January Edition

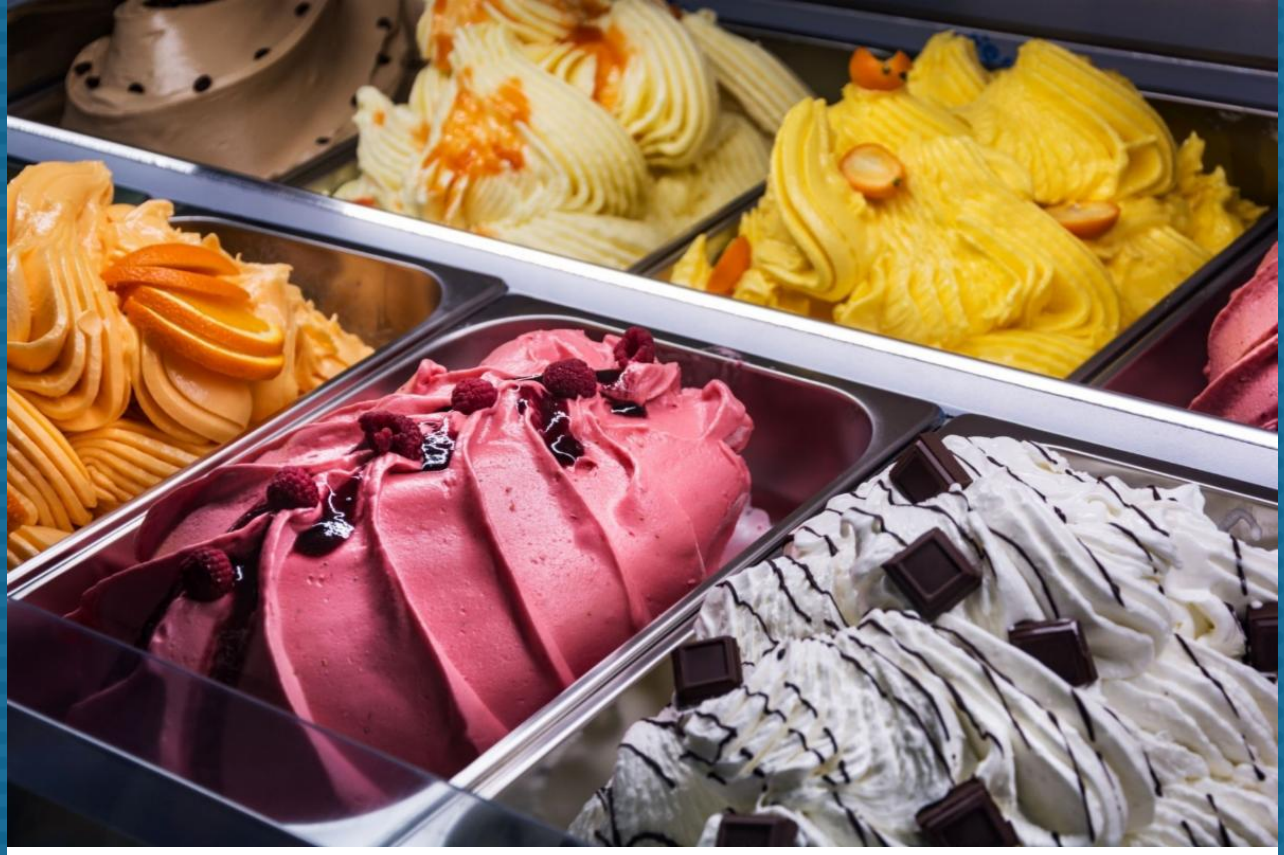
Hi

Welcome to our Vision in the Workplace

Our January edition of Vision includes:

- The Fair Work Commission finds a director of a company as being an independent contractor;
- The Fair Work Commission addresses an overtime loophole in the professional service industry; and
- Ambulance Victoria was found to have no reasonable basis for refusing flexibility bid.

