

IR Bulletin – Labour Hire Special Edition

June 2004

Introduction

Labour hire issues have been surfacing in many areas and jurisdictions. Using labour hire raises industrial and employment issues, discrimination and occupational health and safety issues. There has been activity about labour hire in the Federal Court (see for example the article “Beware the Wolf in Sheep's Clothing” in our *IR Bulletin*, April 2004, page 4, available on our website www.bdw.com), in the Australian Industrial Relations Commission, in various State Commissions and out in the field.

This *IR Bulletin* is dedicated to issues about labour hire and draws together information and lessons arising from developments that have taken place in 2003 and 2004.

When is a Labour Hire Contractor Really an Employee?

In a decision handed down on 5 May 2004, *Staff Aid Services v Bianchi*, a Full Bench of the Australian Industrial Relations Commission upheld a decision of Commissioner Lewin that an employment relationship existed between Ms Bianchi and labour hire company, Staff Aid Services.

Ms Bianchi worked as an assistant rebuyer for Coles Myer Limited, a position she obtained through Staff Aid Services. Staff Aid Services provided Ms Bianchi's resume to Coles Myer Limited who ultimately offered her the position, initially for a period of 4 to 8 weeks, commencing 7 February 2001. Ms Bianchi signed a contract with Staff Aid Services which stated that Staff Aid Services would engage her to provide “Independent Contractor Services” for Coles Myer Limited. Ms Bianchi continued in the role as assistant rebuyer until her employment was terminated on 5 December 2002.

Ms Bianchi applied for relief in respect of her termination. Staff Aid Services sought to dismiss the application on the basis that it was not Ms Bianchi's employer, but merely a recruitment

consultant which facilitated the engagement of Ms Bianchi as an independent contractor providing services to Coles Myer Limited.

Employee or individual contractor? – Indicia

The Commission looked in detail at the contractual relationship between Ms Bianchi and Staff Aid Services in order to determine whether Ms Bianchi was an employee of, or an individual contractor to, Staff Aid Services. The Commission considered indicia such as the following:

- performance of, or entitlement to perform work for, others;
- ultimate place of work and advertisement of services;
- provision and maintenance of tools or equipment;

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- delegation or sub-contracting of work;
- putative employer's right to suspend or dismiss;
- presentation of the worker to the world at large as an emanation of the business;
- deduction of income tax;
- were payments by wage or salary or by reference to completion of tasks;
- provision of paid holidays or sick leave;
- whether work requires a profession, trade or distinct calling;
- creation of goodwill or saleable assets in the course of the work; and

Lessons and Tips

Labour hire companies and principals using labour hire personnel as contractors might consider a checklist in order to determine whether the relationship is truly an independent contractor relationship including factors such as the following:

- Do the contracts describe the arrangement as principal and contractor?
- Is the contract for the provision of services?
- To what extent does the worker exercise, or retain the right to exercise, control over the manner in which the work is performed, place of work, and hours of work?
- Does or can the worker perform (or have a genuine practical entitlement to perform) work for others?
- Does the worker have a separate place of work and/or advertise his/her services to the world at large?
- To what extent does the worker delegate or subcontract work?
- Does the work require a distinct profession, trade or calling on the part of the worker?
- Does the putative employer have the right to suspend or dismiss the person engaged?
- Does the putative employer present the worker to the world at large as an emanation of the employer's business?

- proportion of remuneration spent by the worker on business expenses.

The Commission concluded that “viewed in its totality, the relationship between Ms Bianchi and Staff Aid was one in which Ms Bianchi was the servant of Staff Aid in Staff Aid’s business of providing contract labour to its clients” and “as a practical matter Ms Bianchi could not be said to be conducting a business of her own”.

The Commission dismissed Staff Aid Services’ appeal. This allowed Ms Bianchi to pursue her application against Staff Aid Services.

In a postscript, the Commission commented that consideration as to whether there was joint employment should not be entertained without the other putative employer being provided with an opportunity to intervene and present a case in opposition to such a finding.



Employment Test Case in NSW

The Labor Council of NSW has applied to the Industrial Relations Commission of New South Wales to insert “security of employment” provisions into a number of NSW awards.

The Labor Council seeks, amongst other things, that employers take all responsible steps to maximise the number of permanent positions available, ensure that casual employees have an opportunity to elect to become full time or part time and to ensure that staff from labour hire agencies do not diminish the availability of permanent employment.

Specifically, the Labor Council seeks that:

- labour hire businesses are engaged to supply staff to perform work on a strictly temporary nature which cannot practicably be allocated to existing employees;
- the employer undertakes to offer full time or part time employment to any casual employee of a labour hire business who performs work for a sequence of periods of employment during a period of 6 months; and

- employees supplied by a labour hire company receive wages and conditions not inferior to the wages and conditions of employees of the employer performing the same work.

