

EFFECTIVE HIRING PRACTICES



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Agenda

- Employees not contractors.
- Hiring Practices.
- What to do next.

EFFECTIVE HIRING PRACTICES – EMPLOYEE OR CONTRACTOR (1)

- In many cases, employers do not spend sufficient time on establishing proper hiring practices.
- Sadly, many prefer to avoid the issue and hire contractors. However, in the longer term, this may create even bigger risk.
- Being a “contractor” can have many benefits.
- However, many “contractors” at law, may be regarded as “employees”.
- The distinction is important as an employee is told what to do and how to do it, whereas a contractor is told what to do.

EFFECTIVE HIRING PRACTICES – EMPLOYEE OR CONTRACTOR (2)

- The Courts have used tests to distinguish “contractors” from employees including:
 - “The Control Test”
 - “The Integration Test”
 - “Multiple Indicia Test”
- Wrongly categorising a “worker” as a “contractor” can bring the hirer into collision with the “sham contract” provisions in the *Contractors Act* and the *Fair Work Act*, with significant legal consequences.

EFFECTIVE HIRING PRACTICES – EMPLOYEE OR CONTRACTOR (3)

- Many laws deem some “contractors” to be “employees” for certain purposes
 - eg The *Workers’ Compensation Acts* and the *Superannuation Guarantee Act* effectively remove some of the “benefits” to employers in having a “contractor” on site.
- Once a relationship is determined to be an Employment Relationship and not a Contractor – Hirer Relationship, the “contractor” is deemed to be an employee for all purposes.

EFFECTIVE HIRING PRACTICES – EMPLOYEE OR CONTRACTOR (4)

- This re-definition exposes the employer to back claims for:
 - annual leave and leave loading;
 - long service leave;
 - personal leave;
 - notice or payment in lieu of notice;
 - redundancy pay;
 - Superannuation; and
 - Award rates of pay, including overtime and shift penalties.
- Fines for Award breach or breach of the “National Employment Standards” (“**NES**”) and/or fines for breaching the *Contractors Act* could occur.

WHAT COMPRISES THE “EMPLOYMENT” CONTRACT”? (1)

- The “Employment Contract” can be **written or oral** or **partly written and partly oral**. It can be a Formal Contract or a Letter of Offer.
- Many Employment Contracts, especially those that are not documented correctly, can have **implied provisions** in them.
- All Employment Contracts are underpinned to some extent by **laws** (statutes, regulations, by-laws).
- Many Employment Contracts are also underpinned by **Industrial Awards** and/or **Enterprise Agreements**.

WHAT COMPRISES THE “EMPLOYMENT” CONTRACT”? (2)

- Many employers have a Code of Conduct and / or **Company Policies** that may play a role in the employment relationship.
- In some instances, **custom and practice** in an industry may apply.
- Accordingly, it is important that all Employment Contracts are established in a systematic manner.

A METHODOICAL HIRING PROCESS (1)

- Many employers advertise then, at the last minute, think of the Letter of Offer / Contract of Employment and rush to document it.
- We suggest thinking about what you are doing: Getting the best person for the role. This requires:
 - Determining the Position Description;
 - Preparing an agreed list of the key requirements of those applicants who will make the short list, the KPIs and reporting lines;
 - Drafting the proposed Employment Contract / Letter of Offer;
 - Advertise the role **after** the above paperwork is in place.

A METHODOICAL HIRING PROCESS (2)

- When a short list is determined:
 - Train the selection panel, to ensure only questions relevant to the role are used and that no discriminatory questions are asked;
- Questions that can be asked are:
 - *“How much experience with [eg: name of computer program] do you have?”*
- Questions to be avoided include anything potentially (directly or indirectly) discriminatory:
 - *“When do you think you’ll be having a baby?”*
 - *“You don’t speak English as a first language. Where are you from?”*
 - *“Are you gay?”*
 - *“How old are you?”*

A METHODOICAL HIRING PROCESS (3)

- When the best candidate has been determined:
 - Make an **offer in writing**, enclosing the Employment Contract / Letter of Offer and the Position Description;
 - Have a clear closing date in the offer. Withdraw the offer if it passes the closing date or has a lapsing provision in the letter of offer;
 - Have a formal and documented induction system, so that the new employee is exposed to relevant employer Policies, culture and how tasks are undertaken;
- The offer of employment is an advertisement for the employer.
- Keep documentation on a secure personnel file.

