



## **Business Risk – A Case Study**

Sometimes business risk can result from a company director's own negligent actions. Below is a case study that highlights the trouble found by an employer who created a large compliance risk for himself by changing the employment status of certain members of his staff without reviewing the appropriate legislation.

The Federal Magistrate's Court has ruled that a company director and human resources manager contravened provisions of the Workplace Relations Act 1996 when they attempted to change the company's sales team from being permanent employees to contractors and further paid them on a commission only basis.

The ruling came after one member of the sales team complained about his changed employment status to the Workplace Ombudsman. By the time the Ombudsman began prosecution, the employer was in liquidation. However, the Ombudsman prosecuted the employer's sole director and shareholder, as well as its HR manager, for the alleged breach of section 728 and section 901 of the Act.

The Court heard that in April 2003, the company's sole director was convinced his sales representatives were not performing and this was responsible for the employer's flagging fortunes. The director called the sales staff into a meeting and told them that the basis of their remuneration was changing and that they were to be remunerated on a commission only basis, which took into account only the sales that they made.

The commission only pay structure would come in after an eight-week transition period during which sales staff would be paid \$500 a week.

To effect this change, the director handed the sales team an independent contractor's agreement, which he had drafted and had been finalised by the HR manager. He asked them to sign and return their agreements within seven days.

The contractor's agreements contained substantially the same duties that the sales team were performing at the time, including the same reporting structure. However, it required sales representatives to take out their own indemnity insurance and to invoice the company for work performed. It also included a restraint of trade clause.



The employer engaged the sales team on these agreements for up to three months, until the Ombudsman began its investigations.

The Court held that the sales representatives remained employees for the period that the employer had treated them as independent contractors. However, they had been denied all the privileges of employment over that period, including having no leave entitlement or super contribution made. Because they were paid only by commission, they were also denied the minimum wage prescribed by their sales representatives' award.

For this reason, the Court ruled that the company had breached section 901 of the Workplace Relations Act 1996 that guarded against sham contracting. It had also breached the sales representatives' award and had denied employees more than \$30,000 in entitlements.

The Court noted that the director had spearheaded the company's conduct and had knowledge of each and every element of the employer's contraventions. He was therefore also personally liable for the contraventions under section 728 of the Act.

The Court also held that it was irrelevant that the HR manager did not initiate the contraventions or even know they were in breach of the Act. That he had knowledge of the facts that constituted the contraventions was enough to make him liable under section 728 as well.

Determining whether an engagement is an employment or 'arms length' independent contractor arrangement includes consideration of a number of indicators. This represents an increasingly complex area for business and significant costs can be incurred if these arrangements are not correctly defined and managed.

Currently the Independent Contractors Act 2006 in conjunction with the Fair Work Act 2009 defines the rights and obligations in relation to contractors. The legislation includes significant penalties (up to \$33,000 per breach) for sham arrangements, which can be sought by Fair Work Inspectors in relation to breaches. Courts also have significant powers in relation to reinstatement or injunctions against employer action where individuals are considered to be an employee.



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VECCI can provide employers with a Quick Guide that provides some general guidance on established principles considered by the courts in determining differences between employees and independent contractors. However, VECCI recommends seeking specific advice if there is any doubt about the true nature of these relationships.

For more information on VECCI's Quick Guides or to speak to an Industrial Relations or Workplace Relations Expert about issues in your business, call VECCI's Workplace Relations Helpline on 03 8662 5333 or visit [www.vecci.org.au](http://www.vecci.org.au). VECCI also has a team of experienced Workplace Relations Consultants and is affiliated with CCI Legal in order to assist your business in both assessing and managing your employment risks.