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WHEN AN EMPLOYEE IS NOT AN EMPLOYEE, OR MAYBE IS...

SUBSTANCE WILL PREVAIL OVER FORM IN EMPLOYMENT DISPUTES

EMPLOYERS SHOULD BE WARY WHEN CONTRACTING OUT WORK

WHY IT IS MORE IMPORTANT TO BE WISE THAN TO BE RIGHT

We have often been requested to advise clients in a confusion over the existence or absence of an employment relationship, usually when there's trouble!

Our labour laws provide a presumption of employment under certain conditions. A "contractor" may under these conditions be protected under unfair dismissal provisions in law.

In a recent example, the Body Corporate of a residential complex had contracted a Caretaker to manage the complex. The complex was his only "client", and the relationship had endured for a period in excess of eight years. The Trustees had reacted to an invoice each month, albeit that the amount was consistent. It is relevant, also that the contractor was required to request permission to be absent on holiday, and that he reported on a regular basis to a member of the Trustees. He used the tools and facilities of the complex. In fact, the "business" of the contractor had been established purely for the purpose of fulfilling this function at the Complex.

At a moment the Trustees determined rather to employ a permanent resource. The Contractor was given notice that his service would no longer be required.

In the bunfight that followed, he argued that the relationship was substantively that of employment, and the "employer" was essentially dismissing him.

The "client / employer" claimed the parties had mutually agreed to an independent relationship. There was no written agreement, although the job had been scoped in a letter from the contractor to the client on the contractor's letterhead.

The moment gave pause to consider the issues in contract relationships, especially where a contractor is a small or sole proprietor, or where the relationship is visibly a dependent one:

- Give considerable thought to whether the relationship is really better served as an independent one, as the obligations of employment may well be justified by the additional command and control over the brand of the company;
- File a contract which clearly defines the form of the relationship and binds the parties to acknowledge independence. It is always easier to defend a perspective when it is clear both parties understood and agreed on the form of it;
- Then manage the relationship so as not to develop a reasonable expectation that the relationship has become one of employment. This can easily be achieved through a paper trail of invoices, and through requiring reports from the contractor on letterhead.

The best approach is to ensure that you have an open communication channel. Honest conversation is always better than the best contract.

By the way, the matter did not progress to litigation, but the real issue as usual was not about who was right, rather how the bunfight started in the first place...

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