

'Acute' changes to triangular employment relationships

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Organisations that use workers provided by labour hire agencies or specialist contractors will need to be mindful of the implications of the new Employment Relations (Triangular Employment) Amendment Act 2019 (Act), passed recently on 27 June 2019. The new law will allow the employee in a triangular employment relationship to join the third party client or end-user organisation to the employee's personal grievance against their employer.

Triangular employment relationships are more commonplace in the modern labour market. They arise where an employee is employed by a company, such as a labour hire company or a recruitment company, but the employee works under the control or direction of a third party. It may be short-term, such as the provision of a temp worker, or a long-term arrangement.

The Act uses the definition 'controlling third party' to define the client or host company in the triangular relationship. The controlling third party must have a contract or arrangement with an employer under which an employee of the employer performs work for the benefit of the controlling third party. The controlling third party must exercise, or be entitled to exercise, control or direction over the employee that is similar or substantially similar to the control or direction that an employer exercised (or is entitled to exercise) over an employee. In some situations this definition may capture secondment arrangements and is likely to extend to a wider range of situations, such as where any business contracts for the specialist skills of an individual employed by another business.

Process and remedies

Certain steps must be taken before a controlling third party can be joined in an employee's personal grievance proceedings. First, the employee must raise a personal grievance with their employer relating to an action alleged to have occurred whilst they were working under the control or direction of a controlling third party. Then either the employee or their employer must, within 90 days of the personal grievance being raised, notify the controlling third party that they consider that such party has caused or contributed to the grievance.

If proceedings are filed, then the Employment Relations Authority (Authority) may, on application by either party, join the controlling third party to the proceedings. The Authority must grant the application if it is satisfied that the controlling third party was appropriately notified of the grievance, and that there is an arguable case that their actions caused or contributed to the grievance. If the Authority grants the application, it must consider whether to direct the three parties to mediation.

The Authority will have jurisdiction to apportion responsibility, liability and awards between the employer and the controlling third party. It must award remedies based on each party's contribution and it can order the controlling third party to reimburse the employee for any lost wages or salary, or to compensate the employee for any humiliation, loss of dignity and injury to feelings they have suffered.

Implications

At present, an employee can only bring a personal grievance against their employer. To bring a claim against the controlling third party, the employee must first prove that they are an employee of that third party. Such claims are often difficult to make out as they require the application of a number of legal tests. However, the Act cuts across this and will make the process much easier for employees.

There is some uncertainty as to what the Act means in terms of the controlling third party's obligations to the employee. We do not consider the employee will need to be treated in a similar manner to the controlling third party's other employees. But we expect potential redundancy situations to cause the most problems. For instance, where the controlling third party decides that they no longer have work for the employee, will it be lawful to simply direct their employer to take them back. We think it will but recommend that the controlling third party first enquire what this will mean for the employee's ongoing employment and, if their employment will be terminated as a result, consider taking the additional step of consulting with the employee. Ultimately, for a controlling third party to be liable, it must have acted unjustifiably. Therefore, it should act fairly towards the employee and in accordance with the terms of the contract it has with their employer.

Undoubtedly, the Act will have far reaching implications for employers who use third party labour, whether on a temporary or long-

term basis. Third parties will no longer be able to hide behind employers in order to protect themselves from personal grievance claims. They should remain alive to the possibility that workers within their control and direction could bring a claim against them, and that they could be drawn into proceedings and held liable.

The Act will come into force on 27 June 2020 or earlier by Order in Council. This provides a lead-in time for MBIE to prepare for the change and to draft regulations. We will keep you updated on timing but we expect that at least three months' notice will be given of the date the Act will apply from. In the meantime, we recommend that employers and controlling third parties consider the Act's implications for them and their practices. We would be happy to assist with this.

This update was written by [Sherridan Cook](#) (partner), Lorraine Hercus (senior solicitor) and Gabrielle Lintott (law clerk).

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