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Triangular Employment Relationships

In previous issues of The Advocate (Issues 224 and 250) we reported on decisions which involved what we described as a "*triangular*" arrangement between an employer, the employee and a third party, where the employee was engaged to work at the third party's premises. A more recent Employment Court determination on "*triangular*" arrangements – ***Prasad & Tulai v. LSG Sky Chefs NZ Limited and Solutions Personnel Limited And Blue Collar Limited*** [2017] distinguished between the traditional bi-lateral arrangement between an employee and an employer and a "*triangular, labour-hire relationship*" where *"the labour-hire agency (the agency) hires out the labour of a worker to another business (the host)."*

The Court relied on the definition of "*employee*" and associated commonly applied tests (the written terms of the applicable agreements, how the relationship between the employer and the host company operated in practice, the extent to which the employee was integrated into the host's business and under the '*control*' of the host, the fundamental test and the extent to which the employer operated their own business) associated with that definition to determine whether or not the employee in that case was in fact an employee of LSG Sky Chefs (the host).

The Employment Court, in finding that the employee was employed by LSG, noted the following:

"[91] Workers have a statutory right to seek a declaration as to whether they are employees and, accordingly, entitled to the minimum protections that go with that status. The traditional binary notion of employment, and unitary concept of employer, is increasingly being challenged by innovative ways of working and structuring relationships. It goes without saying that increasingly complex models give rise to increasing degrees of murkiness as to who, if anyone, bears what responsibility for working conditions. Fortunately s 6 is sufficiently flexible to deal with such difficulties in any given case.

[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.

. . .

[97] We are satisfied that the evidence discloses the requisite mutuality of obligations between LSG and each of the plaintiffs. LSG plainly expected that the plaintiffs would turn up to work each day it rostered them on, unless a prior arrangement had been made with it; the plaintiffs plainly expected that when they did show up to work they would be given work by LSG; both parties understood that the plaintiffs would personally do the work; and each of the plaintiffs received payment for the work they did for LSG from LSG, albeit via Solutions. While Mr Prasad later signed a self-styled employment agreement with Blue Collar, we are satisfied that nothing substantively changed in reality.

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- Resolving Personal Grievances and Workplace Disputes
- Employment Agreements - drafting and negotiation
- Employment Relations Authority/Employment Court and Mediation Representation
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- Training
- Monthly newsletter

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 **Raewyn Gibson**, **Peter Zwart** or **Dean Kilpatrick.**

Contact Details:

Level 2

71 Cambridge Terrace

PO Box 892, Christchurch

Tel (03) 365 2345

Fax (03) 365 2347

www.mgz.co.nz

Raewyn Gibson
E: raewyn@mgz.co.nz
M: 0274 387 802

Peter Zwart
E: peter@mgz.co.nz
M: 0274 367 757

Dean Kilpatrick
E: dean@mgz.co.nz
M: 027 279 1353

[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."

Therefore the current status of the law is that an employee would have to meet the tests outlined by the Employment Court to establish they are an employee of the '*host*' to be able to bring a claim against that 3rd party in the triangular relationship.

In line with the principles espoused by the Employment Court in this decision, Parliament has recently passed The Employment Relations (Triangular Employment) Amendment Act 2019, which will come into force on 27 June 2020, or earlier by Order in Council. This legislation provides that either an employee, an employer, or both the employee and employer may make an application to the Authority or Court to join a "*controlling third party*" to proceedings to "*resolve the personal grievance*". This legislation therefore effectively simplifies the process for an employee to pursue a claim against that 3rd party in circumstances where that 3rd party is '*a controlling party*'.

The Act defines a controlling third party as a person:

"(a) who has a contract or other arrangement with an employer under which an employee of the employer performs work for the benefit of the person; and
(b) who exercises, or is entitled to exercise, control or direction over the employee that is similar or substantially similar to the control or direction that an employer exercises, or is entitled to exercise, in relation to the employee."

This application to join a '*controlling third party*' to a personal grievance will apply in circumstances where:

- An employee has raised a personal grievance in accordance with s.114 of the Act.
- An employee has applied to the Authority to resolve a personal grievance with their employer; and
- The personal grievance relates to an '*action that is alleged to have occurred while the employee was working under the control or direction of a controlling third party*'.

Where an application is made to join a '*controlling third party*' the Authority or Court must grant this application if they are satisfied that the following conditions are met:

1. **The Controlling Third Party is Notified of the Personal Grievance within the Requisite Timeframe**

1.1 The employee has notified the '*controlling third party*' that they consider their actions have caused or contributed to the personal grievance within 90 days of the date on which the action alleged to have amounted to a personal grievance occurred or came to the attention of the employee (the same timeframe and obligations as that upon the employee to raise a personal grievance against their employer); and/or

1.2 If the employer is making an application to join a '*controlling third party*' – it must do so within 90 days of the date on which the employer's employee raised a personal grievance claim with the employer.

2. An Arguable Case must be made out that:

2.1 The party to be joined to the proceedings is '*a controlling third party*'; and

2.2 That the party's actions "*caused or contributed to the personal grievance*".

Notably the Authority or Court may "*at any stage of the proceedings*" of its own volition join a '*controlling third party*' to the proceedings.

In circumstances where the Authority or Court joins '*a controlling third party*' to the proceedings they may direct the employee, the employer and the controlling third party to Mediation to attempt to resolve the personal grievance claim.

The Authority or Court may, where they determine an employee has a valid personal grievance claim, awarded remedies against the employer and the controlling third party "*in a way that reflects the extent to which the actions of each contributed to the situation that gave rise to the personal grievance*".

Clearly this legislation has the potential to impact our clients who may either be an employer or '*a controlling third party*'. However most importantly '*a controlling third party*' will not now be able to avoid any liability in a personal grievance setting by asserting they are not the "*employer*". Potentially this legislation may require the employer and the '*controlling third party*' to act in concert when there is a necessity to deal with performance and/or conduct issues or indeed any action which has the potential to impact upon the employee's terms and conditions of employment.