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### **Direct Selling When Is A Distributor A Worker - NSW**

#### **QBE Workers Compensation v Bessemer Pty Ltd (t/as Bessemer Sales) [2005] NSWCA 464**

##### **Principle**

Is a person injured at a direct selling company's premises deemed a 'worker' for workers compensation purposes? The 2005 NSW Court of Appeal decision in Bessemer has significant implications for direct selling companies and workers compensation insurers as it may deem distributors/consultants as 'workers' for workers compensation purposes.

##### **Facts**

Simaru Pty Ltd ("Bessemer") was involved in the direct marketing of cookware products. The marketing procedure was conducted through sales persons. One such sales person was Mrs Santelli, who arranged contracts of sale, collected payments and made deliveries. She also held the role of a "Manager", with the responsibility of recruiting 'agents' and encouraging them to work for Bessemer. For every sale which she procured, she received a commission of 24 per cent. She also received an additional 3 per cent of an "overriding commission" for each sale procured by an agent under her supervision.

Mrs Santelli was injured at Bessemer's premises when she went to pay an account and to collect goods that were to be delivered to a customer.

##### **Issues**

In the initial proceedings, after looking at the totality of the relationship between the parties, the trial judge held that Mrs Santelli was a 'worker' and was entitled to workers compensation. Mrs Santelli was awarded \$19,000 plus costs.

However, on appeal, Bessemer's workers compensation insurer argued that Mrs Santelli was not a 'worker' and the public liability insurer was liable to indemnify Bessemer.

If Mrs Santelli were deemed a 'worker' for the purposes of the *Workers Injury Management and Workers Compensation Act 1998* (the "Act"), Bessemer's workers' compensation insurer would be obliged to indemnify Bessemer against liability.

# Addisons FocusPapers

If Mrs Santelli were not a ‘worker’, Bessemer’s public liability insurer would be obliged to indemnify Bessemer against liability. (Bessemer’s public liability insurance excluded cover if cover existed under Bessemer’s workers compensation insurance.)

## **The Court of Appeal Judgement**

The Court of Appeal considered the relationship of the parties and the agreements in place.

Bessemer’s “Agency Agreement” changed in July 2000 to become a Distributor Agreement. Relevantly, it provided:

*“The Distributor is in business on his or her own account and acknowledges that he or she:*

- *is not an agent, employee or partner of the Company;*
- *is not entitled under the agreement to a commission but will retain the difference between the purchase price and retail prices; and*
- *is not entitled to statutory employee entitlements from the Company. The distributor undertakes not to hold himself or herself out to be an agent, employee or partner of the Company.”*

Mrs Santelli and other “distributors” were required to sign this agreement, which was designed to redefine their roles and responsibilities following the introduction of GST.

Despite Bessemer’s efforts, the Court of Appeal held that the trial judge was correct in considering Santelli’s relationship with Bessemer ‘in its totality’ and that Mrs Santelli was deemed as a ‘worker’ in accordance with the Act, as she was a person paid by commission, even though Bessemer had attempted to characterise the payments otherwise - the agreement was a ‘mere disguise’.

Mason P, who delivered the leading judgement in the Court of Appeal, found that Mrs Santelli clearly fell within Clause 5, Schedule 1 of the 1998 Act which provided:

*“(5) A salesperson, canvasser, collector or other person paid wholly or partly by commission is, for the purposes of this Act, taken to be a worker in the employment of the person by whom the commission is payable, unless the commission is received for or in connection with work incidental to a trade or business regularly carried on by the salesperson, canvasser, collector or other person...”*

The Court held that Mrs Santelli was a ‘salesperson’ who was paid a commission, regardless of the agreement. Mrs Santelli was a ‘go-between’, who promoted, secured and facilitated the sale of goods from Bessemer to the end-customer. This role did not change under the post-2000 agreement. Even if Mrs Santelli were not classified as a ‘salesperson’, then she should be classified as an ‘other person’ due to her managerial role and ‘overriding commission’.

## **What does this mean for direct selling companies?**

The Courts will look beyond the ‘labelling’ of a contract and determine the role of a worker based on the actual responsibility of the individual, particularly whether the relevant activities were done for the ‘sole benefit’ of the direct selling company. The definition of ‘worker’ will be given an expansive interpretation, and employment rights may be conferred on sales



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agents and consultants in direct selling organisations. Labels such as ‘distributor’ and express provisions to the effect that the person is not an employee will not necessarily prevent the application of the relevant legislation.

Care should be taken to ensure that appropriate extensions to worker’s compensation insurance are obtained.

**For more information please contact:**

**Jamie Nettleton, Partner**

Telephone: +61 2 8915 1030

Facsimile: +61 2 8916 2030

Email: [jamie.nettleton@addisonslawyers.com.au](mailto:jamie.nettleton@addisonslawyers.com.au)