



INDUSTRIAL RELATIONS NEWSLETTER

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- When do award provisions and terms apply to an employee?
- Who or what is a contractor?

WHEN DO AWARD PROVISIONS AND TERMS APPLY TO AN EMPLOYEE?

The award system changed in January 2010 but the principles of application of awards still apply and those arise from previous decisions of the Tribunals and Courts.

Awards set out the work that it applies to and the award provisions become applicable to an employee when they perform the work that is designated by the award and its coverage and there is often further clarity in the classification structure of the award.

The legality is that the title of the employee is irrelevant and the issue that decides the coverage of an award is “the major and substantial role of the employee” and if the employee performs the work as designated by the award as their major and substantial role then the award provisions will apply.

It does not matter what the employee is paid or what they are called or titled the issue is does the employee perform the “major and substantial role” of their work as set out in the award and as designated by the terms of the award.

For example an employee can have the title of “account manager” or “sales and development manager” or “marketing manager” and there does not appear to be a classification in an award for an account manager or sales representative or marketing manager but the legal issue is the “major and substantial role” or work of the employee.

The deciding factor in this example is and this is the wording of the Commercial Sales Award 2010:

“Commercial Traveller means a person employed, substantially away from the employer’s place of business, for the purpose of soliciting orders for, or selling articles, goods, wares or merchandise or material for wholesale sale, for resale, or for use in or in connection with the production and/or preparation and/or distribution of commodities for sale by the customer.”

So if the employee is performing those duties or any of them as their “major and substantial role” of work then the award provisions of the Commercial Sales Award 2010 will apply to the employee.

But the wording of the clause also states “a person employed, substantially away from the employer’s place of business etc.” and that provision is also applicable.

The wording of the above clause is very broad in its effect and coverage and will be interpreted as to its ordinary meaning the same as any other award provision as to coverage of the award.

However if the employee is managing the sales operations and does so from the office of the Company and occasionally visits clients or negotiates contracts with the clients of the Company then the employee will not be covered by that award as they are not “employed, substantially away from the employer’s place of business”.

Another example of an “account manager” is an employee employed in the accounts section of a Company who monitors the progress of work performed for the clients of the Company and contacts the clients to ensure the work and product met the expectations of the client.

For example that employee may record the satisfaction of the clients and even confirm for the invoicing of the client or produce the invoices amongst other functions including the taking of orders or work for the clients of the Company.

Again the test is what is the “major and substantial” role of the work of the employee and is the work set out by an award and the award that would appear applicable is the Clerks – Private Sector Award 2010 which states as follows as to coverage of the award:

“clerical work includes recording, typing, calculating, invoicing, billing, charging, checking, receiving and answering calls, cash handling, operating a telephone switchboard and attending a reception desk.”

Another example of questions we get asked is the role of a “leading hand” and for example in a printing operation if the “major and substantial” work of the leading hand is the setting up of the machinery and the running of the machinery then the leading hand will be covered by the provisions of the Graphic Arts, Printing and Publishing Award 2010.

However if the “major and substantial” role of the leading hand is the monitoring and facilitation of the production operations and ensuring the quality of the work or product and the employee is not “hands on” in the production then the leading hand would not appear to be covered by that award.

In some awards such as the Manufacturing and Associated Industries and Occupations Award 2010 it makes reference to the classification of “leading hand” so they would be covered by that award but again the detail is set out in the classification structure of that award and again no matter what the title it is the work performed that is the issue as to award coverage.

Another example that we have dealt with is the issue of what is a manager and there is a significant number of precedents as to that issue but in the main it is based on the degree of the “control of the work” and operations of the Company they are responsible for and the employees performing that work and in some instances the right to “hire and fire” employees of the Company.

As with all these issues it is our experience that it is important to get advice as to the matters and our experience comes from cases we have lost or had to settle as a result of the employer having the view that they were complying with legislation and we have found that employers were or are often unaware of the legality of the distinctions and operations of awards and how they apply.

It is our preference that employers contact us before they move to employ an employee or before they take any form of disciplinary action against an employee and that is one of the reasons why we do not normally charge for phone advice unless it becomes in our view excessive as to the particular issue.

Our organisation exclusively represents employers unless natural justice demands that we act differently in a particular case and circumstances.

WHO OR WHAT IS A CONTRACTOR

There is a significant amount of case law in this issue as well and the example we use to assist employers is as follows:

I am putting a pool in my backyard and I have the builder with me and we are going over the drawings and I tell him that the hole will be dug out tomorrow and the reinforcing steel will be laid the next day and then the builder can do the pouring of the concrete two days after and I have arranged for the concrete trucks to be at the site at a specified time and the tiler is coming a week after that.

The legal test as to when there is a contractor and employer relationship or an employee and employer relationship depends on who is in “control of the work” and in the above example I am in “control of the work” and not the builder so will be probably viewed by a Court or Tribunal that the builder is in fact an employee and not a contractor.

In the alternative I say to the builder here are the drawings and there is where the pool is to be installed and it must be finished in 3 months then leave it to the builder then they are in “control” of the work and they are a contractor.

The tests used by the Courts or Tribunals are the same as that on the Australian Taxation Office website and failure to meet this criteria may result in the establishment of an employer and employee relationship and the award provisions will apply as well as taxation provisions.

The criteria are as follows:

Independent Contractor

An independent contractor is an entity (such as an individual, partnership, trust or company) that agrees to produce a designated result for an agreed price. In most cases an independent contractor:

- is paid for results achieved
- provides all or most of the necessary materials and equipment to complete the work
- is free to delegate work to other entities
- has freedom in the way the work is done
- provides services to the general public and other businesses
- is free to accept or refuse work, and
- is in a position to make a profit or loss.

Employee

Generally, a worker is an employee if they:

- are paid for time worked
- receive paid leave (for example, sick, annual or recreation, or long service leave)
- are not responsible for providing the materials or equipment required to do their job
- must perform the duties of their position
- agree to provide their personal services
- work hours set by an agreement or award
- are recognised as part and parcel of the payer's business, and
- take no commercial risks and cannot make a profit or loss from the work performed.

WHO CAN I CONTACT FOR MORE INFORMATION AND ASSISTANCE?

If you would like to discuss any concerns you may have in relation to issues of employment or any other employment related issues you may have, please contact:

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