cullings

MAY 2009

cullings is the newsletter of ***Cullen – the Employment Law Firm***

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The use of contractors

A recent decision of the Taxation Review Authority again illustrates the importance of businesses carefully considering the true nature of their contractual relationships with workers and carefully documenting it when contractors are engaged (as opposed to employing employees).

In this case the IRD claimed over $1.8 million in unpaid PAYE from a car rental company (the Company) when it formed the view that relocation drivers were employees and not independent contractors. The Company sought a review of the IRD view.

Background

In the car rental industry, customers do not necessarily return their hire vehicle to the same centre from which the vehicle was hired (for example, a tourist may hire a car in Auckland on their arrival in New Zealand, and leave it at Christchurch on their departure).

The Company uses relocation drivers to move cars from city to city (and sometimes within cities). The relocation drivers sign a contract that provides:

- the driver will relocate the Company's vehicles as arranged from time to time - the implication being that the work was not permanent but on an assignment to assignment basis;
- the Company does not guarantee that relocation work will be provided, and the Company (through its managers) has absolute discretion as to which drivers it retains for a particular job;
- drivers are required to observe all traffic laws and they are required to indemnify the Company for traffic offences;
- the Company pays all maintenance and other expenses for the vehicle, and pays for fuel by providing the driver with a fuel card;
- the drivers are paid fixed rates between locations based on distance;
- drivers do not receive holiday pay, sick leave or additional rates for driving on a public holiday;
- the drivers provide invoices to the Company for work done; and
- drivers are not required to wear a uniform or interact with customers.

The law

The courts over the years have developed a number of tests that they apply to determine whether a worker is a contractor or employee. Briefly, these include:

- the *intention test* – the intention of the parties is highly relevant to determining the relationship;
- the *independence test* – this considers the degree to which the worker conducts his or her business independently of the employer;
- the *control test* – this is the inverse of the independence test, and looks at the degree of control that the principal has over the worker and the manner in which the work is done;
- the *integration test* – this considers the extent the worker is integrated into the principal's business;
- the *fundamental test* – also known as the "economic reality test" considers whether the worker is in business on his or her own account;
- The *mixed or multiple test* – is essentially an assessment using all the above tests.

The courts also recognise that parties have freedom of choice and there are many reasons why parties may agree on an independent contractor arrangement.

For example, Justice Hardie-Boys in the Court of Appeal decision in *TNT v Cunningham* in determining whether owner-drivers in the courier business were employees said:

"Where persons wish to enter into a contract for services [e.g., contractor status] the Courts should not frustrate that wish by unswerving adherence to a test which looks to the effect of what they have agreed rather than to the purpose for which they have agreed to it".

The current leading authority on the issue is the *Bryson v Three Foot Six* saga that went all the way to the Supreme Court. It provides useful guidance on determining a worker's status:

- the written and verbal terms of the contract will usually contain indications of the parties' common intention;
- the way the contract has actually been carried out;
- any features of control and integration as to whether the person has effectively been working on their own account;
- statements made by the parties; and
- possibly industry practice.

Some of the factors that the court took into account in concluding that Mr Bryson was an employee were that he received training from the company, he worked regular hours, he received wages on an hourly basis, he worked solely for the company, he was not able to delegate the work, and he made no investment in plant or equipment. Of particular significance was the absence of a written record at the commencement of the arrangement which indicated that the parties had not mutually turned their minds to the true nature of the relationship at the outset (although later an agreement was entered into that said Mr Bryson was a contractor).

The Employment Relations Act also has a statutory test which requires the Employment Relations Authority to "determine the real nature of the relationship" without treating any label put on the relationship as determinative. The Authority also uses the tests set out above.

The decision

After assessing the evidence in great detail, the Taxation Review Authority concluded that the relocation drivers were independent contractors. The Judge found that the written contracts were a genuine representation of the contract made between the parties to structure the arrangement as that of principal and independent contractor.

The Judge commented that the arrangement could also be that of employer and casual employee, but it was persuasive that there was a documented arrangement which the parties worked to.

No doubt the car rental company heaved a sigh of relief at the decision!

Conclusion

This case highlights the importance for businesses to:

- make an informed decision as to whether a proposed contractor or consultancy relationship can truly be characterised as being that of an independent contractor; **and**
- carefully document that relationship in a contract.

Peter Cullen's latest *Dominion Post* article can be read at: http://www.stuff.co.nz/dominion-post/business/2260337/Nine-day-fortnight-is-fraught-with-legal-hooks