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## Employee or not an Employee?

**An employer has different obligations depending on whether the person working for them is an employee or a self-employed contractor.**

**Ensuring the terms of an employment agreement record exactly what the parties intended is essential.**

In a recent case, Mrs Atkinson was working full time hours for the company, Phoenix Commercial Cleaners Ltd in the company's core business, general cleaning of commercial premises. She brought a personal grievance claim for unjustified dismissal.

For Mrs Atkinson, whether or not she was an employee was vitally important to her. If she was not an employee then she could not bring a personal grievance claim against Phoenix for unjustified dismissal.

Mrs Atkinson took her claim to the Employment Court. The company's case was that Mrs Atkinson was self-employed as an independent contractor to Phoenix so that her commercial relationship with the businesses whose premises she cleaned was as a subcontractor to their primary contractor, Phoenix. Mrs Atkinson was therefore, in business on her own account as a commercial cleaner.

Mrs Atkinson said that she was an employee.

There was no written agreement between the parties in this case. Phoenix had presented Mrs Atkinson with a draft form of subcontractor agreement. It was not signed by her or otherwise agreed to. Phoenix sought to rely on the terms of this draft agreement as governing the relationship between it and Mrs Atkinson.

The Court decided that Mrs Atkinson was an employee and she was therefore, entitled to pursue a claim for a personal grievance.

Some of the facts that pointed to there being a relationship of employer and employee were:

- Phoenix obtained and negotiated the cleaning contracts. While there was some flexibility about the times at which Mrs Atkinson could do the work it had to be done outside usual business hours of operation.
- Phoenix prepared and required Mrs Atkinson to adhere to a schedule of areas to be cleaned and how to clean them.
- If Mrs Atkinson was unable to undertake cleaning duties on a particular day she would contact Phoenix who would arrange for a temporary replacement.
- Mrs Atkinson had to wear a Phoenix branded uniform.
- Cleaning equipment was provided to Mrs Atkinson by the company and she was required to perform the cleaning work in the manner dictated by that equipment.
- Mrs Atkinson had no independent trading entity, she was not registered for GST nor did she have an accountant who dealt with her financial affairs.
- She did not have any of her own tools of trade.

- Mrs Atkinson used a motor vehicle supplied by Phoenix which had the company's sign writing on it and she was not entitled to use it for personal reasons. Phoenix paid for the running costs of the vehicle.
- All paperwork to do with Mrs Atkinson's work was undertaken by Phoenix or its chartered accountants.
- A neutral but interested observer of Mrs Atkinson performing her duties would identify her as a Phoenix cleaner.

### **How can we help?**

Are you concerned that someone who works for you is actually an employee when you intended them to be an independent contractor? Are you intending to employ an independent contractor? Are you concerned about whether or not you are an employee? Are you concerned about another employment matter? If the answer is yes then please contact Graeme Withers and Julie Withers of Graeme Withers Law. We are very experienced lawyers. For personal, prompt and professional advice please call us (04) 478 4888; (027) 7155421 or email us [info@witherslaw.co.nz](mailto:info@witherslaw.co.nz)  
Please visit our website [www.witherslaw.co.nz](http://www.witherslaw.co.nz)

*This note is intended for general information only. It is not intended to be relied on as a substitute for legal advice which focusses on individual circumstances.*