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SECRETARIAT

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PRESIDENT'S MESSAGE

Dear Members,

I know it is cliché, but where has another year gone? As I foreshadowed, it will be necessary for members to consider a change of name for the Society from the Industrial Relations Society of South Australia to the South Australian Labour and Employment Relations Association. This is in light of the change of name of the peak national body to the Australian Labour and Employment Relations Association. Early in the New Year, Members will be surveyed about the proposal. We will also ask Members to suggest topics for future seminars. The Society will soon publish details of excellent seminars it is facilitating in the first half of 2014.

I wish all Members and their loved ones a happy, safe and prosperous festive season and New Year.

Best wishes,

Craig Stevens
President IRSSA

DID YOU KNOW?????

The South Australian Law Society has confirmed that all IRSSA seminars are recognised as CPD activities for the purposes of Practising Certificate requirements in South Australia. Legal practitioners in South Australia can claim 1 CPD unit for an active hour at an IRSSA seminar.

When does a workplace injury arise "in the course of employment"?

BY KYLIE DUNN, IRSSA COMMITTEE MEMBER

In *Comcare v PVYW* [2013] HCA 41, the High Court overturned a decision of the Full Court of the Federal Court which had found in favour of an employee who suffered physical and psychological injuries whilst having sex during a work trip.

The employee was employed by a Commonwealth government agency and was directed by her employer to visit a country town in New South Wales to conduct budget reviews and provide training to staff. The employee was required to stay overnight and her employer arranged for her to stay at a motel.

During the evening the employee arranged to meet with a male acquaintance; they had dinner and the employee then invited him back to her motel room. The employee sustained injuries whilst having sex when a glass light fitting above the bed fell from the wall.

The employee brought a workers compensation claim under the *Safety, Rehabilitation and Compensation Act 1988* (Cth). The claim was initially rejected by the compensating authority on the basis that the employee's injuries did not arise out of, or in the course of, her employment. The Administrative Appeals Tribunal subsequently upheld Comcare's decision to reject the employee's claim for compensation.

The employee then successfully appealed to the Federal Court. Justice Nicholas found that the injuries were sustained in the course of employment by virtue of the fact that the employer had directed the employee to be at the particular place, being the motel room, where the injuries were sustained.

Justice Nicholas considered that an employer who expressly or impliedly induces or encourages an employee to be present at a particular place away from their usual place of work will be liable for any injury suffered by the employee while they are present at that particular place, unless the employee engages in gross misconduct. This reasoning was upheld by the Full Court of the Federal Court.

On appeal by the compensating authority, the High Court rejected this view. The High Court considered that for an employer to be liable under workers compensation legislation it must have induced or encouraged the employee to engage in the particular conduct or activity which resulted in the injury.

In this case the High Court found that the employer had not induced or encouraged the employee to have sex (which was the activity which led to the employee's injuries) and accordingly the decision of the Full Court of the Federal Court was overturned.

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This decision clarifies that an injury will be compensable if it arises out of or in the course of an employee's employment. This test will only be satisfied if the employer has induced or encouraged an employee to engage in a particular activity which results in injury.

Taxi Driver is not an employee: A look at *Voros v Dick* [2013] FWCFB 9339

BY KAYE SMITH, IRSSA VICE PRESIDENT

Providing definitive advice as to whether a particular relationship is one of employment or not, is often a difficult exercise. That is because much turns on how the relationship operates in practice, despite the label assigned to the relationship by the parties. This article addresses the recent decision of *Voros v Dick* [2013] FWCFB 9339, where the Full Bench of the Fair Work Commission looked at the nature of an arrangement between a taxi driver and Mr Voros, the owner of a set of taxi plates. This was for the purpose of determining jurisdiction to hear a claim for unfair dismissal brought by Mr Dick asserting he was an employee.

At first instance, Commissioner Ryan determined Mr Dick was an employee and entitled to protection from unfair dismissal. The decision was appealed, and overturned. The Full Bench decided that the Commissioner did not reach the right conclusion on the facts, and that the '*fundamental elements of an employment relationship did not exist*'. The relationship was not a contract *for* services (independent contractor arrangement) either, but rather one of bailor and bailee pursuant to a contract of bailment.

Facts

The facts were these:

- Mr Dick, an experienced taxi driver, began driving for Mr Voros in 1996. Mr Voros leased plates from one Mr O'Callaghan. Mr Voros entered into arrangements with each of Mr Callaghan and Mr Dick such that they would be the drivers of the taxi;

- The arrangements made between Mr Voros and Mr Dick were all verbal. Mr Dick would drive the taxi during the daytime and Mr O'Callaghan would drive the taxi during the night;

- Mr Voros and Mr Dick shared the takings from the taxi, with some disagreement as to the ratio but on the evidence, it was determined to be Mr Voros 52% and Mr Dick 48%;

- The trip sheets recorded a range of data relating to the taxi use, including start and finish times, distances travelled, fares taken, amount spent on fuel, condition of the taxi and the driver's details (which included his ABN);

- Mr Dick would actually pay for the fuel, either out of the day's cash takings or out of his own money, and claim that as a reimbursement from Mr Voros;