The Labor Council also seeks to insert occupational health and safety provisions into awards designed to ensure safety of labour hire employees provided to an employer.

The application has become known as the “secure employment test case” and has broad ramifications for clients who use labour hire or contracting arrangements in New South Wales. Employers have responded with an application to insert into awards provisions about working hours, seasonal employment and part time employees. The Commission will continue to hear the secure employment test case during 2004.



What’s Happening in the Field

A number of our clients have been managing industrial claims and issues about labour hire, including:

- claims that labour hire employees should become permanent employees of the principal using the labour hire agency and that the principal should enter into a certified agreement for those employees;
- claims that labour hire employees have been “unfairly dismissed” if “let go” by the principal using the labour hire agency;
- claims of unfairness if employees of a company using labour hire employees receive higher wages and conditions than labour hire employees;
- claims that use of labour hire erodes the number of

permanent employment positions and conditions of permanent employment; and

- threats of industrial action if labour hire employees are not made permanent employees of the company using the labour hire agency.

A principal using labour hire employees will have various options to deal with such claims and issues. Which option is appropriate will depend on the circumstances.

If faced with threats of pickets or industrial action by labour hire employees, options could include:

- requiring the labour hire agency to provide different labour hire employees;
- obtaining services from an alternative labour hire agency;
- seeking an injunction or penalty where there is evidence that a union or employees are taking action to coerce the principal to make a certified agreement (section 170NC of the *Workplace Relations Act 1996*); and
- applying for an order under section 127 of the *Workplace Relations Act* to stop industrial action taken by labour hire employees.

Labour Hire Employees go from Casual to Permanent

On 28 January 2004, the South Australian Industrial Relations Commission determined that certain employees should convert from casual to permanent employment.

The Clerks (South Australia) Award provides that a casual employee who has been employed by an employer for at least 12 months:

- on a regular and systematic basis for several periods of employment; or
- on a regular and systematic basis for an ongoing period of employment,

has the right to elect to have his or her employment converted to part time or full time employment.

Under the Award, an employer may consent to or refuse the election but may not unreasonably refuse the election.

The Australian Services Union notified a dispute to the South Australian Commission when Workforce Automation Technologies Limited (Direct Personnel) refused an election of 2 employees (Kelly and McCarthy) to convert to full time or part time employment. Both employees had been placed by Direct Personnel to work at Transport SA (TSA). Kelly had worked at TSA for about 6½ years and McCarthy for about 3 years.

Both employees made their election in January 2003. TSA announced in about April/May 2003 that it had decided to employ directly rather than use labour hire personnel and that positions currently filled by labour hire personnel would become fixed term contract positions with TSA.

Consequently, Direct Personnel notified its employees of the pending cessation of their casual assignments at TSA.

Direct Personnel staff could apply for positions with TSA. Kelly and McCarthy did not secure employment with TSA. Both received a letter from

Direct Personnel indicating that their employment would not continue beyond a certain date as Direct Personnel would not be offering further casual engagements.

The Commission found that Direct Personnel's refusal to convert the employees to full time or part time employment was unreasonable.

The Commission accepted that, in making its decision, Direct Personnel was motivated by the nature of its business and, in particular, its inability to control the number of hours worked by its employees each week.

Direct Personnel's concerns about a change in government and TSA policy away from use of labour hire (TSA being one of Direct Personnel's key clients) were insufficient to warrant refusal of the employees' request for conversion to permanent employment given their long periods of continuous service.

The time for considering reasonableness of Direct Personnel's decision to refuse the applications was in January 2003 (the time when elections by the employees were made). This was well before the time when TSA announced a change in policy away from labour hire and towards direct employment.

The Commission determined that the individual circumstances of both employees had not been sufficiently considered by Direct Personnel and that both employees should be converted to either full time or regular part time employment with effect from May 2003.

Issues and Implications

- Before making a decision about new business initiatives, a check should be undertaken of awards and agreements to identify whether they contain security of employment provisions and what implications there may be for contracting and labour hire arrangements.
- If, under an award or agreement, an employee makes an election to convert from casual to part time or full time employment, an employer should take into account the individual circumstances of the employee as well as business and operational considerations before making a decision.
- In recent years, unions have been active in seeking to insert security of employment type provisions into industrial instruments. If such provisions become widespread, the benefits of using labour hire agencies may be reduced.



What About OHS?

Both a principal and a labour hire company may be prosecuted if a WorkCover agency believes there has been a failure to ensure safety of a labour hire employee. Courts are by no means willing to hold only one party responsible.

