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One Servant, Two Masters, Same Service?

According to the results of a recent survey[1], Hong Kong tops the poll on places that are using contingent workers in 2014, followed closely by the United States. Contingent workers could be temporary employees, secondees and outsourced workers, employed or supplied by companies to work for either a single client or multiple and changing clients. Generally, they are engaged on a temporary or project basis to fill gaps without adding to the permanent headcount of the end-user company.

Traditionally, contingent staffing covers industries and job functions such as IT contracting, events staffing, construction as well as secretarial and administrative support. However, this is rapidly expanding to cover a wider spectrum of industries, including financial services, legal services and energy.

There are obvious legal risks stemming from the use of this type of work arrangement, particularly when engaging professionals on a contingent basis. However, the key is to identify and manage the risks.

In this legal update, we revisit the judgment of the Hong Kong Court of Final Appeal in the case of *Chung Yuen Yee v. Sam Woo Bore Pile Foundation Limited* and consider the risks associated with contingency staffing.

The *Sam Woo Bore Pile* Case

The *Sam Woo Bore Pile* case was concerned with an employee ("Employee") who lost his life in an industrial accident while helping a crane driver lift a heavy forklift truck onto a lorry.

THE CLAIM

The claim was brought by the widow of the Employee against four companies within the Sam Woo group. The widow claimed that the Employee was employed by all four Sam Woo companies and each of these companies was in breach of its duty towards the Employee to provide a safe system of work.

In this case, the four Sam Woo companies (abbreviated as D1, D2 D3 and D4) were associated companies, and to a large extent they operated as a single economic unit:

- D1 paid the salaries of group employees, including the Employee, and filed returns to the Inland Revenue in which it described itself as the Employee's employer.
- D2 signed an employment contract with the Employee to employ him as a crane operator.
- D3 and D4 each had some involvement in the events leading to the accident. Specifically, the Employee was asked by individuals employed by D3 and D4 to help lift the truck onto the lorry, which led to the accident.

There was no dispute that the system of work used was unsafe. There was also no dispute that D2 (employer of the Employee) was liable. However, one of the key issues in dispute was whether D1, D3 and D4 were also liable as employers towards the Employee.

The widow's claim against the four Sam Woo companies was initially upheld by the Court of First Instance and the Court of Appeal of Hong Kong. D1, D3 and D4 were dissatisfied with the outcome, and they took the case to the Court of Final Appeal (CFA) of Hong Kong.

CFA'S RULING

On appeal, the CFA ruled that D2 was liable as the Employee's employer, but D1, D3 and D4 were not. The rationale for its decision was as follows:

[1] The survey was conducted by the Manpower Group, and the results of the survey were released in July 2014.

i. The CFA had no issue that an individual could be simultaneously employed by more than one employer to perform *different* services. However, the CFA knew of no case in which anyone had been found to have two independent employers in respect of the *same* services.

ii. If the Employee was in the general employment of D2, but worked under the control of D3 and D4, who directed not only what the Employee was to do but how he should do it, and if the Employee then negligently caused injury to a third party, D3 and D4 would incur liability towards the injured third party as the Employee's "*employer pro hac vice*" (i.e., employer for this occasion). However, this concept of "*employer pro hac vice*" has no relevance to the question of what duty is owed to the employee himself.

iii. Although D4's employee was alleged to have been negligent in not supervising the work of the Employee and other co-workers, the CFA ruled (on the facts of the case) that D4's employee had no responsibility in supervising the work and it was reasonable for D4's employee to leave the experts to get on with the work.

Lessons Learned

The dispute in the *Sam Woo Bore Pile* case stemmed essentially from a lack of clarity in the relationship between the parties. The same problems can also arise in the situation where contingent staffing is used.

From the perspective of the end-user company, the main risks of using contingency staffing are twofold:

1. LIABILITY TOWARDS THE CONTINGENT WORKER

As explained in the judgment of the CFA, no employee would likely be found to be engaged simultaneously by two companies to provide the *same* services.

As such, if a contingent worker is employed by an outsourcing company to perform general work and services for an end-user company, it would be difficult for the worker to claim that he is an employee of both the outsourcing company and the end-user company.

However, there is nothing to stop a worker from simultaneously serving two companies to provide *different* services.

Risk: If an employment relationship is found to exist between the contingent worker and the end-user company, then all the benefits and protection conferred by the employment-related legislation (including the Employment Ordinance, the Employees' Compensation Ordinance, Occupational Safety and Health Ordinance, the MPF Schemes Ordinance, the Minimum Wage Ordinance) would be applicable to the worker.

For example, if a contingent worker is employed by an outsourcing company to provide a specific type of work and services (e.g., to develop a website for the end-user company), and the worker is asked by the end-user company to perform a different type of work or services (e.g., to provide network security services), then there could be basis for finding that the worker is an employee serving two separate employers (i.e., the outsourcing company and the end-user company). This would be a particular cause for concern if the worker is seen as an integral part of the business of the end-user company and the worker is asked to perform the extra work and services in accordance with the directions and instructions of the company.

2. LIABILITY TOWARDS THIRD PARTIES

Although a contingent worker is an employee of the outsourcing company, he would generally be expected to work under the control and direction of the end-user company.

Risk: If the contingent worker is negligent in carrying out his work, the end-user company would be liable to pay compensation to the injured party.

For example, if the contingent worker does not have the relevant qualification or training to perform the services, and he causes loss or injury to a co-worker or third party, then the end-user company would incur liability towards the injured party.

How to Minimise the Risks

To minimise the risks, companies that engage contingency workforce should review the existing work arrangement and consider the following:

- ❑ Is the individual contracted to provide the *same* services as those services set out in his employment contract with the outsourcing company?
- ❑ Could the individual be said to have a direct employment relationship with the company?
- ❑ Does the individual have sufficient training to discharge the duties (without being negligent)?
- ❑ Does the company have insurance cover to deal with incidents or accidents stemming from any negligent act of the contingent worker?
- ❑ Is there a proper contract signed between the company and the outsourcing company setting out the respective duties and obligations with respect to the individual?

As always, it is better to be safe than sorry!

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