Where labour-hire workers gain employee status, 17 January 2018

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The Employment Court has recently released an important judgment concerning the use of labour-hire workers. Companies can use labour-hire workers sourced from an agency to supplement their workforce. These companies, often known as “host” companies, pay the labour-hire agency a fee rather than paying the worker directly for their services. The workers are paid by the agency and have a legal relationship with the agency either as an employee or an independent contractor. This model can be advantageous to host companies since it increases the flexibility of their staff and allows host companies to fill any gaps in the workforce.

However, in *Prasad & Tulai* v *LSG Sky Chefs New Zealand Ltd* [2017] NZEmpC 150 two labour-hire workers successfully claimed they were in an employment relationship with the host company, LSG. As a result, the workers were entitled to the protections of employment legislation such as the Holidays Act 2003 and the Employment Relations Act 2000 (ERA).

After analysing the practicalities of how the workers performed their jobs, the Court found that an employment relationship existed because there was unclear contractual documentation about the nature of the relationship, the work was of indefinite duration and the host company had a significant degree of integration and control over the workers.

The discussion below examines this judgment and provides guidance as to how host companies can minimise the possibility of a labour-hire worker being found to be an employee.

Factual background

LSG provides in-flight catering services to airlines and has several hundred workers, some of whom are employees and some are not. LSG relied heavily on workers provided by labour-hire agencies including relevantly Solutions Personnel Limited (Solutions).

Mr Prasad and Ms Tulai were two of the workers provided to LSG by Solutions. Ms Tulai worked at LSG almost exclusively for about four years and Mr Prasad for about two years. During this time Ms Tulai worked up to 62.75 hours per week for LSG. During one period, Ms Tulai worked for LSG for 34 full days continuously without a break. Mr Prasad worked an average of 45 hours per week for LSG. Neither worker had a good understanding of employment law and did not appreciate the significance of the independent

contractor agreements they signed with Solutions which led to them doing work for LSG. They did not have any agreements with LSG.

The issue to be determined by the Court was whether or not these workers were employees of LSG. The Court was not asked to consider if they were also employees of Solutions.

Legal background

Section 6 of the ERA relevantly provides:

> **6 Meaning of employee**
>
> (1) In this Act, unless the context otherwise requires, employee—
>
> > (a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and …
>
> (2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them.
>
> (3) For the purposes of subsection (2), the court or the Authority—
>
> > (a) must consider all relevant matters, including any matters that indicate the intention of the persons; and
> > (b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.

As a result of this section, in determining whether a person is an employee or not, the Court must:

- examine the “real nature” of the relationship
- consider “all matters”, and
- not treat any contractual or other documents as decisive.

The Court emphasised that contractual documents alone cannot determine whether there is an employment relationship or not. The issue was not simply whether there was a contract and what that contract said. Rather, the Court had to inquire into how the relationship operated in practice.

The Court also confirmed that although this case involved a work arrangement which differed from the traditional model, namely a self-styled labour-hire arrangement with an end-user (LSG) and an intermediary (Solutions), that did not mean that s 6 of the ERA did not apply. The test set out in the ERA remained the same.

The Court therefore applied a two-pronged approach to determining whether the workers were employees of LSG. The first prong consisted of looking at any contractual documents signed by the workers. The second prong involved looking beyond the documents and examining how the relationship operated in practice. This meant that the outcome of this case was factually specific and that any similar cases will likewise be determined on their individual facts.

The contracts

The Court analysed the independent contractor agreements between the workers and Solutions and concluded that they were “poorly worded and confusing”. They contained elements which indicated that there was an employment relationship between Solutions and the worker despite the documents being labelled contracting agreements.

Additionally, both workers spoke English as a second language and had no substantial knowledge of New Zealand employment law. The agreement was not explained to them in any detail by Solutions.

The Court concluded the workers were “effectively steam-rolled into signing a document which they had no real understanding of”. The Court also noted the imbalance of power in the relationship between Solutions and the workers and that this needs to be taken into account in deciding whether the terms of any written agreement really represented what was agreed.

Ultimately, the Court concluded that the contractual documents were out of step with the real nature of the relationship as it operated in practice.

Real nature of the relationship

Next the Court turned to analysing how the relationship between the workers and LSG operated in practice. Specifically, the Court assessed:

- how the relationship operated overall
- the degree of control LSG had over the workers
- the extent to which the workers were integrated into LSG, and
- whether the workers were in business on their own account.

Examining these issues, the Court found that the workers were essentially treated as employees of LSG. They worked almost exclusively for LSG and had little control over when, how or what work they did. They were supervised by LSG managers. The workers were provided with a regular stream of work which they were expected to be available to perform. They were integrated into LSG's business, wore LSG uniforms and provided timesheets to LSG which also controlled their rosters (although the workers were paid by Solutions).

If LSG wanted the workers to perform extra work outside rostered hours, LSG would contact the employee directly. When the workers were not at work, they were not replaced by other workers. Both workers worked for LSG for what the Court described as a lengthy period of time for long hours on a regular basis.

The Court found the workers were not in business on their own account because they did not have the freedom to hire their own workers or delegate their work, did not produce invoices and they were not registered for GST.

In practice, there was little distinction between LSG's employees and its labour-hire workers. The Court concluded that the reality of the working environment and their length of service for LSG pointed strongly towards an employment relationship for these two workers. As a result, the Court declared that the workers were employees of LSG.

Consequences of this decision

Employers should be aware that labour-hire workers have the potential to be considered employees, as this case shows. However, as the Court noted, whether or not an employment relationship will be found to exist is highly dependent on the facts of the individual relationship. The Court explained that where the worker clearly understands and agrees to the obligations, rights and roles of each party and the work is provided on a supplementary or temporary basis, this will make it much less likely that the worker will be an employee of the host company. However, where documentation is non-existent or unclear, the work is of indefinite duration and is expected to be performed by the worker with a significant degree of supervision and control, this will indicate that the host company is the employer.

If a host company wishes to minimise the risk of a worker being found to be an employee, it should ensure:

- there is clear documentation which sets out the nature of the relationship
- the nature of the relationship is explained to the worker so the worker understands he or she is not an employee of the host company
- the worker genuinely consents to the relationship
- in practice, the relationship operates in accordance with this documentation, and
- the relationship with the host company is limited in duration and not indefinite.

What the new Government could mean for labour-hire workers and dependent contractors

This decision reflects the changing ways workers perform their work. The workforce is moving away from the traditional employment relationship with an employee working full time, regular hours for a single employer.

This change includes contractors working for companies essentially full time. These workers have been labelled "dependent contractors" because, while not being employees, they predominantly or only work for one company, unlike independent contractors who can work for many companies.

One of the new Labour coalition Government's policies is to provide dependent contractors with the statutory support currently only available to employees. While the details of this proposal have not been specified, dependent contractors could become entitled to the minimum wage and have similar job security to employees as well as the right to bargain collectively. The Government is likely to provide further details of its plans in 2018.