MANAGING THE WORKPLACE

Useful for: Business, Non Govt Organisations
Article looks at: Employees/Independent Contractors

Last updated on 1 April 2023

In Brief:

- Mediating to resolve a dispute is fast and cheap compared with other methods of dispute resolution.
- When successful it can provide the parties with a much wider range of pathways forward than the judgment of a court – this is because mediation focuses on the interests of the parties, rather than the rights of the parties.
- The issues surrounding employment (and engaging independent contractors), are many and varied.
- From the interview or procurement, all through the relationship and even after it ends, employers must put in place effective legal agreements, scrupulously manage the legal (and practical) relationships, and consider up front restraint and non-competition clauses carefully to reduce the risks when people leave the business.
- It is important to make the distinction between employees and independent contractors, because:
    - Employees come with a raft of tax obligations on the employer that do not apply to contractors; and
    - Employees have rights under workplace health and safety laws and fair work laws that independent contractors don't have (although some laws apply to independent contractor individuals as well).
- Be aware that the legal obligation to pay superannuation contributions applies to some contractors notwithstanding that they are clearly independent and not employees, and this obligation can not be contracted out of.
- Companies and labour firm hires are not employees, but note that the obligations on employers not to discriminate apply to independent contractors as well as employees and are not limited to contractors who are individuals;

- Restraints of Trade are, as a starting point, unenforceable, but may be enforceable if the employer can show that the restraint is reasonable in the circumstances and goes no further than to protect the employer's legitimate interests – this is because of the public interest in ensuring people can earn a living.
- Non-solicitation clauses prevent an employee or contractor engaging or soliciting your employees/contractors/suppliers or clients when they leave (or when the project they were engaged for, ends).
- As the gig economy ramps up, there is ever increasing awareness of the effects of discrimination, hostility and bullying in the workplace. Put in place detailed workplace policies to deal with the behaviour of both employees/contractors and the employer to avoid disputes and give all employees and contractors a clear pathway to make and resolve complaints.
- It will be discriminatory and therefore illegal to take "adverse action" against someone because of the person's race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin so frame interview questions carefully and limit them to enquiries that go directly to the ability of the person to do the job.
- Adverse action includes refusing to hire or dismissing a person, offering employment on different grounds than the employer is prepared to offer others, treating a person differently to other employees, among other things, it is not limited to refusal to hire someone, or dismissing them.

EMPLOYEE OR INDEPENDENT CONTRACTOR AND WHY IT MATTERS

Employees Used to Be – people who arrived at your office at 9, left at 5, and in between time did a defined job, for a certain amount of money (out of which the employer deducted PAYG tax), paid periodically, and whose day to day rights didn't extend much further than the right to a "lunch hour", access to endless supplies of coffee tea and Tim Tams. Their rights to take leave for specific purposes (essentially recreation and sick leave) were legislated, so a person could calculate their accrued entitlements on any given day. Staff management consisted of not much more than tapping your watch when someone came in late or spent too long sitting in the tearoom reading the paper.

Independent Contractors Used to Be – all the people you engaged to provide your business with services that your business needed, but were not part of your business, things like bookkeeping, accounting services, fixing the photocopier, IT help-desk. They provided the service from their own office, or sent a person of their choice from their business to your business if the services needed to be carried out on site, and even if that person sat in your office for days at a time and helped themselves to coffee tea and Tim Tams they were still an independent contractor, not an employee, because you were engaging a "business" – not a "person".

Legal Developments

With the rise of the internet and digital convenience, the nature of business continues to change rapidly. Not only yours, but the all businesses that supply and service yours. It has always been important for businesses to know whether a person they engage is an employee or an independent contractor, because the rights duties and obligations of that person to their business, and their rights duties and obligations to that person, were (and still are) quite different.

The dominant tests that a court traditionally used to apply to determine whether a person was an employee or a contractor, were the "control test" or a "multifactorial" test. In short, the greater the degree of control the business had over the job being done, when it was done and how it was done, the more likely it would be that the person doing the job was an employee. What you called your agreement, and the agreed terms, was taken into account, but it was just one factor in the overall picture. Given that many times the contract was/is drafted by the business seeking the services and presented with little or no opportunity for negotiation by the person being hired, the Courts were quick to look behind the form of the agreement to its actual substance.