- Mr Voros maintained the taxi and kept it registered, insured and in running order, and repaired the taxi if damaged at his cost;

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- Mr Dick was not registered as a business until around 2000, when at Mr Voros' request he supplied an ABN;
- Mr Dick was not given any form of paid leave;
- No tax was deducted from Mr Dicks' earnings, nor was tax paid on his behalf;
- Mr Voros did not make any superannuation payments on behalf of Mr Dick;
- At the commencement of the arrangement Mr Voros would put aside $5 per week and pay $250 to Mr Dick at the end of the year. Mr Voros described this arrangement as a rebate of rental. Mr Voros ended this arrangement in about 2008;
- The relationship between them ended on 5 December 2012 when Mr Voros sent Mr Dick a text message "*due to your actions you no longer have a car*' after Mr Dick apparently fell behind in payment of 'hire fees' under the 'hire agreement'; and
- Mr Dick was also the tenant in a house owned by Mrs Voros. In 2012 following a dispute about unpaid rent and the condition of the house Mr Dick was given notice to quit the house. That dispute was taken to VCAT.

The evidence before the Commissioner at first instance was that Mr Dick was free to perform as much or as little work as he liked. He did so when, where and for whom he saw fit, without any control by Mr Voros. The arrangement was not one where Mr Dick performed work for Mr Voros. Rather, the taxi service was a contractual arrangement between Mr Dick and the customer receiving the service. There was a distinct lack of obligation on Mr Dick to perform for Mr Voros.

There was also an absence of payment to Mr Dick for the provision of the work. Money passed the other way that is, by Mr Dick to Mr Voros of an agreed percentage of fares (less fuel) where the fares represented the hire or rental of the taxi. The error in the Commissioner's approach, according to the Full Bench, began with use of common law criteria to distinguish employment from independent contractor relationships, when the real question to be determined was whether Mr Dick was an employee. In circumstances where there was no contract such that Mr Dick was engaged and paid by Mr Voros for the work, the relationship could not be one of employment nor on an independent contracting basis.

Conclusion

The case provides a useful and logical outline of the correct approach to considering whether or not a relationship is one of employment.

Essential to the employee employer relationship is the 'work wages bargain.' That is, where one party is obligated to perform work or services reasonably demanded under the contract, and where the other is obligated to pay for that work or those services.

In this case, none of the services were 'for the benefit' of Mr Voros, but rather in a location and a time of Mr Dick's choosing without reference to Mr Voros, for the customer. The Bench's conclusions were in line which what it described as "a long line of authority" concerning the relationship between taxi owners and taxi drivers. However the Bench was also careful to caution that this did not preclude the possibility for taxi owners to engage drivers as employees.

Inadequate policy: inadequate protection. Oracle found vicariously liable for employee's sexual harassment.

By Sonia Albertini - Special Counsel, Minter Ellison

The recent decision of *Richardson v Oracle Corporation Australia Pty Limited* [2013] FCA 102 highlights the importance of having a tailored sexual harassment policy in place.

Ms Richardson and Mr Tucker were employed by Oracle as part of a team established to bid for a multi-million dollar contract. During the course of their employment, Mr Tucker made inappropriate comments to Ms Richardson, including:

- stating they must have been married in a previous life because they fought so much;
- stating the sex in that marriage would have been 'hot';
- putting a sexual spin on seemingly innocent remarks;
- repeatedly pursuing dates;
- telling her he would have kissed her if she went out with him;
- inviting her for a 'dirty weekend' together; and
- telling her he was thinking about her legs wrapped around him.

The Federal Court held Mr Tucker's conduct amounted to sexual harassment in contravention of section 28B of the *Sex Discrimination Act 1984* (Cth).

Ms Richardson claimed that Oracle was vicariously liable for Mr Tucker's actions as he was their employee. Under the Act, an employer is liable for the actions of employees unless the employer '*took all reasonable steps to prevent the employee… from doing acts of [that] kind*'.

Oracle asserted that it took all reasonable steps, and in doing so relied on:

- a *Code of Ethics and Business Conduct*, which included a global policy on sexual harassment;
- an online sexual harassment training program required to be completed by employees;
- prompt investigation of Ms Richardson's complaints by Oracle; and
- Mr Tucker was dealt with sternly by being given a final warning.

Despite all of this, the Federal Court held Oracle did not take all reasonable steps. The Federal Court explained that the policy:

- did not refer to the Act as the legislative foundation for sexual harassment;
- did not clearly express that the conduct was against the law; and
- did not point out to employees that an employer could be vicariously liable.

The Court concluded that these shortcomings were necessary to notify employees of the consequences of a policy breach, and demonstrate the employer's interest in strict compliance. Further, these were simple inclusions.

Ms Richardson was awarded $18,000 compensation as a result of Mr Tucker's conduct. This is significantly lower than we have seen in cases such as *Poniatowska v Hickinbotham* [2009] FCA 680 largely because Ms Richardson maintained a continuing ability to work, obtained similar paying employment elsewhere and could not establish Mr Tucker's conduct caused her to incur the medical expenses.

The case highlights the importance of taking all reasonable steps. A tailored and detailed sexual harassment policy is a simple, necessary step that employers can, and should, implement to stamp out sexual harassment in the workplace.