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THE ADVOCATE

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When Temps become Employees

A recent determination of the Full Court of the Employment court, ***Prasad & Tulai v. LSG Sky Chefs NZ Limited*** [2017] NZEmpC 150 has the potential to be significant for organisations who engage contract workers via a temporary/labour hire company.

The facts before the Employment Court were as follows:

1. Solutions Personnel Ltd ("*Solutions*") operated as a "*labour hire company*".
2. Solutions provided workers to a number of organisations, including LSG Sky Chefs ("*LSG*").
3. LSG relied heavily on workers sourced from agencies such as Solutions to fulfil the operational requirements however it also employed employees in addition to engaging the labour hire staff.
4. Solutions engaged the workers in this instance via an independent contract (as opposed to an employment agreement).
5. The workers were paid by Solutions, who in turn were paid by LSG for the hours the workers were engaged by LSG.
6. The Employment Court noted that:

   "[7] The labour hire arrangement evidently suited LSG. It meant that the company was not troubled by the usual responsibilities and liabilities associated with an employment relationship. As the contemporaneous documentation reflects, another identified spin-off benefit was that Solutions workers would be able to work through any strike action by LSG employees. . ."
7. The workers concerned worked exclusively for LSG for a number of years and did not take on any other assignments for other organisations.
8. The workers claimed that despite having signed an independent contract that they were employees and further that they were employees of LSG, not Solutions with whom they entered into a contract for services.

LSG argued that there was no *"contractual nexus"* between the workers and LSG. In this regard the Employment Court noted that:

"[19] The reality is that it is not uncommon for workplace relationships (to use a neutral term) to morph over time and to change their nature incrementally, or for their true nature to emerge once the particular factual context is considered. It is certainly not unusual for there to be no contractual documentation, or documentation of any sort, evidencing a relationship. Nor is it unusual for documentation, when it does exist, to mask the true nature of the parties' relationship, either deliberately or inadvertently. And it is not uncommon for one party to have no idea about what the legal framework for the relationship is. This is particularly so in cases involving vulnerable workers."

The Employment Court determined that the question before it was essentially to determine whether the 'real nature of the relationship' between the workers and LSG pursuant to s.6 of the Employment Relations Act to determine whether the workers were employed by LSG:

"[33] It follows, from the plain wording of s 6, that the s 6(1) inquiry (namely as to whether a person is employed to work under a contract of service) is not to be answered by asking, as the defendant would have it, whether there is a contract; if so, what its nature is; if not that is the end of the inquiry. Rather, it is (as s 6(2) makes clear) to be answered by working backwards, from an assessment of the real nature of the relationship. This, in turn, requires an assessment of a number of relevant matters, including (but not limited to) the intention of the parties."

The Court also referred to the underlying policy intent of Section 6 of the Employment Relations Act which was *"to "stop some employers labelling individuals as 'contractors' to avoid responsibility for employee rights such as holiday pay and minimum wages," in other words to prevent form trumping substance. As Mr Cranney points out, this dovetails into the broader underlying objectives of the Act. It seems to us that the underlying policy intent of s6 has particular relevance to arrangements such as labour hire agreements."*

In undertaking this inquiry into the real nature of the relationship between the workers and LSG the Employment Court made the following factual findings:

1. There were no written agreements between LSG and the workers.

Christmas Shutdown

Our office will be unattended from 5 pm on Tuesday 19 December 2017 until Monday 8 January 2018.

If you require assistance during this time please contact us on the following numbers:

Neil 0274 387 803
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Disclaimer:

This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact **Neil McPhail**, **Raewyn Gibson**, or **Peter Zwart**.

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2. The workers underwent an initial screening and "*Sign-up*" process with Solutions. Once this part of the process was completed the workers attended an interview at LSG. In this regard the Court noted:

   "[48] . . . From this point Solutions largely fell out of the picture and had very little ongoing involvement with the workers placed with LSG, other than in terms of payment."

and

   "[52] It was entirely a matter for LSG as to whether or not it took on any worker. If the decision was positive, the worker would be placed on a roster in a particular department and the worker would be told to come in as per the roster."