On a multifactorial test the terms of the contract are relevant, but need to be consistent with the substance, that is, can not hide what is, in fact, operating as an employer/employee relationship. Other predominant considerations are:

- Payment – is payment made to the person by your business on a regular basis (in the nature of wages?)
- Ability of person to delegate – Can the person delegate work to other people engaged by it, or must the job be done by them personally?
- Who has responsibility for commercial risks – such as responsibility for insurances that must be carried by the contractor's business?
- Who is responsible for the provision of equipment necessary to do the job?
- Does the person work from where they choose or must they work in your office or at places set by you?

With the rise of the gig economy the business world today is awash with sole traders who contract to the businesses that need their services, on the basis of contracts (verbal or written), that provide for short term, or loosely described, work arrangements. The mere fact that the worker has an ABN and issues tax invoices for the services they provide, does not

necessarily mean they are not employees for the purposes of workplace law. This issue arises in the context of compliance with employment laws (Fair Work legislation, Long Service, Sick, Family and Domestic Violence leave legislation), taxation laws (GST, superannuation* and income tax) and to determine whether the person in question has rights under other legislation (for example, under work health and safety laws).

It can be helpful to understand what an employee is not.

- A company is not an employee. An employee must be a person. A director or other officer of a company or other incorporated legal entity may be an employee of the contracting entity, but they are not employees of your business when you engage the company.
- A person engaged through a labour hire firm is not an employee. Your contract is with the labour hire firm, or the business that is seconding or providing the services of that person to your business, and your contract is with the labour hire firm, not the person they provide you to do the work your business needs.

Where you are hiring an individual however, care needs to be taken to ensure that the contract you enter with the individual is a true independent contract, and doesn't leave doubt that it is a sham, or not sufficient to support the relationship of independent contractor.

**Note that in certain cases, the superannuation laws provide that you must pay superannuation contributions for contractors who are individuals, notwithstanding that the individual is an independent contractor for the overall purposes of the law. This obligation can not be contracted out of, and specific legal advice should be sought where contracting with individuals for the provision of services or contact the Australian Tax Office for information.*

CURRENT LEGAL APPROACH TO EMPLOYEE VS INDEPENDENT CONTRACTOR

The High Court has recently decided in two separate cases that the sole consideration should be the terms of the contract between the parties. However, it is not as simple as reading the contract and upholding the literal words it contains. It is important to note:

- in one case the contracts being considered were in writing and reflected clear and comprehensive statements of the parties rights and responsibilities. Further, it was not suggested by either party that the terms hadn't been adhered to, or that they didn't reflect the reality of the work that was being undertaken in practice. Having regard to these facts the court decided the workers in question were in fact independent contractor; but
- In another case, the court found on the basis of the same test, that is, by looking at the terms of the contract only, that the person was in fact an employee, regardless of the fact that the contract called him a "contractor", because the nature of the contract was one of employment, that is, it provided that the business hiring the person controlled all aspects of the work being done under the contract.

Following these cases, the message is that where the parties have committed their agreement to writing, the courts will not interfere, even where on the multifactorial test a different conclusion would have been reached.

The courts have left the door open to take a multifactorial approach where contracts are not in writing, partly written and partly oral, where the terms are being challenged as invalid (sham) or have been varied since being signed. Further, there may be other remedies sought by a party to correct or vary contracts that are unconscionable, or contain errors of law.

Employment and Independent Contractor arrangements should always be in writing, with the bare minimum of legal due diligence being:

- standard straightforward letters of employment should be done on a legally drafted template, and
- where an independent contractor relationship is desired, contracts should be drafted or vetted by a lawyer having regard to the circumstances of each individual contracting arrangement.

