Turks LEGAL

INSURANCE ▪ COMMERCIAL ▪ BANKING

LEGISLATIVE DEVELOPMENTS

There are no legislative developments to report this month.

RECENT NEWS

Media release 6.11.19: Insurance and Care NSW (icare) has announced that Allianz, EML and QBE have been reappointed along with GIO (newly appointed) to provide claims management services for the NSW Treasury Managed Fund (TMF). The new contracts for existing claims managers will commence from 1 January 2020 with GIO to commence following implementation of the icare technology platform.

RECENT DECISIONS

- **Reality TV contestant found to be a 'worker'**
  Nicole Elizabeth Prince v Seven Network (Operations) Limited [2019] NSWWCC 313 (25 September 2019)
- **What constitutes disciplinary action under section 11A(1)?**
  Webb v State of New South Wales [2019] NSWWCCPD 50 (13 September 2019)
- **A day at the races**
  Scone Race Club Ltd v Cottom [2019] NSWCA 260 (31 October 2019)

RECENT DECISIONS

Reality TV contestant found to be a 'worker'

Nicole Elizabeth Prince v Seven Network (Operations) Limited [2019] NSWWCC 313 (25 September 2019)

Link to decision

Summary

The New South Wales Workers Compensation Commission recently found that a contestant on the reality TV show "House Rules" was a worker in the employ of Channel Seven for the purposes of the *Workers Compensation Act 1987* (NSW), despite a signed Agreement and Release expressly excluding an employment relationship and right to claim for loss and damage.

This is a topical reminder that the substance or reality of the relationship between parties is key, and the terms of any contract do not solely determine the nature of an arrangement.

Background

In 2016 Ms Prince and her friend applied to be contestants for "House Rules", which the arbitrator described as a home renovation reality show that pitches pairs of contestants against others in order to win a prize at the end of the show. After a selection process including filming, promotional photography and medical and psychiatric assessment, the pair were selected. Each signed an Agreement and Release created by Channel Seven, which they could not negotiate, and in addition there was an extensive set of written Rules which strictly governed the contestants' behaviours on and off the show.

Some of the relevant conditions of the Agreement, Release and Rules included:

- Allowance of $500 per week and $500 for meal and incidental expenses per week during filming, until voted off the show;
- Channel Seven retained:
  - The sole and exclusive rights to determine content and design, and their final decisions could not be disputed;
  - Full editing discretion;
  - 24 hour filming access, being informed of all plans, movements and whereabouts.
- No claim could be brought for any costs, loss or damage including for loss of opportunity;
- Restrictions on clothing, and requirement to wear clothes when supplied by Channel Seven;
- Private socialising with contestants, crew or outsiders was prohibited, as well as photography or audio visual recordings of any facet of production;
- Removal of microphone or turning off audio transmitter was not allowed, and if a contestant wished to go to the toilet they had to inform a sound recordist;

back to top

- Sunglasses, smoking and playing of music required prior approval;
- Contestants must only use tools, vehicles, and communications devices provided to them;
- The renovation budget must be balanced at the end of each renovation;
- No talking to tradespeople or entering the building site without permission; and
- *"You acknowledge that your participation in the program is not employment, does not create an employer/ employee relationship between Seven and you and is not subject to any award or collective bargaining or workplace agreement and does not entitle you to any wages, salary, corporate benefits, superannuation, workers compensation benefits or any other compensation."*

The applicant and her friend were eliminated from the competition in March 2017, and in May 2017 she made allegations of bullying and harassment causing psychiatric injury arising from systemic isolation, bullying by competitors (condoned and encouraged of the producers), and negative portrayal as bullies. As a result, Ms Prince said she was subject to online abuse, including threats to her physical safety, and has been unable to obtain work since.

Relevant Principles

Worker is defined in section 4 of the *Workplace Injury Management and Workers Compensation Act 1998* (NSW) as:

Worker means a person who has entered into or works under a contract of service of a training contract with an employer (whether by way of manual labour, clerical work or otherwise, and whether the contract is expressed or implied, and whether the contract is oral or in writing)…

Common law principles govern whether an arrangement is a contract.

The Commission considered that it should decide if Ms Prince provided a service to Channel Seven, and if she did, determine whether that service provided under a contract of service (employee) as opposed to a contract for service (independent contractor). Fundamental to the distinction is the fact that when personal services are provided to another business, an independent contractor provides those services whilst working in and for his or her own business, whereas an employee provides personal services whilst working in the employer's business.

Control of the person engaged remains the principal criterion for a contract to be one of employment, however there are extensive indicia including:

- Mode of remuneration;
- Provision and maintenance of equipment;
- Obligation to work;
- Timetable of work and provision for holidays;
- Deduction of income tax;
- Right to delegate work;
- Right to dismiss the person;
- Dictating hours and place of work, and
- Right to exclusive services of the person.

