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Direct Selling

When is a Distributor deemed an Employee – Victoria

Homecare Direct Shopping Pty Ltd v Gray [2008] VSCA 111

Principle

In a manner similar to the New South Wales decision in *Bessemer*¹, a 2008 decision of the Victorian Court of Appeal relating to a workers compensation claim made by a distributor of a direct selling company raises important issues that direct selling companies need to consider when drafting distribution agreements. This decision suggests that certain distributors will be deemed as employees for the purposes of Victorian workers compensation law.

Facts

Judy Gray (“Ms Gray”) was a door-to-door salesperson who sold products on behalf of Homecare Direct Shopping Pty Ltd (“Homecare”).

Ms Gray’s responsibilities involved delivering Homecare catalogues and products to customers at their homes.

Ms Gray reported to Mr De Groot who was Homecare’s “Area Manager”. The legal relationship was one of principal and agent.

Subsequently, Ms Gray and Mr De Groot entered into a distributor agreement which referred to Ms Gray as a “independent sub-agent”.

In 2002, on a visit to a customer, Ms Gray fell and injured her right knee.

Issues

Ms Gray sought compensation under the Victorian *Accident Compensation Act 1985* (the “Act”), on the basis that she was a “worker” for Homecare.

¹ *QBE Workers Compensation v Bessemer Pty Ltd (t/as Bessemer Sales) [2005] NSWCA 464*. See Addisons’ FocusPaper no. 129.

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Ms Gray won at first instance. The trial judge found that there was a contract between Ms Gray and Homecare and that Ms Gray was a worker for the purposes of the Act (and that there existed a “contract of service” – or an employment contract, as more generally known) for the following reasons:

1. The principle of agency – Mr De Groot acted as an agent for Homecare in entering into a distribution agreement with Ms Gray (the distribution agreement was a “contract of service” between Homecare and Ms Gray for the purposes of the Act); and
2. Implied contract – an implied contract existed between Homecare and Ms Gray once the totality of the conduct of the parties was analysed (and this contract was a “contract of service” between Homecare and Ms Gray for the purposes of the Act).

Court of Appeal Decision

Homecare appealed the decision on the basis that, as an agent, Mr De Groot did not have the authority to enter into a distributor agreement on its behalf. The Court held that this was incorrect. Even though the agreement between Homecare and Mr De Groot purported to be for the sole purpose of soliciting sales, it was clear that Mr De Groot has implied authority to enter into contracts with prospective distributors, like Ms Gray.

Moreover, their Honours considered Ms Gray’s distributor agreement and, while they found that the contract appeared to be between Mr De Groot and Ms Gray, the Court looked at the circumstances in which the agreement was made, and noted:

- the agreement was prepared by Homecare;
- the agreement was between a “Homecare Area Manager” and not Mr De Groot, who was described as a ‘duly authorised area manager’;
- the commission payable to Ms Gray was to be paid by Homecare, not Mr De Groot.

These circumstances showed that the objective of the Ms Gray distributor agreement was to further Homecare’s interests, and not the interests of Mr De Groot or any other area manager. Accordingly, the Court said that the agreement between Mr De Groot and Ms Gray was properly characterised as an agreement between Homecare and Ms Gray.

Although the Court did not consider it necessary to decide the issue of whether an implied contract existed between Homecare and Ms Gray, it nevertheless considered Homecare’s arguments.

Their Honours found that the conduct of Ms Gray in selling Homecare products was also consistent with an implied contract existing between Homecare and Ms Gray. Notably, the Court found:

- Homecare products were delivered to Ms Gray (via Mr De Groot) to enable purchases by customers;
- Homecare decided how much distributors earned and where they worked;

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- all payments received by Ms Gray were to be made to Homecare;
- customers placed orders for Homecare products with Ms Gray;
- Ms Gray was given Homecare apparel and badges.

The Court noted that, while the agreement was the best evidence of the relationship between the parties, “the parties cannot alter the truth of that relationship by putting a different label upon it” (*Massey v Crown Life Insurance Co*).

The Court made it clear that, in determining the scope of and effect of an agreement, the Court is not limited to an examination of the terms of the document.

In conclusion, the Court held that there was an implied contract between Homecare and Ms Gray as a distributor. By virtue of this relationship, she was deemed by the Act to be an “employee” of Homecare.

What does this mean for a direct selling company?

The “labelling” of a contractual relationship will be relevant, but not decisive, in determining the true nature of the relationship between the distributor and the direct selling company. The Court may consider other circumstances, including the background to the relationship between the parties. If there is to be an agent/sub-agent relationship (rather than a deemed employment relationship), the existence of an implied agreement between the distributor and the company must be expressly excluded. This may not be sufficient as, just as is the case in NSW, an employment relationship will be construed broadly by the courts for the purposes of workers compensation legislation.

The assistance of Michael Camilleri, Solicitor, of Addisons in the preparation of this article is noted and greatly appreciated

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