

## Employment and Industrial Relations Client Alert

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## Sham Independent Contractor Relationships

**The Federal Magistrates' Court has recently considered the defence to the prohibition on sham contractor agreements.**

It is unlawful to misrepresent an employment relationship as an independent contractor relationship. Such an arrangement is known as a sham arrangement. The *Fair Work Act 2009* (Cth) ("**FW Act**") provides for penalties of up to \$33,000 per offence.

A person can defend an allegation of a breach of the sham arrangements provision of the FW Act if they can demonstrate that, at the time the arrangement was entered into, they did not know, and were not reckless as to whether the contract was actually a contract of employment, rather than a contract for services.

In [CFMEU v Nubrick Pty Ltd \[2009\] FMCA 981 \(7 October 2009\)](#), two factory workers were hired by a Mr Noy (a manager at Nubrick) under what all parties concerned believed to be contracts for services as independent contractors. The workers' rate of pay was set at \$30 per hour, out of which they were required to pay tax. They received no superannuation, annual leave or personal leave entitlements. The workers were also required to invoice Nubrick for work done and provide Nubrick with an ABN. The contracts permitted the workers to use company equipment. The workers had no qualifications and did not provide Nubrick with any skilled labour.

In assessing whether a person is an employee or a contractor, the courts use what is referred to as the mixed-factor test, and analyse:

- the way in which the person is paid;
- the level of control over the person;
- the ability of the person to delegate their duties or to work for another principal;
- whether the person pays their own tax, superannuation and insurance;
- whether the person accrues leave with the principal;
- the level of skill the person brings to the engagement; and
- whether that person is required to supply their own tools and equipment.

Each case will be assessed in the circumstances.

After assessing the circumstances, the Court found the Nubrick contracts should have been properly classified as contracts of employment. However it also attributed significant weight to the fact that the parties, at the time the contracts were entered into, believed that they were contracts for services.

The CFMEU argued that Mr Noy had been reckless as to the workers' entitlement to superannuation under the contracts. The Court, however, disagreed. While Mr Noy conceded in cross-examination that he was *now* aware of the risk of the workers being properly classified as employees, the Court found that that knowledge of substantial risk, harm or illegality of the contracts was required *at the time* that the workers were engaged.

The onus still remains with the employer to establish that it honestly believed there to be no risk, harm or illegality in engaging a person as a contractor. Employers should seek legal advice before engaging independent contractors to reduce the risk that the arrangements may be considered to be sham arrangements.

For further information please contact a member of Russell Kennedy's Employment & Industrial Relations Team on (03) 9609 1555

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