

Is a property practitioner an employee? Part 2

Last week we started to discuss an important issue that arises from a Property Practitioner's (PP) letter of employment (LOE), being whether or not a property practitioner is an employee? Refer back to that post for information relating to relevant sections in the Labour Relations Act.

This week, we turn our attention to some of the tests applied by the Courts when determining if someone is an employee or independent contractor. It is important to note, that the discussion that follows in no way purports to be legal advice but is merely for information purposes. You are required to seek the advice of a labour law professional or consultant for actual legal advice.

The Courts look to discover the true essence of the relationship between the parties (employer and employee). Let us summarise what the Courts have indicated:

1. One of the most important issues relates to supervision and control. In other words, the greater the degree of supervision and control that the employer exerts, the more it suggests a relationship of employment between the parties, as opposed to the "employee" being an independent contractor. A relationship of employment indicates that the employer has the right to instruct the employee what has to be done and how the work is to be performed.
2. An employee is contracted to render a particular service to the employer, as defined in the employment contract and the employer can then direct the employee to do what the employer requires, whereas an independent contractor is contracted to perform a particular job of work.
3. Following on from this point, an employee must follow the lawful instructions of the employer. If you are employed to work in finance and your employer wants to move you to marketing, then you cannot refuse to do so. An independent contractor is governed by the contract entered into with the client (employer). As an example, if you are contracted to build a wall, the client (employer), cannot instruct you what to do, as long as you are doing the work according to specification.
4. An employee must be available to do their work during specified times, for example, 8am to 5pm, Monday to Friday. An independent contractor's work will be governed by the contract, not by the instruction of the client (employer). Therefore, an independent contractor may perform the work that they have been contracted to do, at times that are normal or usual working hours.
5. An employee must perform the services that they are required to do, personally. Hence, you cannot send a family member to work in your place. An independent contractor does not have to perform the work personally, as long as the work gets done. For example, a plumber may send one of their staff members to fix the leaking tap and not necessarily do the work themselves.
6. An employer may decide to use or not use the services of an employee. As an example, if an employer tells an employee to go home and come back to work the following week, then employee must do so. An independent contractor would have to deliver the specified work in the specified time frame. As the independent contractor is not under the supervision and control the client (employer), the employer is not able to tell the independent contractor to go home and come back the following week. Their relationship is governed by the contract that they have entered into.

There are various other tests that the Courts apply, but those tests are not important for the purpose of our discussion. Considering the points mentioned above, what

the Courts seek to do, is understand the relationship between the parties. Is the relationship one of employment or is the relationship akin to that of an independent contracting relationship.

As mentioned last week, if the relationship is one of employment, then it means that there is whole host of legislation that would apply to and govern the relationship.

More about this next week.