STEVENS & ASSOCIATES LAWYERS

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A VISION IN THE WORKPLACE

Our February edition of Vision includes:

- A recent case clarifying the legal framework for an employee and contractor;
- Lessons from relating to employee earnings during COVID-19 shutdowns; and
- An insight into the new Omnibus IR Bill and the things you need to know.

Employee or contractor? The Fair Work Commission apply the legal framework in a recent case

A recent decision[i] of the Fair Work Commission has clarified the legal principles which are used by the Fair Work Commission to determine whether a relationship is that of employer and employee or principal and contractor.

Background

The Worker (**the Worker**) performed work for a nursing service (**the Business**).

The initial decision concerned whether the Worker was a *"person protected from unfair dismissal"* within the meaning of s 382 of the *Fair Work Act 2009* (Cth) (**FW Act**) such as to entitle her to seek an unfair dismissal remedy. At first instance Commissioner Simpson held that the Worker was an employee of the Business and not an independent contractor and consequently was a person protected from unfair dismissal. The Business contended in its appeal that the Commissioner erred in reaching that conclusion.

On Appeal

Commission looks to the relationship not the label

On appeal, the Commission rejected the Business' argument that the labelling of the Worker's position as an "*independent contractor*" in her contract (**the Contract**) should be given primacy over the way in which the contracts were implemented in practice.

The Commission, following earlier cases, considered that "*labels cannot alter the substantive nature of the relationship*". That it could, "*disregard such labels, because in law they were wrong, and look beneath them to the real substance*".

Following the High Court in *Hollis v Vabu* the Commission looks, "*not merely* [at the] *contractual terms"* but rather at the, "*the totality of the relationship between the parties*".

Accordingly, although not irrelevant, the characterisation of the Worker's status in the Contract as that of an independent contractor and not employee is of lesser significance in the face of substantive contractual rights and obligations which, as applied in practice, point in a different direction.

This reaffirms the Commissions position that labelling in contracts is not determinative of the true employment relationship. In looking at the totality of the relationship, the Commission applies a multi-factor test identified in a number of High Court decisions, most notably *Stevens v Brodribb Sawmilling Co Pty Ltd.*

The Tax Return Issue

Firstly, the Business submitted that the work expenses claimed by the Worker as deductions from her taxable income were a substantial indicator of her being a contractor. The Commission disagreed because:

1. The mere fact that a person performing work for another claims expenses incurred in the performance of that work as tax deductions, even when the amounts claimed are of significance, is not of itself determinative of the person's status.

2. The expenses claimed were primarily for the provision of the Worker's motor vehicle and for her home office. It is not uncommon for workers who are undeniably employees to use their personal motor vehicle for work travel, and also to establish home offices for the purpose of working from home.

   The tax expert called by the Business to give evidence, said that there is no distinction in the capacity of employees or contractors to claim tax deductions for the cost of personal motor vehicle and home office use for work purposes.

   The Commission held that the motor vehicle provided by the Worker was not a specialised piece of equipment requiring particular skill or expertise to operate, but simply a car which could equally be used for private purposes. There is no basis to conclude that it constituted a capital investment of significance for the purpose of the operation of a business. The same can be said of the establishment by the Worker of a home office. The evidence as to the "tools of trade" did not establish that any substantial cost was involved in their purchase.

3. The characterisation of the amount of expenses claimed as deductions as being "substantial" or "significant" requires scrutiny. The Worker earned $104,155 and had expenses of $15,493. The Commission did not regard tax deductions of this order necessarily to be indicative of a contracting rather than employment relationship.

Indicia indicative of an employment relationship

There are, a number of indicia which firmly point to the existence of an employment relationship. In the present case the Commissioner found:

1. The Worker was not conducting a **business of her own.** The patients she provided services to were obtained by the Business through its commercial contractual arrangements and allocated to the Worker. There was no evidence that the Worker had the capacity on her own initiative to increase

the number of her patients and thus increase her income. The patients had no separate contractual or commercial relationship with the Worker and the Contract expressly restrained the Worker from such arrangements.

2. No effective right for the Worker to **subcontract or delegate** the performance of the services under the Contract. The Worker was not permitted to sub-contract her obligations under the contract without the prior approval of the Business, and there was no evidence that such approval was ever sought or obtained.

3. The Business **controlled** the work of the Worker in important ways. The Contract gave the Business the power to determine the quantity and nature of the services to be provided by the Worker as well as requiring the Worker to follow any lawful direction made by the Business as to the provision of those services. Assessed cumulatively, these provisions gave the Business legal control over what amount of work was to be performed by the Worker, what the nature of the work was to be, and how it was to be performed.

