

Three's a crowd: developments in labour hire and tripartite employment arrangements

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Employment practices have not been immune to the effects of the so-called "gig economy" and there is a growing trend in engaging workers on an "as-needed" basis. Labour hire companies, although not a new industry, have been quick to capitalise on this, hiring out their workers to clients without the need for a direct contractual relationship between the worker and the end user.

While many of these practices are lawful and benefit all parties, they are open to abuse and can be problematic from an employment law perspective. As a result the Employment Court and the Labour Government has made moves to protect the rights of workers in these arrangements, as outlined below.

In *Prasad v LSG Sky Chefs New Zealand Ltd*, E tū union took a case against LSG on behalf of two workers who were engaged by labour hire company, Solutions Personnel. Solutions Personnel then contracted with LSG for the workers to perform work for LSG.

The Employment Court found that in spite of the contractual arrangements (or lack thereof) between the parties, the true nature of the relationship between LSG and the workers was that of an employer and employee. This finding was based on a variety of factors, including the degree of control LSG had over the workers, the longevity and ongoing nature of the relationship (ie the workers expected to be given work and LSG expected the workers to perform it personally), the fact LSG usually contacted the workers directly, and overall LSG treated labour hire workers no differently to its actual employees, except for the fact that labour hire workers were paid less.

Essentially, this case closes a loophole for companies seeking to avoid employment-related obligations through the use of labour hire companies. While this is a big win for labour hire workers in exploitative relationships, this case may have more far-reaching effects for legitimate, short-term labour hire workers.

Likely in response to *Prasad* and situations like it, a new Members' Bill was introduced to Parliament by Labour MP Kieran McAnulty. The Employment Relations (Triangular Employment) Amendment Bill has two primary purposes. First, to allow employees who are employed by one employer (the "primary employer"), but are working under the control and direction of another business or organisation (the "secondary employer"), the right to coverage of a collective agreement covering their work for the secondary employer. Secondly, to give such employees the right to join their secondary employer to a personal grievance claim against the Primary employer (if that personal grievance claim has also been raised with the secondary employer).

In its current form, the Bill's definition of "secondary employer" is a person who "exercises or is entitled to exercise control or direction over the employee equivalent or substantially equivalent to that which would normally be expected of an employer". This definition may be problematic for all businesses that engage labour hire workers, as it is broad enough that it could be interpreted to include legitimate short-term use of labour hire personnel or temporary workers.

Although it does not form part of Labour's official employment policy, given its increased union coverage and the fact it reflects the employee-friendly principles from *Prasad*, it is possible the Bill will pass in some form. It will likely be referred to the Select Committee alongside the recently introduced Employment Relations Amendment Bill.

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