

A-Z Guide

TRIANGULAR EMPLOYMENT



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Overview

The Act deals with personal grievances arising out of triangular employment arrangements. A triangular employment arrangement is generally made up of three parties – the employee, the employer and the ‘controlling third party’.

Commencement

The Employment Relations (Triangular Employment) Amendment Act 2018 was passed and received Royal assent on 27 June 2019. The Act amends the Employment Relations Act 2000. The changes introduced by the Act come into force on the date immediately after 12 months from the date of Royal assent – 27 June 2020.

Introduction

The Employment Relations (Triangular Employment) Amendment Act 2019 (the Act) governs the ability to join a controlling third party to a personal grievance.

This A-Z Guide deals with triangular employment. Separate **A-Z Guides** deal with:

- Personal Grievances

Definitions

Controlling third party

The Act defines a controlling third party as a person:

- Who has a contract or other arrangement with an employer under which an employee of the employer performs work for the benefit of the person; and
- Who exercises, or is entitled to exercise, control or direction over the employee that is similar or substantially similar to the control or direction that an employer exercises, or is entitled to exercise, in relation to the employee.

Controlling third party means a person who has an agreement with an employer to have their employee perform work for the person who has similar control over the employee that their employer has.

In essence, the controlling third party is an entity which has entered into a contract or other arrangement with an employer to supply labour, the employee performs work for the benefit of, but is not employed by, the controlling third party, and the controlling third party exercises control or direction over the employee in a way that is equivalent to that which would be normally expected of an employer.

Employee

An employee is a person of any age employed by an employer to do any work for hire or reward under a contract of service.



Personal Grievance

An employee who believes that he or she has a personal grievance may pursue that grievance as per section 102 of the Employment Relations Act 2000. A personal grievance, as per section 103 of the Employment Relations Act 2000, means any grievance that an employee may have against the employee's employer or former employer because of a claim:

- That the employee has been unjustifiably dismissed; or
- that the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer; or
- that the employee has been discriminated against in the employee's employment; or
- that the employee has been sexually harassed in the employee's employment; or
- that the employee has been treated adversely in the employee's employment on the ground that the employee is, or is suspected or assumed or believed to be, a person affected by family violence; or
- that the employee has been racially harassed in the employee's employment; or
- that the employee has been subject to duress in the employee's employment in relation to membership or non-membership of a union or employees organisation; or
- that the employee's employer has failed to comply with a requirement of Part 6A; or
- that the employee has been disadvantaged by the employee's employment agreement not being in accordance with section 67C, 67D, 67G, or 67H; or
- that the employee's employer has contravened section 67F or 67G(3).
- that the employee's employer has, in relation to the employee,—
 - engaged in adverse conduct for a prohibited health and safety reason; or
 - contravened section 92 of the Health and Safety at Work Act 2015 (which prohibits coercion or inducement).

For the purposes of this Part, a representative, in relation to an employer and in relation to an alleged personal grievance, means a person—

- who is employed by that employer; and
- who either—
- has authority over the employee alleging the grievance; or
- is in a position of authority over other employees in the workplace of the employee alleging the grievance.

Refer to the **A-Z Guide** on **Personal Grievances** for more information.

Joining a Controlling Third Party

In the event that an employee raises a personal grievance against his or her employer, the Act sets out a process whereby the employee and/or the employer may apply to the Employment Relations Authority (the Authority) or the Employment Court (the Court) to join the controlling third party to the proceedings to resolve the personal grievance.

Process

The process is broadly as follows:

- The employee must first raise a personal grievance against their employer;
- If the employee or employer considers that the grievance relates to, or was caused by the actions of the controlling third party, they must then notify the controlling third party that a grievance has been raised (failure to notify would not



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prevent them from being joined to the proceedings subsequently);

- The employee and/or the employer may apply to the Authority or the Court to have the controlling third party joined to the proceedings;
- If the employee and/or employer can establish an arguable case that the actions of the controlling third party caused or contributed to the grievance, then the Authority or Court must join them to the proceedings. The Authority or court can also join a controlling third party to the proceedings if it considers it just to do so;



- If the controlling third party is joined to a grievance, the Authority or Court must consider what proportion of responsibility for the grievance is shared between the employer and the controlling third party, and what proportion of any award or remedy is to be made by each party.
- The Authority or Court can order the controlling third party to provide to the employee either or both of the remedies in section 123(1)(b) and (c) of the Employment Relations Act 2000 – lost wages and compensation for hurt and humiliation respectively.

Conclusion

This A-Z guide has been designed to help you understand your obligations when managing an employer's employee as a controlling third party. It has set out the requirements of the Employment Relations (Triangular Employment) Amendment Act 2019 and guided you on recommended best practice. If you have any questions that remain unanswered by this guide, or need assistance with the drafting or redrafting of your employment agreements, or just want to talk to a real person about your management queries, contact EMA AdviceLine on 0800 300 362.

Remember

- Always call AdviceLine on 0800 300 362 to check you have the latest guide.
- Never hesitate to ask AdviceLine for help in interpreting and applying this guide to your situation.
- Use our AdviceLine employment advisors as a sounding board to test your views.
- Get one of our consultants to draft an agreement template that's tailor-made for your business.

This guide is not comprehensive and should not be used as a substitute for professional advice.

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