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EMPLOYEE OR SELF EMPLOYED CONTRACTOR?

Whether a person is an employee and therefore subject to the rights and obligations set out in the various applicable Employment related legislation or an Independent Contractor and is a common consideration for many businesses. Too many of them get it wrong.

Southern Taxis ("Southern") operated a taxi business in Dunedin. They had the contract for Southern District Health Board and Dunedin Airport.

They had a number of Drivers they referred to as Commission Contract Drivers who were paid 40% commission of gross weekly fare takings.

Southern provided the drivers with a vehicle to use as a taxi for which all expenses were paid by Southern. The drivers had no control over fare settings or takings, interestingly enough they received payslips, they did not file their own tax returns and they were not invoiced for ACC levies. The drivers were on a rostered system which was produced by Southern each month. The Company provided a uniform although it was not compulsory, wearing Company ties was. Drivers logged on and off their computerised system and were monitored by GPS and had to notify them when they were taking their breaks which dispatch would record in their computer system. They recorded times and jobs in their logbooks. The Labour Inspectorate undertook an investigation. They found that the structure operated by Southern meant that the drivers were earning less than minimum wage.

The Inspector determined that the drivers were all Employees of Southern and accordingly arrears of wages under various provisions of the Minimum Wage Act, Wage Protection Act and Holiday's Act were payable.

The Court applied the well established tests. They refer to them as the intention of the Parties Test, the Control Test, the Integration Test and the Fundamental Test. The intention of the Parties Test is relatively straight forward. Some of the Employees had requested holiday and sick pay and one of them put in a claim for ACC. They had previously been Independent Contractors in the taxi industry and understood how it worked. Southern provided them with a vehicle and did not charge them a depot fee they charged Contractors. The Authority believed that this showed an intention more towards an Employee than a Contractor.

When applying the Control Test they looked at the extent of which Southern exercised control over the drivers. They determined that there was a significant degree of control over the driver's activities.

The Integration Test required analysis as to whether or not a worker was an integral part of the organisation. The Labour inspector determined they were part and parcel of Southern. They were needed in order to meet the Company's contractual obligations with Southern District Health Board and Dunedin Airport. The drivers were not entitled to use the vehicles to drive for other taxi companies and were not able to be hired to other drivers. The Authority determined they were an integral part of the organisation.

Lastly the Fundamental Test which simply required an examination as to whether the drivers were in business on their own account. What the Authority looked at was whether the drivers had assumed an element of financial risk as a result of participating in Southern including in its profit and loss. The Authority determined that they were not in business on their own account.

Even if they had had a contract in place that specified they were Independent Contractors it is unlikely they would have found to have been so. It is irrelevant what you put in the document and what label you allocate to someone that is working in your business. It is the fundamental relationship that will be analysed using the above tests.

Southern found out the hard way and not only were they ordered to pay holiday pay the difference between what was paid and minimum wage over a period of time they were also penalised for failing to have written Employment Contracts.

The Labour Inspector has applied for penalties to be awarded against the Directors personally.

That issue has now been appealed to the Employment Court and is yet to be heard.

If you operate your business either with a mixture of Employees and Contractors or just Contractors you need to make sure you get it right.

If you have any doubt please feel free to contact us should you require our assistance.

20 MINUTE FREE

**WANT to review your Family Trust structure?
 THEN call us and take advantage of our 20 Minute Free interview**