This was demonstrated in a case last year, *Labour Co-operative Limited v WorkCover Authority of New South Wales* (2003) NSWIRComm.

The employee, Ms Lister, asked CSR Timber Products for a job. CSR directed her to register with Labour Co-operative. Labour Co-operative gave Ms Lister a general induction and training but she was not alerted to any specific hazard in the area that she would be working in. Ms Lister commenced work at CSR. She was working with heavy machinery and was subsequently injured.

Prosecution against Labour Co-operative

Labour Co-operative submitted that CSR had a sufficient degree of control to make Ms Lister an employee of CSR. This was because CSR had total control over the manner in which she would perform her work, the type of work that she was to perform during each shift and the place at which she was to perform her work.

The Commission disagreed and confirmed that in the absence of discussions between CSR and Ms Lister regarding the wage to be paid, work to be performed, hours of work or conditions of employment generally, there was no legal relationship of employment.

While the existence of control was significant, it was not the sole criteria by which to gauge whether an employment relationship existed. Mere on the job direction of a person did not necessarily make that person the employee of the person directing him or her.

Although CSR had control of the premises, the Commission found that Labour Co-operative had a very real measure of control to ensure such matters as instruction, training,

supervision and workplace practices would not cause a safety risk to Ms Lister. That measure of control was simply the ability to refuse to supply its employees to CSR until “appropriate and sufficient measures to ensure safety were implemented”.

The Commission found that the defendant failed to pay attention to the instruction, training and supervisory needs of Ms Lister in being sent to operate heavy machinery. It was plain that Labour Co-operative merely satisfied the call by CSR for a labourer and, apart from providing induction to occupational health and safety measures in a general sense, had left it entirely to CSR to train and supervise Ms Lister.

The Commission said that the approach of Labour Co-operative was contrary to its responsibility for the workplace safety of its employees. It represented a failure to meet its special responsibility as a labour hire company “to take positive steps to ensure that the premises to which its employees are sent to work do not present risks to health and safety” and “to ensure that their employees are not instructed to, and do not, carry out work in a manner which is unsafe”.

Labour Co-operative was fined \$90,000.

While the existence of control was significant, it was not the sole criteria by which to gauge whether an employment relationship existed. Mere on the job direction of a person did not necessarily make that person the employee of the person directing him or her.

Prosecution against CSR

A prosecution had previously been launched against CSR as principal. In the prosecution against CSR, the Commission said:

“There can be no sharing out, even through contract, of the absolute obligation for safe working by a defendant employer conducting its undertaking at its place of work to another organisation who, as a labour hire firm, sits as the nominal employer of the employees at a defendant’s work site. Evidence revealed CSR held full responsibility for the design of this work method and the machine’s safety features. Although the defendant involved the labour hire firm in its training programme for site safety, as a large organisation it must accept it cannot pass over its obligations for site safety to such as the labour hire firm. Each organisation must meet its own obligations whether it be as the employer or as the contractor”.

CSR had been convicted and fined a sum of \$150,000.

OHS Lessons and Tips

For Labour Hire Companies

- Take pro-active steps to manage safety of labour hire employees at your customer's premises.
 - Ensure inductions are undertaken and tailored to the work to be done.
 - Ensure risk assessments are carried out which specifically identify any hazards and risks the labour hire employee might encounter at the customer's premises and how those hazards and risks are to be managed.
 - Inspect the premises where the employee is to work, clearly define the scope of work to be carried out by the employee and instruct the employee only to perform work within that scope
- and to perform no other work unless authorised by the labour hire company.
- Provide a mechanism whereby labour hire employees can feed back any issues or concerns about safety to the labour hire company.
 - Provide a labour hire company representative to carry out ongoing reviews and a monitoring/inspection role during the course of the labour hire employees' assignments.

For the Principal

- Ensure persons provided by the labour hire company are competent, experienced and have the qualifications to carry out the work in question.
- Ensure induction and training is carried out specific to the work

to be performed by the labour hire employee.

- Ensure the labour hire employee is specifically instructed as to safety practices, policies and procedures and how to apply and use them.
- Ensure labour hire employees are made aware of risks/hazards at the workplace and measures to eliminate or control those risks/hazards.
- Ensure the employee is supervised in order to properly police compliance with the company's safety policies, procedures and systems.
- Take steps to have a labour hire company no longer provide a particular labour hire employee if that employee fails to follow appropriate safety procedures.

Parliamentary Paper Recommends Review of Labour Hire

On 8 March 2004, the Federal Parliamentary Library released a research paper into labour hire in Australia. The paper suggests that a national inquiry into the labour hire industry is warranted in light of recent attempts by many States to review and/or control the industry.

The paper acknowledges that the employment placement services industry is a fast-growing industry which has achieved a 30 percent growth in income from 1999 to 2002 and which is likely to be a permanent feature of our modern labour market.

