

Client Update

JUNE 2020

Triangular Arrangements Recognised – the Employment Relations (Triangular) Amendment Act 2019

OVERVIEW

‘Triangular’ employment arrangements, in which a worker is employed by one organisation but is under the direction or control of another, are becoming increasingly prevalent in New Zealand.

They are commonly found in sectors that use labour hire, have seasonal fluctuations or have temporary workforce needs. Triangular employment relationships have always been legal but have been criticised for being easily abused and for leaving workers without legal remedies.

Redressing these concerns, *The Employment Relations (Triangular) Amendment Act 2019* (the Amendment Act) is set to come into effect on 27 June 2020. The Amendment Act updates the *Employment Relations Act 2000* to provide more robust protections for workers by allowing them to join a “controlling third party” to a personal grievance claim.

ISSUES ADDRESSED

Some businesses have tried to avoid their employment obligations by using labour hire companies or staffing agencies. This has meant that labour hire or contract employees who want to pursue personal grievances against the controlling organisation have had to prove that the “real nature” of their relationship with that organisation is employment.

Two workers employed by a labour hire company, Solutions Personnel, were able to prove in *Prasad v LSG Sky Chefs New Zealand Ltd* that their work arrangement with a controlling third-party, LSG, was really an employment relationship.

The Employment Court was persuaded by the degree of control LSG had over the workers, the longevity and ongoing nature of the work relationship, and by the fact that (but for rates of pay) overall LSG treated labour hire workers no differently from its actual employees.

However, because each case turns on its particular facts, businesses involved in triangular employment arrangements have had no certainty about exposure to personal grievances.

THE CHANGES

The Amendment Act introduces section 103B to the *Employment Relations Act 2000*, making it easier for both employees and employers to join controlling third parties to personal grievance claims.

The new section allows:

- workers to join controlling third parties to a personal grievance claim, with a 90-day notification period
- an employer to join a controlling third party to a personal grievance proceeding it is facing, with a 90-day notification period, and
- the Employment Relations Authority and/or the Employment Court to join a controlling third party to proceedings at any stage.

If an application to join a controlling third party to a proceeding is granted, the Authority or Court must also consider whether to direct the parties to use mediation. Joining a controlling third party to an alternative dispute resolution process could introduce unfamiliar dynamics to that forum.

If the dispute ends up before the Authority or Court, a controlling third party may be ordered to contribute to any remedies awarded to a worker to the extent that it has caused or contributed to the worker's personal grievance. Contribution includes payments for lost wages, and compensation for hurt and humiliation and/or the loss of any benefit.

CONCLUDING COMMENTS

The Amendment Act provides greater certainty around employment rights, obligations and remedies. It is now clear that organisations that use labour hire companies, or engage temporary employees through agencies, will need to treat those workers as if they are direct employees.

Organisations using labour-hire and agency workers should carefully analyse every aspect of their engagement with the workers. Otherwise, they risk liability – including payments for hurt and humiliation compensation, and lost wages or benefits. Claims may prove costly if organisations are found to have caused, or contributed to, a grievance.

EPL insurers and brokers should assess whether policies cover, or are intended to cover, these claims.

Need to know more?

For more information please contact us.



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