Director of Company Found as an Independent Contractor



A recent decision by the Fair Work Commission (" **FWC**") held that the director of a company was an independent contractor, not an employee.

Background

The matter of *Sarah Mandelson v Indivia Foods Pty Ltd, Angelo Sperlinga, Richard Simiane* concerned the sole director of Sarric Pty Ltd (" **Sarric**"), Ms. Mandelson, who owned and operated Serendipity Ice Cream ("**Serendipity**"). Ms. Mandelson sold the Sydney Inner West ice cream shop to Indivia Pty Ltd ("**Indivia**") in 2021.

Prior to the sale, the parties agreed to an oral contract whereby Ms. Mandelson was to continue working at Serendipity on a part time employment basis as CEO.

One of the terms of the business sale was that each party provide an employment contract. Indivia provided Ms. Mandelson with an employment contract, however it was not signed and returned.

The sale of business was finalised regardless, and Ms. Mandelson continued to perform work at Serendipity as the CEO.

Ms. Mandelson suggested to Indivia's CFO that she should bill Indivia as a consultant rather than being paid as an employee. As such, Sarric invoiced Indivia for "*professional services*" and "*consultancy*" and Ms. Mandelson did not benefit from any employment entitlements such as annual leave.

In early 2022, Indivia emailed Ms. Mandelson notifying her that her " *consultancy to Indivia is to be cancelled immediately.*" Ms. Mandelson responded by filing a General Protections claim with the FWC regarding her dismissal from her role.

The Judgment

The FWC's Deputy President Boyce found that despite the fact Ms. Mandelson and Indivia had "*clearly contemplated*" her becoming an employee, there was no conclusive agreement and no written contract found relating to the work she performed.

Boyce noted there was a " *gaping hole*" in the evidence provided by Sarric in relation to Ms. Mandelson's failure to explain what happened to the employment contract she was issued by Indivia at the time of the business sale.

Boyce explained that after the High Court Decision in *CFMMEU v Personnel Contracting* ("**Personnel**") last year, the "*focus is now upon the terms of a contract that were in fact agreed*" and that employment contracts are to be interpreted in the same way as any other contract under Australian law. He also cited Justice Gordon's Judgement in Personnel where she stated that:

"where the contract is oral, or partly oral and partly in writing, subsequent conduct may be admissible in specific circumstances for specific purposes – to objectively determine the point at which the contract was formed, the contractual terms that were agreed or whether the contract has been varied or discharged."

In considering this, Boyce found a number of oral and written contract terms and subsequent conduct that indicated that Ms. Mandelson was an independent contractor to Indivia rather than an employee. These included the following:

- Ms. Mandelson issuing tax invoices to Indivia was an agreed term to their oral contract and was inconsistent with an employment relationship.
- Ms. Mandelson providing her own tools to work.
- Absence of superannuation, annual or sick leave entitlements for Ms. Mandelson.
- Ms. Mandelson describing her work as "consultancy" in a number of emails.

Consequently, Boyce dismissed the case as he found that the contractual terms "bear all the hallmarks of an independent contractor and principal relationship" and therefore Ms. Mandelson did not have jurisdiction to make a General Protections claim relating to dismissal as she was not employed.

The Takeaway

This case has highlighted that the issue of defining workers as either employees or independent contractors is critically important and can be highly complex.