When the Relationship Ends –

Restraining ex-employees or contractors from trading in competition with your Business

The starting position at general law is that provisions restraining ex-employees or contractors after a relationship ends are not enforceable, because it is contrary to public policy to stop people earning a living. Restraints can take the form of:

- Restrictions on the employee working, or trading, for a certain period of time, in certain geographical locations and/or in a certain industry or trade; or
- Restrictions on the ex-employee/contractor soliciting other employees or clients of your business; and/or
- Exclusive dealing clauses in independent contracts (that is, a provision in the contract that gives a party sole or exclusive rights to purchase or sell to the other party*).

*Note – the enforceability of exclusive dealing clauses is not dealt with in detail in this article but is included as a reminder that exclusive dealing clauses can be unenforceable, so care needs to be taken if your contract contains one. It is especially important to consider the potential ramifications of the competition provisions in the Australian Consumer Law.

Restraining Employees from working in competing businesses

A restraint of trade clause prevents an employee for working for other businesses that are in competition with yours.

If you impose a post-employment restraint in the contract, or seek to enforce a non-solicitation or exclusive dealing clause, it will be up to you to demonstrate that the restraint is reasonable, if you need to take action to enforce it. A restraint may be reasonable where it goes no further than to protect the legitimate interests of the employer, having regard to the interests of the employer, the employee, and the public interest.

The Court will consider a number of factors, including where your business is located, the geographical scope of your customer or client base, the nature of the activities that you are seeking to restrain and how long the restraint lasts. Courts will look at such factors as:

- Whether the employer has agreed as part of the termination or expiry provisions in the contract, or will, adequately compensate the employee for the restraint (ie will

the employee go on being paid or otherwise compensated for the period of time during which they cannot work);

- Whether the duration is reasonable having regard to the nature of the position – how long should it reasonably take for your business to replace the employee and for them to establish relationships with your clients?
- Is the scope reasonable having regard to the location that your business operates in and the nature of your business. If your business and its customers are located solely in one State, it will likely be unreasonable to impose a restraint covering other States. If you operate in a certain or niche market, a restraint covering other markets or a separate niche of the market, will likely be unenforceable.

To provide discretion at the time of termination, and avoid a restraint being held to be unenforceable, the restraint clause can be drafted to provide options for levels of restraint of each of duration and geographical area. Options can be struck out until the "reasonableness" sweet spot is reached. These are known as "cascading" or "waterfall" clauses.

NON-SOLICITATION CLAUSES

A non-solicitation clause restrains the outgoing employee from engaging with (whether by way of offering employment or contracting with), your customers or clients, suppliers, employees or contractors, or otherwise interfering with any of your business relationships that the outgoing employee had relationships of influence with while employed or engaged by you.

All the same considerations apply, but non-solicitation clauses can be much easier to enforce, because the person restrained is likely someone who is a former part owner/officer of your company, or employed at a high level – that is, people who have developed strong relationships with your staff, suppliers or customers/clients. Breach of these clauses is likely to cause real commercial loss to your business, as opposed to just leaving you annoyed that in losing a valuable employee your competitive position in the market is reduced.

Non-solicitation clauses are not the only protective mechanism available to employers. Contracts of employment or engagement with C-Suite executives and other management positions should contain obligations requiring ongoing confidentiality and perhaps also restrictions on future use of the intellectual property of your business after the relationship ends.

KEEPING THE WORKPLACE RUNNING SMOOTHLY – POLICY AND PROCEDURE

The employment contract covers the legal terms of your relationship, but what about after the person sits down at their desk? As your business expands you'll likely need to have policy and procedure in place to ensure employees have a clear understanding of their rights and what is expected of them in a range of areas, including:

Behaviour of Employee

An employee code of conduct might include provisions about:

- Standards expected in relation to behaviours and treatment by employees and officers and relevant contractors, in relation to others in the workplace, including harassment (including sexual harassment) and bullying*, health and safety obligations, discrimination, honesty and acknowledging the contributions of colleagues.
- Standards expected in relation to the employer, including rules about use and misuse of phone, computer (including password protection), vehicles or other equipment or property of the employer, observing health and safety rules, misappropriation of company property or money, drug and alcohol use, email and internet use, avoiding conflicts of interest, compliance with particular legislation affecting the employer's business and confidentiality of the employer's commercial information (including use/misuse of the employer's intellectual property).
- Behaviour toward clients/customers including how complaints are managed and resolved.
- Carrying out private activities on company time and/or use of company equipment for private use.
- Potential ramifications for breach of the code of conduct, (noting that any rights to dismiss should be clearly set out in the employment contract).

