COLEMAN GREIG
LAWYERS

RecruitmentEdge

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Who is an employee and who is a contractor? Yes, that old chestnut.

The Federal Court recently had to consider whether door-to-door insurance salesmen engaged by Combined Insurance were actually employees, despite contracts which asserted (strongly and repeatedly!) that they were contractors. Some of the engagements in question went back almost 20 years.

In what is becoming something of a trend, Justice Perram found that the various factual matters which have to be weighed up to decide this question could be pretty much summed up as *"Were they really working in their own businesses? Or were they actually working in the business of the insurance company?"*

He decided, emphatically, that they worked in the business of the insurance company and that it was a sham to regard to them as conducting their own businesses, even where they formally contracted to Combined through companies. Those companies were merely a way to receive payment, but it was the individuals who were actually engaged, as employees. As a result the insurance company owed substantial amounts of annual leave and long service leave.

As a picturesque detail, the weekly reporting meetings included warm-up exercises in the form of rhythmic chants *("1 2 3 4, let's go selling door to door"), and motivational songs ("Owned by AON we might be, but Combined will be at the top of the tree.").* The judge felt that this showed the salesmen were being required to 'dance to the insurer's tune', rather than acting independently.

More substantively, the salesmen did not accumulate any goodwill because the insurer had the customer contacts, the legal relationships were all between the insurer and the customer, and the turnover of policies and salesmen were such that the chance of future business rested entirely with the insurance company: the salesmen generated nothing that they could sell as an ongoing business. The insurer regulated every level of operation by detailed contracts, rigorously controlled the way they went about their work, and held the power to dismiss the salesmen.

The salesmen were also encouraged to represent themselves as being from the insurer, even though they wore no uniform. While their contracts theoretically allowed the salesmen to engage in business other than Combined, in actual fact this was not practically possible. Combined Insurance also provided scripts that the reps should use when dealing with customers, and disciplined salesmen who departed from those scripts.

These points overrode the factors going strongly the other way, such the salesmen paying some of their own expenses, and employing administrative staff (their wives). The insurer deducted no tax, and the salesmen looked after their own tax affairs – but this didn't count for much when the insurer issued tax invoices to itself on behalf of the salesmen.

What lessons can be drawn from this case?

This case reiterates that whatever the parties involved call their relationship *will* not inhibit a court from finding that the *substance* of the relationship is employment.

It also emphasises that whether someone is a contractor or not is as much a question of how the relationship is managed, day to day, as it is about the contractual structure around it.

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A lot actually hangs on this: it is not only about possible liability for employment entitlements. It is often overlooked that even if the person is a contractor, the principal may still bear liability for on costs (such as workers compensation, superannuation and pay roll tax).

These risks mean that it is important to be clear about the implications:

- If your particular contractor is, in fact, a contractor – what will you be liable for anyway? What is the real cost to your business of engaging this person?
- If you are to avoid the contractor being classed as an employee, what do you need to do to manage that risk, both contractually and in managing that person over time?

If you would like advice with regard to employment relationships or need assistance setting up employment contracts, please contact one of our experienced employment and workplace relations team on ph: 02 9635 6422. Alternatively, email Stephen Booth at sbooth@colemangreig.com.au.

"The probability of being watched is proportional to the stupidity of your act": but make sure you have a social media policy.

Employment law cases involving social media are no rarity.

The subject matter is often an employee rant on their Facebook page. Whether or not the rant is sufficiently gross to justify termination or other disciplinary action will depend on the content and circumstances (who could see it, and how strongly the employer was identified), but also on the clarity of the employer's rules about acceptable and unacceptable conduct, including conduct away from work and on a "private" site.

By now, all employers should have in place email and internet policies which deal with acceptable and unacceptable conduct: often, social media policies can be an extension of these existing policies.

As an illustration of the need for a social media policy, consider this recent case involving Linfox.

Linfox employee, Mr Stutsel, made derogatory comments about his managers on his Facebook page, including comments fantasizing about a bear committing violence on the managers, and referring to a Muslim manager as a "bacon hater". One of the managers came across the comments, by indirect means, and was upset. Mr Stutsel was sacked, and claimed unfair dismissal.

The employee's Facebook page had been set up by his wife and daughter and he thought it had the maximum privacy setting. FWA thought that the comments had the flavour of a whinge about work in conversation in a pub or a café. They were foolish, but not to be taken too seriously. They were not a blog intended to be on public display. FWA found that the employee had a right to free speech, and, within the forum he was using, his comments were not out of place. Mr Stutsel had been with Linfox for 22 years, with an unblemished record for 22 years and was reinstated. FWA

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"The probability of being watched is proportional to the stupidity of your act": but make sure you have a social media policy cont.

described his conduct as foolish and stupid and thought that he would well advised to heed another comment on his Facebook page: "The probability of being watched is proportional to the stupidity of your act".

"Here is wisdom" was FWA's dry comment.

The outcome may have been different if Linfox had had a clear policy in place, prohibiting disparagement of co-workers or the company in public forums, or comment on operational (confidential) matters. However Linfox did not have a policy at all. FWA said its induction training and employee handbook were insufficient these days, since many large companies have detailed social media policies and have taken pains to acquaint employees with those policies.

So, are your policies up to speed?

For help in preparing or vetting a social media policy in your workplace, contact Stephen Booth at sbooth@colemangreig.com.au, Anna Ford at afford@colemangreig.com.au or Enza Ianella at eianella@colemangreig.com.au

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