4. The Business had the legal right to, and did in practice, require the Worker to work **exclusively** for the Business. The Contract allowed the Worker to engage in other work provided that this did not conflict with her duties and responsibilities to the Business, however, it also required the Worker to give absolute priority to the provision of services to the Business under the contract over any other work or assignments. This provision, together with the capacity of the Business to require the Worker to provide a quantity of services amounting to full-time work, meant that the Business had the legal means to require exclusivity.

5. The **payment system** is indicative of the Worker being an employee rather than an independent contractor. The payments were made for the provision of the Worker's personal labour, and not for the production of a result by whatever means the Worker selected. Accordingly, this is indicative of an employment relationship.

6. Finally, to a limited degree, the Worker presented herself to the patients as an **emanation of the Business** in that she had an the Business-branded name badge, business card, folder and paperwork and, at the time of the termination of her engagement, she had the Business **uniforms** on order. There was no countervailing evidence to the effect that she presented herself to the patients or the public at large as operating her own business.

Decision Overturned

There is one conclusion reached by the Commissioner which was disagreed on appeal.

At first instance, the Commissioner found that because the Worker, as a Registered Nurse, held a tertiary level qualification and exercised specialist skills, this "*tends to favour the prospect of the engagement being a contracting relationship rather than employment*". The appeal bench determined this cannot be correct. The same proposition is true of all nurses, as well as other occupations such as teachers, engineers and lawyers, the large majority of whom work as employees. In the absence of evidence that the Worker performed her

work as a nurse in a business of her own, the Full Bench consider that this must be treated as a neutral consideration. This conclusion is, of course, not one that favours the Business in its appeal.

Conclusion

In the Commission's decision the degree of control which the Business had over the work, its capacity to require her to work exclusively for the Business, the system by which she was remunerated, her lack of capacity to subcontract or delegate her work, the lack of any evidence that the Worker ran a business on her own account, and her presentation as working in the Business's business rather than her own, lead us to conclude that she was an employee of the Business. These are matters going to the substance of the relationship. The Worker's conduct of her tax affairs and the fact that she held an ABN, charged GST (at the Business's insistence) and rendered tax invoices are matters of lesser weight because they are merely consequential upon the contractual label given to the relationship – a label which arose because the Business required its nurses to contract with it on that basis.

The Commission did not agree with the Business's submission that this conclusion is inconsistent with earlier decisions of the Commission. These types of cases each turn on their own set of facts, and as such the ability to draw broad inferences from earlier cases is limited.

Accordingly, the Commissioner's initial conclusion was affirmed that the Worker was, at the time of her alleged dismissal, an employee of the Business and thus was a person protected from unfair dismissal. The Business's appeal was dismissed.

If you have any questions in relation to the above, please do not hesitate to contact Nick Stevens, Luke Maroney or Daphne Klianis.

[1] *Aster Home Nursing Service Pty Ltd v Peel* [2020] FWCFB 6760 delivered 17 December 2020 per Hatcher VP, Mansini DP and McKinnon C.

Lessons That Can Be Learned from The FWC's Determination That Workers Need to Be Paid Their Ordinary Earnings During COVID-19 Shutdowns

A recent Fair Work Commission (**Commission**) decision has determined that workers need to be paid their ordinary earnings during COVID-19 related

shutdowns, and cannot be forced to utilise their leave. Stevens & Associates Senior Solicitor Luke Maroney, who acted for the union that brought the claim, shares some lessons that can be learned from the Commission's decision.

Background

An employer operated an aged care facility (**Facility**) in Sydney's Inner West. A resident of the Facility was admitted to Concord Repatriation General Hospital (**Hospital**). After the resident returned to the Facility from the Hospital, it was discovered that she had been in contact with a doctor at the Hospital who was suspected of being exposed to COVID-19.

The Facility was requested by the local public health unit to 'lock down' and to isolate the resident. In addition, it was recommended that any of the Facility's staff who had been in contact with the resident since her return be directed off work for 14 days. The Facility's staff were not required to self-isolate. The Facility followed the recommendations and directed staff not to attend work.

In the following days, the resident returned multiple negative COVID-19 tests and was considered clear of the virus which causes the disease. As a result, staff who had been stood down were returned to work. Upon their return to work, the staff were asked to elect what type of leave they wanted to use to cover their absences.

The Decision

The Commission determined that the employer could not require the relevant staff to utilise their leave and, rather, the Facility was required to pay them their ordinary earnings for the period of the stand down.

Lessons for Employers

What is a stand down under the *Fair Work Act 2009* (Cth) (***Act***)?

Under sections 524 and 525 of the *Act*, an employer can stand down an employee without pay where they cannot be usefully employed. The inability to be usefully employed must be because of:

- Industrial action;
- Broken machinery or equipment, when the employer is not held responsible for this breakdown; or
- A stoppage of work due to causes outside of the employer's scope of responsibility.