The paper notes that while governments generally accept the usefulness of labour hire as it provides flexibility for employers who need to meet limited periods of demand, there is concern about its use for particular workers over extended periods. The paper emphasises the fact that by

international comparisons, Australia has few formal restrictions on the use of temporary employment contracts. Chief among these are a lack of restrictions relating to the type of work the contract can cover, the area of economic activity and, most importantly, the maximum number of successive contracts and contract renewals permitted.

The paper cites major developments in New South Wales and Victoria that may lead to greater regulation of labour hire. The paper refers to the secure employment test case which is currently

before the Industrial Relations Commission of New South Wales (see the article "Employment Test Case in NSW" on page 3).

The paper also refers to the inquiry being undertaken into labour by the Victorian Parliamentary Committee on Economic Development. The Committee is required to provide findings on the extent and breadth of labour-hire employment in Victoria, the consequences of those findings and recommendations.

The details of the paper are: Shane O'Neill, "Labour hire: issues and responses", Research Paper No.9, 2003-04.

AIRC Issues Interim Order to Stop Outsourcing

On 17 March 2004, the Australian Industrial Relations Commission issued an interim order in favour of the Australian Manufacturing Workers Union (AMWU) to prevent Holden Limited from outsourcing the design and manufacture of certain disc brakes for a period of 4 weeks. The AMWU alleged that Holden had breached certain terms of the Holden Ltd Enterprise Agreement (2001-2004).

Commissioner Foggo held that there was enough common ground between the parties to raise serious concerns about a possible breach of the dispute resolution procedures of the Agreement. In light of the seriousness of the issues and the centrality of the consultative procedures in the Agreement the Commissioner felt that the issue of an interim order was warranted.

In addition to preventing Holden from taking any steps to outsource for a period of 4 weeks, the interim orders required Holden to provide the AMWU with documents relating to the alleged outsourcing and information on an internal review of the company's technical capacity to produce the disc brakes.

Lessons and Tips

- **Outsourcing initiatives generally affect the distribution of labour to be performed. If an employer wishes to introduce any outsourcing initiative, a check should be undertaken to ensure compliance with any applicable procedures in an industrial instrument requiring consultation with employees.**

Dispute – But Not With Your Employees!

Due to its influence over the employment relationship between a labour hire company and its employees, Telstra was found by the Australian Industrial Relations Commission to be party to a dispute between the CPSU and the labour hire company: *CPSU v DFP Recruitment Services and Telstra Corporation Limited* – see the *IR Bulletin*, November 2003, page 2, available on our website, www.bdw.com.

DFP Recruitment Services (Dorothy Farmer) provided employees to Telstra at a call centre in Ballarat. Telstra sought to significantly vary the availability requirements for Dorothy Farmer's employees. Failure by the employees to conform to the new requirements would potentially result in termination of their employment with Dorothy Farmer as their services would no longer be required by Telstra. The employees resisted the change.

In proceedings before the Commission, Telstra submitted that no grounds existed for a dispute between CPSU and Telstra and that an earlier finding of a dispute involving Telstra should be revoked. Telstra maintained that no employer/employee relationship existed between Telstra and the Dorothy Farmer employees. Telstra submitted that Dorothy Farmer was an unrelated corporate identity with whom Telstra had an arm's length commercial relationship.

Following earlier case law, the Commission held that a dispute can be found against a non-employer where the party holds a "vested interest in the employees of the employer because of the integration with its business."

The Commission found that in setting its availability requirements Telstra had the power to directly influence the relationship between Dorothy Farmer and its employees.

This, combined with the fact that the employment contract between Dorothy Farmer and the employees identified Telstra's control in relation to skills, work practices and remuneration, lead the Commission to find that Telstra was capable of being a party to the dispute.

EEO Liability Involving Labour Hire Employees

In 2003, the Industrial Relations Commission of New South Wales held that a casual worker engaged by a labour hire company was actually an employee of the "host" employer for the purposes of the worker's unfair dismissal application: *Nguyen v ANT Contract Packers Pty Ltd*.

In an earlier decision, *Elliott v Nanda and Commonwealth*, the Federal Court held the CES jointly and severally liable for sexual harassment of a job applicant it placed elsewhere. This decision has implications for labour hire companies in their placement of employees.

To protect both host employers and labour hire agencies in relation to EEO claims:

- both must take action if they become aware of EEO issues or complaints;
- both should ensure that the other has EEO policies and training in place;

- a written agreement should be entered into before the placement of any workers which clearly sets out the relationship between all parties; and
- host employers should ensure that their EEO and harassment policies are applied, in practice, to labour hire personnel.

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