Not all of the indicia must be present to establish employment, rather they are individual factors as part of the consideration of the total relationship.

Conversely, a contract for services will show in practice that a person operates a business and in performing their work is a representative of their business and not of the entity receiving the work.

Submissions and findings

Counsel for the applicant forcefully submitted that all of the indicia favouring a contract of employment, save for the deduction of income tax, were present and it could not seriously be argued that Ms Prince was engaged for profit in her own business of home renovation (as all contestants were amateur and unskilled novice builders) nor was she an actress. The service was a reality TV business for profit and the applicant provided labour and represented a public face of the show.

Channel Seven confined its argument to the concept of contestant being nowhere near a worker. There was no service provided by the applicant, but rather the hope of winning $200,000 if and only if they were successful

back to top

in the competition, and there was no direct benefit to Channel Seven from the value of the renovated homes. Accordingly, there was neither a contract of service nor a contract of services, simply a payment for allowances for participating in the competition.

The Commission found the relevant indicia were "overwhelmingly in favour" of the relationship being one of employer and employee, such that Ms Prince was a worker. In addition to satisfying the indicia set out above (save taxation), the Commission noted the applicant:

- had to relinquish her vocation and relocate;
- was an integral part of and essential to the product and business of the show;
- took no risk in the running of the show;
- took no benefit from any goodwill from the renovations; and
- did not bear the cost of any tradespeople engaged (with permission).

Implications

The very clear wording of the contract did not overcome the reality of the situation.

Whilst the Commission and the parties described the factual background as unusual, the gig economy and modern working styles mean that more and more contracts for personal services for reward are purported to be contracts for services but may in reality expose insureds and insurers to unexpected employer's liabilities.

The potential impact of the decision is not limited to workers compensation cases in New South Wales, as the classification of a contract as one of services relies on common law principles applicable in most jurisdictions.

For more information, please contact:

David Pitt
Special Counsel
T: 07 3212 6735
M: 0448 003 963
david.pitt@turkslegal.com.au

Craig Bell
Partner
T: 02 8257 5737
M: 0418 673 112
craig.bell@turkslegal.com.au

back to top

RECENT DECISIONS

What constitutes disciplinary action under section 11A(1)?

Webb v State of New South Wales [2019] NSWWCCPD 50 (13 September 2019)

Link to decision

Summary

The worker suffered a psychological injury on 21 April 2017 after a meeting in which his employer advised him of an investigation into an allegation of non-work related misconduct. The worker was subsequently exonerated.

Despite the fact that the allegation was of non-work related misconduct, the employer was under a duty to investigate.

The worker made a claim for weekly payments, medical expenses and lump sum compensation in respect of 16% whole person impairment.

The claim was denied on the basis that the injury was wholly or predominantly caused by reasonable action taken by the employer in respect of discipline, pursuant to section 11A(1) of the *Workers Compensation Act* 1987.

The Arbitrator found in favour of the employer and the worker appealed the decision.

Background

The worker submitted that the meeting did not constitute disciplinary action as the meeting was called to ensure that the employer complied with its statutory obligations to investigate allegations of employee misconduct involving children.

The Arbitrator did not accept this submission, and determined that disciplinary action was a potential outcome of the investigation. The Arbitrator further determined that the fact that the worker was allocated alternate duties and was transferred to a different office pending investigation indicated a relationship between the meeting and potential discipline.

The Arbitrator found that while there had been psychological injury, it was wholly or predominantly the result of reasonable action taken in respect of discipline.

On appeal

Deputy President Elizabeth Wood noted the worker's submissions to the effect that the Arbitrator had erred in determining that the employer's action was with respect to discipline.

The employer submitted that the investigation was 'with respect to discipline' given the potential disciplinary action if the allegation of misconduct had been proven as a result.

Contrary to the Arbitrator's view, Deputy President Wood considered the fact that the alleged misconduct did not occur at the workplace, and that it was non-work related to be highly relevant. She noted that the definition of discipline as indicated in *Dennis*, involves action taken in relation to the worker's conduct or performance either in the workplace or arising out of the worker's employment.

Relying on interpretations of 'discipline' in *Kushwaha* and other more recent case authorities which adopted a narrower definition of the term, Deputy President Wood held that there was no process instigated by the employer that was disciplinary in nature within the scope of the meaning attributed to it in those cases.

back to top

Deputy President Wood held that although the employer's actions were reasonable, they were not with respect to discipline for the purpose of section 11A.

Implications

Action cannot be considered to be 'with respect to discipline' where that action *may* result in disciplinary measures on the basis of a potential finding or outcome.

For more information, please contact:

Jesse Mikaelian
Lawyer
T: 02 8257 5731

Mary Karekos
Partner
T: 02 8257 5731
M: 0419 281 720
mary.karekos@turkslegal.com.au

back to top

RECENT DECISIONS

A day at the races

Scone Race Club Ltd v Cottom [2019] NSWCA 260 (31 October 2019)

Link to decision

Summary

This case considers the implications arising from the absence of a risk assessment in a situation where there is no evidence that such an assessment would have led to the implementation of an alternative system of work.

