

**FAIR WORK OMBUDSMAN v QUEST SOUTH PERTH HOLDINGS
PTY LTD & ORS (P38/2015)**

Court appealed from: Full Court of the Federal Court of Australia
[2015] FCAFC 37

Date of judgment: 17 March 2015

Date special leave granted: 14 August 2015

This application concerns the proper construction of s 357(1) of the *Fair Work Act 2009* (Cth) ('the Act') which provides: '*A person (the employer) that employs, or proposes to employ, an individual must not represent to the individual that the contract of employment under which the individual is, or would be, employed by the employer is a contract for services under which the individual performs, or would perform, work as an independent contractor.*'

The appellant claimed that the first respondent ('Quest'), an operator of a business providing serviced apartments, contravened s 357(1) by making representations to two housekeepers employed by it to the effect that they would not be (and later that they were not) its employees, but independent contractors performing work at its premises. The housekeepers were first employed by Quest in 2007. In October 2009, Quest entered into an agreement with the second respondent ('Contracting Solutions') by the terms of which Quest engaged Contracting Solutions to provide "the administrative management of contractors". The object of the exercise was to have the existing housekeepers of Quest continue to perform the same work for Quest as they were then performing, but as independent contractors under Contracting Solutions' system and not as employees. A number of representations were made to the employees urging them to sign up to the new system and stressing the asserted benefits of "converting" to being independent contractors.

The primary judge (McKerracher J) dismissed the claims against Quest and Contracting Solutions pursuant to s 357 in relation to the representations made to the housekeepers.

On appeal to the Full Federal Court (North, Barker and Bromberg JJ) the appellant contended that an actionable representation was not confined by s 357(1) to a mischaracterisation of the contract between the employer and employee, but included a representation that the employee was an independent contractor, including an independent contractor whose contract was with a third party, when in fact that person was the employee of the representor.

The Court rejected that argument, finding that the subject matter, to which an actionable representation under s 357(1) must be directed, is the nature of the contract between the representee (the employee) and the representor (the employer). This construction was based upon the text of the provision and a consideration of the legislative history and relevant extrinsic material, including explanatory memoranda and regulation impact statements of predecessor legislation.

While acknowledging that it could be argued that this construction failed to achieve the beneficial purposes of Division 6 of the Act, the Court stated that there were two answers to that argument. First, at least in relation to situations where an employer seeks to convert its employee or former employee into an independent contractor (including through triangular contracting), another provision (s 359 of the Act) could provide relief. A second and complete answer was that whilst a Court's approach to construction should strive to give effect to the evident purpose of the legislation, it must nevertheless arrive at a construction consistent with the terms of the legislation. The Court did not accept that the construction for which the appellant contended was consistent with the terms of s 357(1).

In this matter the 1st respondent has not participated in the appeal. The 3rd respondent has filed a submitting appearance.

The ground of appeal is:

- The Judges of the Full Court of the Federal Court erred at law in finding that a misrepresentation by an employer to a person who is, in truth, its employee that the person is performing work as an independent contractor under a contract for services:
 - (a) is only actionable under s 357(1) of the *Fair Work Act 2009* (Cth) if the sham contract for services is made directly between the employer and the employee; and
 - (b) is not actionable under s 357(1) of the *Fair Work Act 2009* (Cth) if a third party is interposed into the sham independent contractor arrangements (such as when the employee provides services through his or her own company or, as in this case, the services are provided via a labour hire company).