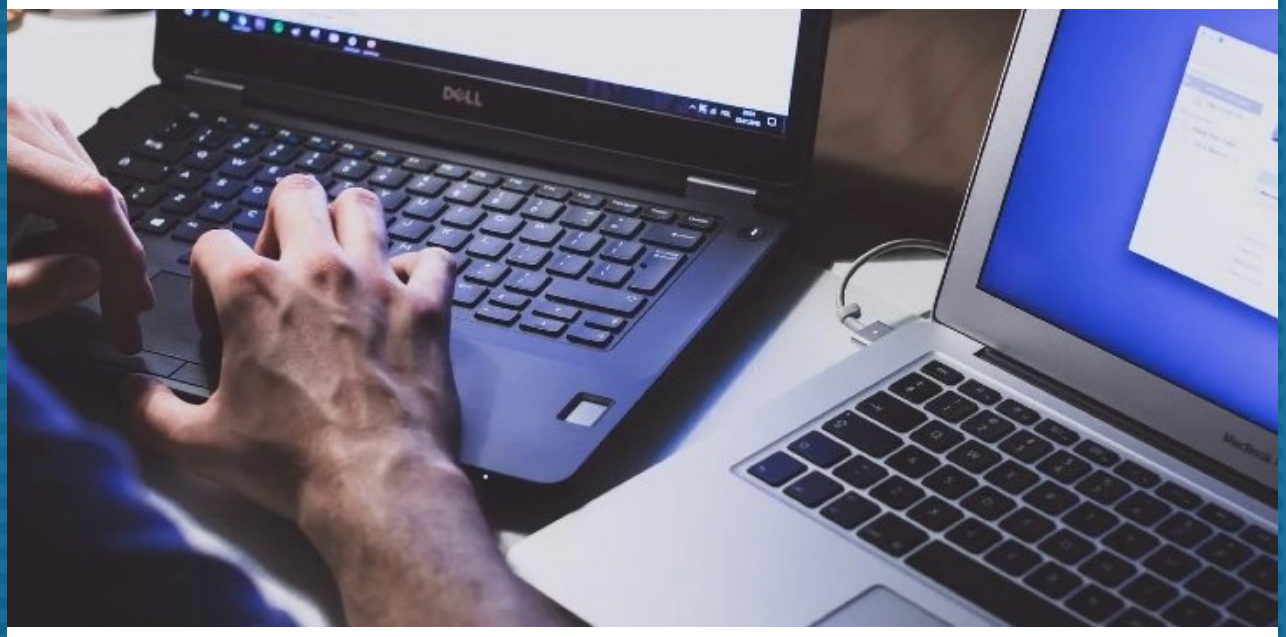
As noted by Boyce in this matter, following the decision in Personnel the key factor in determining if a worker is a contractor or employee is the agreed terms of the contract issued. Accordingly, it is critical for employers to be drafting comprehensive contracts that clearly define and confer appropriate entitlements for all workers to eliminate doubt as to whether they are contractors or employees. Parties must ensure these contracts are signed and copies of the same are kept and accessible.

Given the complexity and importance of these contracts, we recommend that employers seek legal assistance in drafting them to ensure all relevant entitlements are covered as to avoid any potential adverse legal action.

The solicitors here at Stevens & Associates Lawyers are highly experienced in drafting both employment contracts and independent contractor agreements in accordance with the Fair Work Act and relevant Modern Awards. f you have any questions please do not hesitate to contact Nick Stevens, Peter Hindeleh, Daphne Klianis or Josh Hoggett.

Sarah Mandelson v Indivia Foods Pty Ltd, Angelo Sperlinga, Richard Simiane [1] [2023] FWC 50.

FWC Addresses Overtime Loophole



The Fair Work Commission ("**FWC**") has proposed changes to the modern award covering IT professionals, engineers, scientists, gaming sector employees due to underpayment of overtime entitlements and excessive litigation associated with the same.

The Association of Professional Engineers Scientists and Managers Australia (" **APESMA**") have expressed concern over unrecorded overtime work for employees covered by the Professional Employees Award 2020 ("**the Award**"). Award covered employees in the sector claim to work well over 38 hours per week. However, the annual salary of award

covered employees does not account for overtime hours. Instead, annual salaries are intended to cover all hours of work and often do not clearly define fixed hours of work.