A METHODOICAL HIRING PROCESS (4)

- The offer of employment should say:
 - *“We are delighted to make you the offer of employment on the following conditions.”*
- The offer of employment should **not** say:
 - *“We refer to your recent interviews and **confirm** the offer of employment of the role of [title].”*
- In the latter case, the offer of employment has already been made (especially if the employee has already started work) so any provisions in the letter they don't like are open to challenge. Real questions arise as to what are the actual terms of that employment.

A METHODOICAL HIRING PROCESS (5)

Pre-employment Medicals

- Some employers require pre-employment medicals. This opens up a range of legal issues and liabilities.
- The position is that pre-employment medicals are lawful if they are used to:
 - Determine the Applicant's capacity to fulfill the inherent requirements of the role; and
 - Provide a bench mark medical status in the event of later claims. For example in determining hear loss claims.
- One size does not fit all. The examiner **MUST** be given a copy of the Position Description and details of what the role actually requires.

A METHODOICAL HIRING PROCESS (6)

Pre-employment Medicals (Continued)

- Any adverse findings (especially if a disease is found) should be shared with the employee.
- However, this gives rise to whether the employee might assert that discrimination has occurred because of a disability or perceived disability. Reasonable accommodation may have to be offered.
- Problems also occur if drug use is revealed.
- Perhaps risk can be reduced by examining the 2-3 most suitable candidates. Then the employer can decide to take the most healthy. However, this is not always possible, especially in senior positions.

A METHODOICAL HIRING PROCESS (7)

Non-disclosure of medical condition

- Sometimes an applicant will not disclose a pre-existing serious medical condition. What can the employer do?
- If the medical condition goes to the employee's capacity to fulfill the inherent requirements of the role, then the employer may terminate the employment. However, the non-disclosure can't be trivial. Industrial tribunals generally take the view that wilful and misleading statements by applicants needs to be assessed on materiality.

A METHODOICAL HIRING PROCESS (7)

Non-disclosure of medical condition (Continued)

- It is often useful to have the following question and statement in an application form:
 - *“Are there any medical issues, physical or other impediments that affect you that may impact on your ability to fulfil the inherent requirements of your role? If so, please provide details. We reserve the right to have you assessed for your fitness for the role by a medical examiner of our choosing.”*

FALSE & MISLEADING REPRESENTATIONS (1)

- Employers are often exposed to litigation from promises or inducements allegedly made during the selection processes and which are not documented.
 - eg In *O'Neill v Medical Benefits Fund* [2001 FMCA 61] representations of secure, long term employment were made. O'Neill, was actively pursued by MBF to leave his current, secure employment and accept employment with it. Having signed the employment contract with MBF, O'Neill's position was subsequently downgraded and, within two years of commencement, his position was made redundant.

FALSE & MISLEADING REPRESENTATIONS (1)

- McInnes FM found that the representation as to secure, long term employment had been made with little regard to whether or not it was true. The overall circumstances of that case included the fact that the termination of the applicant's employment was not a genuine redundancy.
- For a decision that had an opposite result see ***Robertson v Knott Investments*** [2010] FMCA 142 (8 March 2010).

WHAT TO DO NEXT

- If you wish to properly manage the hiring of employees and the documentation of the employment relationship, but do not have the in-house skills and/or the time, then don't fudge the issue.
- Give us a call and we may be able to assist.
- **We can design a hiring practice and pro forma Letters of Offer and Standard Conditions of employment that are Award and legislation compliant and then train you / your staff in how to use them.**



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