an injury he sustained when he was providing ERA to an RACV member. In the claim form, Mr Barca identified 'Nation Wide Towing' as the 'employer responsible for this workplace' and ticked the boxes next to the words 'Full time' and 'Contractor'. EVS is part of the Nationwide Group, being wholly owned by Nationwide Towing & Transport Pty Ltd.

Initially the Victorian WorkCover Authority (**VWA**) accepted Mr Barca's claim for compensation. EVS lodged an objection to liability with VWA on the ground that Barca was not a 'worker' within the meaning of the Act and should not be claiming compensation against EVS.

VWA determined in writing that Mr Barca was a 'worker' of EVS as defined in the Act. VWA concluded that the contract between Mr Barca and EVS was a contract of service and thus he was deemed an employee of EVS, and EVS was his employer.

The Trial

EVS appealed the VWA Determination to the Victorian Supreme Court. The trial judge dismissed the Appeal by EVS, concluding that Mr Barca's work for EVS had little or nothing to do with his business and that the relationship between Mr Barca and EVS was one of employer/employee.

The Appeal

EVS appealed to the Full Bench of the Victorian Supreme Court. EVS contended that the judge should have concluded that Mr Barca was not an employee and not a worker within the meaning of the Act. The Full Bench of the Victorian Supreme Court agreed and held that Mr Barca was not a common law employee of EVS and did not fall within the definition of 'worker' under the Act. The Court considered a number of common law factors relevant to this determination:

1. Control

The Full Bench of the Victorian Supreme Court considered the element of control in classifying the nature of the employment relationship between Mr Barca and EVS, and noted that control may be less significant or reflected differently in multi-party arrangements when compared to a bilateral relationship. The Full Bench held that while the relationship carried a high degree of control over the presentation of the Worker and integration into the RACV network, Mr Barca retained significant control in the way he utilised his skills and judgement in providing services.

Crucially, Mr Barca also had the freedom of choice to decline work, was not required to commit to minimum work levels and was allowed to delegate work, which supported the argument that the relationship was that of an independent contractor.

2. Provision and maintenance of equipment

EVS did provide Mr Barca with the Van which could not be used for any other business. The provision of the

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Van, which is essential to the provision of the ERA services, does suggest that Mr Barca is engaged in the business of EVS rather than on his own account. Certainly, it is difficult to see how an ERA business could be conducted without the Van.

Mr Barca provided, and was responsible for, his other tools of trade. He was also responsible for the maintenance and upkeep of the Van provided by EVS.

The provision of the Van was an important factor in favour of a conclusion of an employment relationship. It is tempered, to an extent, by the fact that Mr Barca was required to keep it operational and provide other tools and equipment.

3. Remuneration

The Court found that the frequency and form of payment was also a factor that is relatively neutral and was of a kind that might commonly be seen in both contracts of employment and contracts for services. Certainly, the absence of a fixed wage and the risk borne by Mr Barca as to the volume of work are factors that pointed away from an employment relationship.

Mr Barca was paid at "an agreed job rate for each completed job" through the provision of an invoice to EVS. He also did not receive did not receive typical employee benefits such as annual leave and sick leave.

4. **Tax arrangements**

The taxation arrangements was also held to be relevant and of some weight in determining the relationship as it detracted from an employment relationship.

The evidence showed that Mr Barca treated the EVS income as business income in a personal services business. Correspondingly, EVS did not withhold tax from the payments it made to Mr Barca. Mr Barca's tax returns show that he claimed deductions against the EVS income.

5. Intention of Parties

The written contractual agreement between Mr Barca and EVS ("**the Agreement**") also contained an express clause stating that he was a contractor of EVS.

It is important to note that when the competing indicia for employee/independent contractor are reasonably evenly balanced, as they are in this case, the parties' own genuine understanding of their relationship will usually be very instructive.

Whilst this alone is not determinative of the true employment relationship, it was found that the agreement was longstanding, and the label of 'contractor' seemed to fit more harmoniously with the Agreement as a whole and was not simply a self-serving label.

The takeaway for employers

This decision provides insight into the relevant common law tests that are considered in the context of a multiparty arrangement in order to classify an employee as a workers employment relationship or one of independent contractor.

If you have any further questions regarding whether to classify workers as independent contractors or employees in the context of multiparty arrangements

(or generally) please do not hesitate to contact Nick Stevens, Jane Murray or Bernard Cheng.