Depending on the nature and size of the business, some or all of these might warrant their own

Behaviour of Employer

- Workplace surveillance policy (if cameras are installed or company computers or phones are accessible by IT management while they are allocated to an employee);
- Whistleblower policy;
- Handling of the personal information of employees (if something more in depth or separate from the privacy policy that applies generally is needed);
- Flexible working arrangements or leave policies that go beyond the employee's legislative rights;
- Employee complaints and grievance policy.

Customer/Client handling or other outward facing policies

Depending on the nature of the business and the industry, the following may be necessary or desirable:

- drug and alcohol testing of persons entering a work site (may apply to contractors as well as staff);
- Customer/client complaints handling policy including a mechanism that ends with the CEO or Board as appropriate, and also provides information on any available third-party dispute resolution services relevant to the particular industry, for example an industry association, ombudsman or regulator that provides investigation, conciliation/mediation or other services to customers in the industry.

*Note: The concepts of bullying and harassment are wide, and depending on the context, may include:

- Aggressive behaviour toward another person;
- Intimidation;
- Abusive or offensive language;
- Humiliating or mocking behaviour, including public criticism of a person's work;
- Initiation ceremonies or hazing;
- Teasing or practical joking;
- Increasing or decreasing the workload of a person unreasonably;
- Directing a person to perform work that is below or above their skill level;

- Providing inadequate supervision or information to perform the work required, or at the opposite end of the spectrum, unreasonably micromanaging.

Reasonable performance or other management action is not bullying. The problem is that what is "reasonable" will vary depending on the circumstances of each case, and even reasonable management actions may still be bullying if they are imposed in an unreasonable way.

Continuing developments in laws impacting the workplace and in the broader sense, work health and safety, anti-discrimination (sex, racial and disability) and human rights mean that employers now need to focus on actively preventing discrimination and harassment in the workplace, rather than merely responding to incidents as they occur.

Under existing and emerging law, employers must take reasonable and proportionate measures to proactively avoid discrimination and sexual harassment on the ground of sex, and also to avoid subjecting a person to a workplace environment that is hostile on the ground of sex. That is, the objectionable behaviour does not need to be directed at a person, it only needs to be offensive, intimidating or humiliating to a person because of their sex or a characteristic that appertains to or is imputed to a person of that sex.

The Interview – start as you mean to go on

The laws against discriminatory behaviour don't begin only after a person is hired or engaged. The Fair Work Act specifically forbids "adverse action" against prospective employees as well as actual employees and independent contractors (which are not limited to individuals) "because of the person's race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin".

This means that care needs to be taken when formulating questions to be asked at interview.

Adverse action at interview stage is essentially a refusal to employ a person, or discrimination in the terms and conditions on which the offer of employment is made (but does not include action that is necessary because of the characteristics of the particular position).

Questions asked at interview (or when engaging an independent contractor) should be strictly limited to the suitability of the applicant for the particular position or work, having

regard to its capacity, skills and experience. If there are specific characteristics of the position that may affect the ability of certain persons to do the job, for example, overnight work, shift work, heavy lifting, insecurity of workplace or inherent physical or psychological dangers in workplace, then those should be made clear, and the person can be asked if there is anything that they think would impact their ability to fulfil the job requirements.

The websites of the **Fair Work Commission**, the **Fair Work Ombudsman** and the **Human Rights Commission** have a wealth of information and advice available for employers to assist in compliance and managing all aspects of the workplace relations landscape.

Important Note: This article is general in nature and is not intended to be a substitute for specific legal advice in relation to the laws and issues impacting your particular workplace, or your specific industry sector. You should have a lawyer draft your employment contracts (although a template may suffice for administrative hires that are straightforward). A lawyer should always draft (or advise on) your contracts for the delivery of services to or by your business as independent contractors.