The FWC's Acting President Adam Hatcher, Deputy President Tony Saunders, and Commissioner Phillip Ryan noted that implementing a prescriptive regime of overtime and penalty rates is not commonly accepted as industrially appropriate in highly paid professional industries. In industries where workers' specialised educational qualifications are highly educated and are "held accountable to ethical and performance standards", annual salaries are generally seen as adequate to remunerate workers for all aspects of their employment.

However, employees in this industry that are being paid the minimum award annual salary or even slightly above are actually being paid significantly less than what they are entitled to if overtime penalty rates were applied. Workers are being as paid as little as $22 per hour under the minimum salary of $57,619 if they work 50 hours in a week. Currently, the Award only requires part time and casual workers to be paid overtime penalty rates while full time workers do not have a prescribed rate of pay for additional hours worked beyond their agreed working hours.

In considering this, the FWC has said they will adopt a "minimal" approach to apply the same penalty rate entitlements to full time workers as they do to part-time and casual workers under the Award. This will exclude any worker making 25% or more above the minimum award salary. There will also be an enforceable entitlement to either remuneration or time in lieu leave for full-time employees working more than 38 hours per week and a baseline entitlement for additional remuneration for working in "unsociable hours".

If you have any questions about overtime wages or modern award compliance please do not hesitate to contact Nick Stevens, Peter Hindeleh, Daphne Klianis or Josh Hoggett.

No Reasonable Basis for Refusing Flexibility Bid

The Fair Work Commission ("**FWC**") has recently found that Ambulance Victoria (" **the Employer**") lacked reasonable grounds for rejecting a paramedic's flexibility request to work 'bespoke' night shifts so she could care for her three young children.

Background

Natasha Fyfe ("**the Applicant**") is a young mum with three children and also an experienced Advance Life Support Paramedic having been employed by the Employer since 2015. In an attempt to balance her work and family life, the Applicant made an application to the Employer for flexibility in her shift arrangements. The Applicant proposed that she commence night shift at 9pm (rather than 6pm) and finish at 6am (rather than 8am). This arrangement would allow her to meet her childcare responsibilities by being home during the day and working at night.

In response to the Applicants request, a senior team manager told her it could not be done as that night shift "*doesn't exist*". In a follow up email, the manager said that ambulance service area Hume 1 "*is currently not able to provide shift start and finish times outside the employee's team roster configuration*" and "*we are not in a position to offer this level of roster variation*".

Ambulance Victoria told the FWC the proposed shifts do not qualify for funding and it could not accommodate unfunded shifts "*as it does not align with [the Company's] service delivery model and its operational need to provide safe and compliant health services to the community*". The Employer further argued that rosters are "driven by the

needs of the community its branches service, in terms of the number of personnel and shifts required and the resources available.

Judgement

Commissioner Johns found that the Applicant's request would not result in unfunded shifts because she could be treated as a flexible spare and "*allocated to any number of branches as a last resort*". Given evidence that a number of shifts at various locations go completely unfilled and there are many "dropped shifts", he said "as the last resort option, the Applicant would be filling a position that would otherwise be vacant".

Accordingly, Commissioner Johns held that the Employer lacked reasonable grounds for refusing the flexible work arrangement under clause 23.4 of its 2020 Enterprise Agreement, noting that it did not meet its consultation obligations by meeting or discussing the request with the Applicant in the 16-days before confirming its decision. He further held that the Company "acted unreasonably, and that unreasonableness infected its decision".

Takeaway

Requests for flexible working arrangements form part of the National Employment Standards ("**NES**"). The NES apply to all employees covered by the national workplace relations system and include a right for employees to request flexible working arrangements from their employer. This case highlights the fact that employers can only refuse such requests on 'reasonable business grounds'.

If you have any questions about flexible working arrangements, please do not hesitate to contact Nick Stevens, Peter Hindeleh, Daphne Klianis or Josh Hoggett.

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T: 02 9222 1691 E: enquiries@salaw.com.au

www.salaw.com.au