Avoiding Blurred Lines Between Temporary Workers And Employees



Where agency workers are brought in for temporary assignments, a question may arise in unionized workplaces whether the temporary workers are employees of the company, or rather employees of the employment agency. If the agency workers are found to be employees of the company that has brought in the temporary workers, then the workers may be found within the scope of the applicable collective agreement between the company and the union.

Arbitrators in Ontario have applied different approaches to determine when workers provided by employment agencies are employees of the company contracting them in, versus the employment agency that assigned them. In the 2002 *IKO Industries* decision ([2002] O.L.A.A. No 1043 ((P.C. Picher)), the arbitrator sought to clarify the test for identifying an employment relationship in the face of a booming temporary worker market. In that case, the arbitrator drew a distinction between workers brought in to fill temporary work vacancies and workers brought in to fill permanent work vacancies. In permanent replacement situations, where bargaining unit employees had formerly performed the work, the most important and often determinative consideration would be who exhibited day to day control over the workers' tasks. In those scenarios, the arbitrator concluded that it will nearly always be the contracting company that will have control over precisely what tasks are performed by agency workers, the manner in which they are done and when they are done. Where that is found to be the case, it will not matter that the contracting company did not control who would be sent to perform the work. In temporary replacement scenarios, the arbitrator found that other factors will be relevant to determine who is the true employer, including identifying who:

1. Exercises direction and control over the employees performing the work;
2. Bears the burden of remuneration;
3. Imposes discipline;
4. Hires the employees;
5. Has the authority to dismiss the employees;
6. Is perceived to be the employer by the employees; and
7. Has the intention to create the relationship of employer and employees.

The seven part test was originally developed by the Ontario Labour Relations Board and is still used in identifying the true employer. Similar tests, focusing on control of the worker, have also been applied by the Supreme Court of Canada's decisions in Sagaz and more recently in the Fasken Martineau decision, which examined

the level of control and dependency over an worker to determine whether they are an employee or an independent contractor .

The “control” focused test remains very relevant to arbitrators in the temporary employment agency context. A question of ”who is the true employer” was determined this past year in Gate Gourmet Canada Inc v Teamsters Local 647. In that case, a company terminated its sanitation department and replaced it with workers from an employment agency. This was a permanent replacement scenario, but the arbitrator determined that the most important factor in determining the true employer was identifying which party exercised control over the workers. The arbitrator found that the agency workers, in that case, only ever interacted with supervisors employed by the agency, which were also working onsite. Through these supervisors, the agency exercised control over the temporary workers. As such, the arbitrator concluded that the company was not the employer of the workers, who were employed by the temporary employment agency.

The *Gate Gourmet* decision suggests that a company contracting workers from a temporary employment agency – even for non-temporary roles – may be able to establish they are not the true employer where, for example, it is established that the direct supervision of the agency workers is the agency itself. What will be needed is to establish that control over the working lives of the temporary workers resides with the temporary agency, and not the company to which the workers are sent.

Another major consideration will be whether the temporary workers erode or otherwise undermine bargaining unit rights. Where arbitrators conclude that the agency workers are simply replacing bargaining unit employees, the agency workers will likely found to be employees subject to the terms of the collective agreement. Specific collective agreement language will always need to be considered, particularly on the issue of contracting out. In *Gate Gourmet*, the contracting company had specifically retained the right to contract out in their collective agreement.

These cases illustrate the importance of planning how temporary workers will be brought into the workplace, in order to ensure such individuals do not accidentally become “employees” in the legal sense. While we have focused on a unionized labour arbitration context, these considerations are relevant for tax law, Employment Insurance, workers’ compensation, union certification, employment standards and civil liability for employment related claims. The exact tests to be applied may vary in different contexts, but the overarching principles remain and must be considered by employers at the outset, to avoid blurred lines or mistaken assumptions down the road.

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