cullings

LATEST ISSUE

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The Hobbit and employment law

The Hobbit debate has appeared in headlines worldwide and ignited discussion about workers rights in the entertainment industry. Personalities involved have soaked up the spotlight and may have overshadowed some of the real issues that concern contractors working on fixed-term projects like The Hobbit.

New Zealand's employment laws will apply to Middle-Earth if the film is filmed here. What are the key issues as the law currently stands?

Contractor v employee

The debate about whether a worker is a contractor or an employee is a long standing one. If a worker is a contractor they are not protected by the minimum standards that New Zealand employment law provides. If the worker is an employee, the employer will be required to treat the worker fairly and reasonably.

In deciding whether a worker is a contractor or an employee the determining factor is an assessment of the "real nature of the relationship". Simply labelling the relationship as that of "contractor" in any written agreement is not conclusive.

Sir Peter Jackson is very familiar with the law on this issue. The case of *Bryson v Three Foot Six Ltd* was the first Supreme Court decision from New Zealand's newly established highest court. It arose out of the production of the Lord of the Rings trilogy.

Mr Bryson was a technician. The Court concluded that there was no evidence that he engaged himself as a 'person in business on his own account'. Of particular relevance were:

- Bryson did not tender for the position, the position was not short-term, and Bryson had no other employment while he was with Three Foot Six;
- Bryson required 6 weeks' training for the position and could not be said to have been contracting his skills to Three Foot Six;
- Notwithstanding references to "independent contractor" in the 'crew deal memo', much of it read like an employment agreement, including provision for discretionary sick leave;
- Three Foot Six closely controlled the work done by Bryson, expected him to work regular hours, and treated him as an employee in this regard.

Determining the real nature of the relationship is largely a factual enquiry. Each decision will be based on the worker's individual circumstances. In *Bryson* the Court said the decision that he was an employee should not be regarded as affecting the status of other employees in the film industry. The outcome will vary depending on the individual facts of each case.

The Government has indicated that it will urgently amend the law to provide "certainty".

Collective Bargaining

The Employment Relations Act introduced a new set of rules in relation to collective bargaining. It expressly provides that parties must bargain in good faith for a collective agreement. The Act does not go so far as to require an employer to make compromises with a union, or to enter into a collective agreement if there is a genuine reason based on reasonable grounds not to do so.

Interestingly, the Media Entertainment Arts Alliance only became a registered union in New Zealand on 14 October 2010. Prior to that the Australian-based organisation was prohibited from engaging in collective bargaining with New Zealand employers under New Zealand law as it was not a registered union. Similarly,

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non-registered organisations (like Actors Equity) are also prohibited from collectively bargaining.

The union in this debate was arguing wider issues than just those affecting its employee members. It was attempting to address the rights of actors as contractors in the context of broader industry practice. Strictly speaking it is not collectively bargaining in doing so. Still, its arguments have taken the world stage.

Right to Strike

The requirement under the Employment Relations Act for parties to deal with each other in good faith does not preclude certain strikes and lockouts being lawful. Provided that certain processes have been complied with, strikes are lawful if they relate to bargaining for a collective agreement.

The boycott on work for the Hobbit may have constituted a strike for members of the union involved in collective bargaining. For contractors the boycott would simply mean they either ended their contract or didn't enter into one to begin with. Non-union employees are not lawfully able to strike.

The unions were exposing themselves to potential damages claims because of their call for an industry wide boycott. A person/organisation commits the tort of unlawful interference with contractual relations if it induces workers to commit a breach of their contract.

Strikes can consist of full or partial withdrawal of labour and are prohibited in certain essential services. They are often used as a tool in negotiations where the parties cannot reach agreement. Similarly, employers have the ability to "lock out" employees as a tool to reach agreement.

Summary

The Hobbit debate has raised a number of issues in relation to how the film industry operates in the areas of employment and contracted labour.

Both sides of the argument clearly had a bigger agenda than the narrow employee/contractor debate

It will be interesting to see how the Government's changes to employment law for the film industry will work out in practice. While there is some precedent for this (for example, real estate agents are contractors and not employees) why is the Government only proposing to make changes for the film industry if it alleges that there is uncertainty in this area of law?