Sarah Wroe
Martelli McKegg | Auckland - New Zealand
Ph: +64 9 379 7333 | sew@martellimckegg.co.nz

CONTRACTING ACROSS THE TASMAN

When businesses decide to venture across the Tasman to set up a new Australian or New Zealand based office, it is sometimes in the belief that the easiest and best option is to start by engaging contractors. Employers can be forgiven for thinking that this would be preferable to getting to grips with employment law in the neighbouring jurisdiction and much easier than trying to understand different tax implications. Labelling an employee a "contractor" won't avoid the issue and could prove costly.

CASE STUDY

In the recent New Zealand case of ***Harrington v Flavour Creations Pty Limited***[1] a Brisbane-based company needed a new business manager for New Zealand. When Mr Harrington took on the role, it was originally in response to an advertisement for an employed position. In the course of negotiations, he agreed to accept an additional $10,000 per annum in return for taking responsibility for his own pay-as-you-earn tax (PAYE). Flavour Creations would engage Mr Harrington's company who would then pay him a salary after deducting PAYE. When Mr Harrington was later dismissed, he brought a personal grievance. The Employment Relations Authority (**ERA**) was asked to rule on whether there was an employment relationship before it could hear his claim for unjustified dismissal. There was some conflicting evidence for the ERA to weigh up, but Mr Harrington's evidence was that he believed that Flavour Creations' motivation for the payment arrangements was to avoid any difficulties due to differing tax laws, accident compensation deductions and KiwiSaver contributions. Mr Harrington maintained that he was an employee. The ERA agreed, rejecting Flavour Creations' argument that Mr Harrington was a contractor.[2]

The ERA referred to 3 tests:

- A control test – can the employer control what work is done and how it is done?
- The integration test – is the worker part and parcel of the organisation?
- The fundamental test – is the worker in business on his or her own account?

The ERA also considered the tax implications, the parties' intentions and how the arrangements worked in practice. In all respects, the facts pointed to an employment relationship. Mr Harrington's work day and activities were closely monitored. Flavour Creations determined what work he did, set key performance indicators for him and he was not free to work for anyone else during this time. He did not take advantage of any tax benefit for his company and no deductions or expenses were made by the company before his salary was paid.

Where a relationship is truly one of employment, rather than a contract for services, then a New Zealand employer will be subject to good faith obligations. Other statutory minimum requirements in relation to pay, leave and conditions also apply. The employer may have to make deductions from salary for KiwiSaver, Accident Compensation contributions and PAYE. Where these deductions are made late, an employer can face penalties and interest.

It pays to take advice from the relevant jurisdiction before taking on employees or contractors. In the case of ***Harrington***, the costs of litigation and any compensation that may be awarded could far outweigh the cost of taking the time to understand the legal requirements for employees/contractors in New Zealand.

[1] [2014] NZERA Auckland 151
[2] The ERA's decision is currently subject to appeal.