3. The workers had signed a written agreement entitled a "*Contractors Agreement*" with Solutions however the Court determined that neither of the workers had any real understanding of what they had signed. In this regard the Court noted:

   "[59] We do not see this statement of general principle as controversial. In the present case the agreements contain some indicators that independent contractor status was intended (at least by the drafter, Mr Moniem). However, the documentation is poorly worded and confusing. The reality is that both plaintiffs were effectively steam-rolled into signing a document which they had no real understanding of. As s 6 makes clear, the way in which the parties have described their relationship in a written agreement is not determinative. Section 3 of the Act underscores the point, providing that one of the objectives of the legislation is to address the underlying imbalance of power between employer and employee. Section 6 must be read in light of the Act's objectives.

4. In respect to how the relationship operated in practice, the Court determined:

   - After the initial screening process with Solutions they attended an interview with LSG.
   - At LSG they filled out an application form for work (which was entitled "*Application for Employment Agency and Contractor Employees*") and were asked what days/shifts they could work and if they would be available to work overtime.
   - After the interview the workers were offered work by LSG and placed on a roster (which Solutions had no input into) which drew little distinction between workers engaged via Solutions and employees employed directly by LSG.
   - The workers received an induction pack and training from LSG, a LSG health and safety booklet and code of practice. The workers were required to comply with the obligations set out in those documents.
   - The workers received ongoing supervision from LSG direct line managers.
   - The workers were contacted directly by LSG if they were required for additional work.
   - The quality of work was checked by LSG and any performance issues were generally dealt with by LSG to the extent that workers were terminated by LSG without referral back to Solutions and lesser performance issues were dealt with directly between LSG and the workers concerns.
   - The workers were required to wear uniforms which were provided and laundered by LSG; these were the same uniforms as those worn by LSG employees.
   - The workers were required to obtain and maintain security clearance to enter the LSG workplaces.
   - The time worked was recorded in a timesheet which was provided to LSG's finance department who in turn extracted data from the timesheets and provided this to Solutions for payment.
   - The workers, in the matter before the Court, had worked for LSG for long hours per week on a regular basis for a lengthy period of time. *"LSG provided both plaintiffs with a regular stream of work, which they expected and which LSG expected them to be available to perform; and there was continuity of the relationship over an extended period of time. Both factors, individually and together, point towards a contract of service."*
   - The workers had very little, in some instances no contact with LSG.

The Employment Court in reaching a determination that the workers were in fact employed by LSG noted:

"[92] Much will depend on where a particular case sits on the spectrum. It is less likely that a host organisation will be found to be in an employment relationship with a labour hire worker where, for example, the arrangement and the obligations, rights and roles of each party is well documented, understood and agreed at the outset, and the work is provided on a supplementary and temporary basis. It becomes increasingly likely that an employment relationship will be found to exist where, for example, the documentation is non-existent or unclear; the work is of indefinite duration, is expected to be provided and is expected to be performed by the individual; a significant degree of supervision, control and direction is exercised by the host; and performance issues are dealt with by it.

[93] In assessing where on the spectrum a case sits the Court will closely scrutinise the way in which arrangements are structured, particularly where there is a deficit of bargaining power, and how such arrangements have operated in practice, to determine what the real nature of the relationship is.

. . .

[98] A labour-hire agreement does not represent an impenetrable shield to a claim that the "host" is engaging the worker under a contract of service. Much will depend on the particular facts of the individual case and an analysis of the real nature of the relationship, including how it operated in practice."

While we understand that the determination may be appealed, this determination is very much based on the facts before the Employment Court in this instance and will not, in a large number of instances have any impact upon the use of labour-hire agency/temp staff. However it would be timely to review the nature of your relationship with labour-hire agency/temp staff to ensure the facts relied upon by the Court in this instance are not present in your relationship with agency staff.