Background

The worker was employed by the Scone Race Club ('the Club') as a waste management labourer and supervisor. During a race meeting conducted by the Club the worker sustained an injury to his right knee. The worker alleged that he was instructed to empty an overflowing bin liner that was inside a 240 litre garbage bin and that when he attempted to lift the bin liner, he slipped and suffered injury.

The worker alleged negligence on the part of the Club, including amongst other things, a failure to maintain a safe system of work and failure to take reasonable care to assess, monitor, identify, reduce and eliminate the risk of injury from a defective system of work.

On the day in question, large black two-wheeled garbage bins of 240 litre capacity, commonly referred to as "wheelie bins", were placed around the public enclosure. Some of the bins were located on a large sloping grassed area adjacent to the track. The bins were not fixed in position and were lined with large bin liners. Further away from the race track there was a large garbage skip, into which the bin liners filled with rubbish were placed after they were removed from the bins. The worker contended that he was directed to remove the full bin liners while the bin remained on the sloping grass and then carry them to the skip bin. The Club contended that the system was to wheel the whole bin to the skip bin and then remove the liner.

The worker said that he had complained about the bins and had suggested that the Club should install level concrete pads on which to place the bins. The Club managers gave evidence that they had never received a complaint about anyone slipping on the grass or injuring themselves while removing garbage. They also denied that the worker had ever spoken to them about the grassy slope being slippery or dangerous. No employee or patron had complained about the slope and no one had complained about the system of emptying the bins. No one had made any such complaint since the incident. The worker's manager denied that the worker ever mentioned to her or in her presence that concrete pads were necessary. There was no evidence as to the cost of constructing concrete pads.

The primary judge accepted that:

- the cost and inconvenience of constructing concrete pads was outweighed by the benefits.
- there was no evidence to establish when or by whom notice of the system of work contended for by the Club was communicated to the worker.
- the Club had an obligation to conduct a risk assessment of the job of removing garbage from a bin on a sloping, grassy area and to take steps either to eliminate or to ameliorate the risk of injury.

While the primary judge considered that the Club ought to have conducted proper risk assessments, there was

back to top

no evidence as to the nature of the risk assessment that should have been carried out, or of the likely result of such an assessment.

Decision

The Court of Appeal concluded that it didn't matter which system of work was accepted as applicable. Nothing turned on it as both systems required the liner to be removed from the bin at some point. The Court expressed the view that removing the liner on the sloping grass, in the midst of a crowd of racegoers, would present a greater risk of injury than wheeling away the bin so that the installation of concrete pads may have presented a greater risk of injury both to workers and racegoers.

Emmett JA, with whom Gleeson JA and Brereton JA agreed, said:

… the primary judge erred in concluding that the Club failed to take reasonable care by reason of its failure to install concrete pads upon which to locate the bins. There was no evidence as to the gradient of the slope to indicate why the slope itself was a hazard for an employee removing loaded bin liners from the bins. Clearly, the slope was not so steep that the bins were unstable. The precise mechanism of the Worker's fall, in relation to his standing on an incline, is quite unclear. There was no specific or reliable evidence as to the area of, or depth of, the pads or the places where they should have been installed. It is by no means certain that a concrete pad would be less prone to causing injury than grass. I do not consider that the Club was in breach of any duty of care or any statutory duty that it owed to the Worker.

As to the need for a risk assessment, His Honour said, in accepting the Club's submissions:

… the concept of risk assessment does not assist the Worker's case in circumstances where there was a long history both before and after the Worker's injury of absence of problems and no example of precautionary measures taken elsewhere. It would therefore be concluded… that a risk assessment would have demonstrated that no action was necessary. More specifically… a risk assessment would not have demonstrated the need for concrete pads without a cost benefit analysis comparing the magnitude of the Risk with the proposed cost of dealing with it, being the cost of concrete pads or the employment of additional staff.

The primary judge was not in a position to determine that such costs were "minimal".

Implications

It has become increasingly common for plaintiff's to allege negligence on the part of an employer for failing to undertake a risk assessment. This decision illustrates that the mere failure to undertake an assessment is not negligent. It must be shown that a risk assessment would have identified a risk of injury which could be removed or ameliorated by reasonable and affordable action taken by the employer.

The special relationship between employer and employee has the consequence that the duty of care owed by an employer to an employee is non-delegable. That duty is to take reasonable care to avoid harm to the employee. However, there is no special or exceptional duty of care owed by an employer to an employee beyond what is reasonable in all of the circumstances.

For more information, please contact:

Doug Vorbach
Special Counsel
T: 02 8257 5722
M: 0419 013 617
doug.vorbach@turkslegal.com.au

back to top