The Commission determined that, while the relevant employees were not being put to work, there was no '*stoppage*' within the meaning of the *Act* because the Facility continued to provide the same services, just using different employees. Employers can only make use of the stand down provisions related to stoppage of work where some part of their actual business stops, as opposed to the workers themselves no longer performing the work. In circumstances where the stand down provisions of the *Act* were not enlivened, there was no ability to

refuse to pay the employees or require them to utilise their accrued leave.

Understand the guidance being provided by health authorities

A critical aspect of the Commission's decision was the effect of a public health order as opposed to a recommendation offered by public health authorities. A public health order could provide circumstances where employees might not be 'ready, willing or able' to work and, as such, might not be entitled to pay. However, where a recommendation was provided, the decision to have employees cease work over the period was the responsibility of the Facility. This demonstrates the significance of understanding the guidance provided by authorities and the potential risks of misinterpreting the way in which guidance applies to the workplace.

Understand your own policies

Employers must recognise the significance of understanding and actively implementing company policies correctly. In this case, the Facility had set out changes to its Leave Policy in response to COVID-19. Those changes provided that where an employee was required to take time off work as a '*precautionary measure*', the ordinary rate of pay would be paid to the employee. The Facility's failure to understand the effects of its own policy was a significant factor in both the pursuit of the claim, and its ultimate success. While policies typically do not bind employers contractually, having policies in place can set the expectations for employees. It is also not a '*good look*' for an employer, when defending proceedings, to seek to put a position inconsistent with the expectations it has set for its employees.

Have open discussions with employees and their representatives

Having open discussions is crucial in any work environment and can help prevent disputes and complications. Such conversations could be of particular benefit when clarifying the expectations of employees and their representatives. In the present case, the Facility only advised staff about the requirement to utilise leave after they had returned from their absence. They did not proactively engage with the workers or their representatives at an earlier stage, which might have averted the dispute.

Get advice early

Even in urgently unfolding situations requiring a rapid response, it pays to get advice early. That will be able to inform your response to inquiries made by workers, assist in your strategy for communicating with them and being clear on what your responsibilities are under the *Act*, the contracts you have with your employees and any applicable industrial instruments. It might also avoid the need to participate in litigation.

If you have any questions about workplace conditions in the ever-changing COVID and post-

COVID environments, or about standing down staff, please do not hesitate to contact Nick Stevens, Luke Maroney or Daphne Klianis.

The Omnibus Industrial Relations Bill: Things to Know

The Omnibus Industrial Relations Bill (**"the Bill**") was introduced in Parliament on Wednesday 3rd February and quickly picked up criticism surrounding key components of the Bill. Set to help revive the economy following the hit of the pandemic, the Bill reforms the Fair Work Act, specifically targeting the operation of the Fair Work Commission, the gig economy and enterprise agreements.

Key areas of the Bill include: its redefinition of a "casual employee" to be an employee who accepts an offer of employment in circumstances were their employer made "no firm advance commitment to continuing and indefinite work according to an agreed pattern of work"; its proposal to reform the Modern Award System by simplifying additional hours agreements as well as flexible work directions; its proposal for a two-year exemption which prevents individuals from being negatively affected by material in enterprise agreements (also known as the Better Off Overall Test); and its provisions which aim to prevent non-compliance to workplace laws within a workplace.

Academics' submission to the Senate

In response to the Bill, a group of academic experts (**"the Experts**") in the field of labour law provided their comments on the Bill. This included their support of a couple of proposals within the Bill, specifically that in relation to points addressing compliance and enforcement. There were however many key reforms that they did not support, notably that relating to awards and agreement-making. The academics also claimed that the Bill fails to deal with current pressing issues of wage-stagnation, insecurity of work and entrenched inequalities, and will increase administrative costs within workplaces.

With respect to casual employment, the Experts agreed with the Bill's statutory definition of casual employment, however, they believed the definition somewhat entrenched the practice of long-term casuals performing work of a full or part time nature. Finally, one additional area of opposition came in relation to the proposed exemption to the Better Off Overall Test (**BOOT**) contained in the Bill. The Experts claimed that this exemption "would tear a gaping hole in the award safety net" and thus would fail to provide any additional

support to workers who have been affected by COVID-19.

Labor's Response

In preparation for the upcoming election, Labor has promised an alternative approach to the gig economy, in response to the Coalition's Bill. This alternate approach seeks: to better define "casual employment"; to prevent casual employees performing in roles of part-time or full-time nature; to put forward "portable entitlements", allowing those in the gig economy to carry annual, sick and long service leave into new roles; to adopt a "same job, same pay" principle; and to provide the Fair Work Commission the power to intervene where necessary to confirm the rights and obligations of emerging job types.

If you have any questions regarding the new industrial relations reforms, please contact Nick Stevens, Luke Maroney or Daphne Klianis.