Contractor Clarification

Say what it is and follow what you say!

Earlier this month the High Court of Australia (HCoA) delivered two judgments bringing clarification to determining whether workers are independent contractors or employees.

Previous Test

Known as the 'multi-factorial' approach, the previous test assessed the totality of the working relationship between the parties in practice.

Current Test

Where a formal and comprehensive written agreement between the parties exists, generally, this agreement will determine whether the individual is an employee or a contractor.

The HcoA held that where parties have entered into a valid and comprehensive written agreement, the ultimate characterisation of the relationship is focused on rights and duties established by the written agreement, and not how the relationship operates in practice.

These two decisions highlight the importance of employers having effectively drafted agreements for both independent contractors and employees.

Background

In both cases, *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1 (**Personnel Contracting**), and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2 (**Jamsek**), the HCoA had to determine whether the relevant workers were employees or independent contractors.

The HCoA upheld both appeals, however, with two different outcomes. In Personnel Contracting the HCoA held that the worker was an employee, whilst in Jamsek, the workers were found to be independent contractors.

In both cases, it was not suggested that the:

- contracts were not observed in practice;
- reality of the work was inconsistent with the contracts;
- contracts were a sham or unlawful; or
- written contracts had been varied by conduct of the parties.

It was in this context that the majority held that the terms of the written contracts should have been the sole focus of the analysis of the relationship.

Applying the new approach, the majority of the HcoA found in Personnel Contracting that despite the agreement labelling the worker as a contractor, the terms of the agreement, such as the labour hire business being able to:

- offer the worker shifts and the workers was able to refuse such work;
- pay the worker by the hour;
- control how the worker performed their work;
- determine if the worker could delegate their work to other parties or was required to perform the work himself; and
- determine if the worker should provide his own tools and equipment;

established an employment relationship.

The majority emphasised that it was the ***actual rights and obligations established under the agreement*** which were relevant to the analysis of whether the worker was an employee of a contractor.

In Jamsek, the HcoA held the terms of the written agreement established an independent contracting relationship as it identified that:

- the workers had to provide their own trucks;
- the company had specifically stated they wished to move away from an employment

model and the offer for the two drivers to continue a relationship with the company was only extended on the basis that they would be independent contractors;

- the workers were responsible for the maintenance and servicing of their trucks; and
- the company had no control over what was delivered and that the workers had discretion over which routes or areas they would follow in making deliveries based on personal preference and overall conveniencel and the agreements were with partnerships rather than the individual drivers.

Warning

The HCoA made clear that the previous 'multi-factorial' approach (ie to assess the 'reality' of the relationship between the parties) still had a role to play in circumstances where:

1. the agreement between the parties was not entirely in writing;
2. there is a dispute about the validity of the terms of the engagement; or
3. the agreement is ineffective under general law or statute, or is a sham; or
4. the agreement has been varied or otherwise displaced by the conduct of the parties.

In these circumstances, the 'reality' of the worker's engagement and the totality of the relationship between the parties could be used to determine whether the worker was an employee or independent contractor.

What do employers need to be aware of going forward?

In light of these two HcoA decisions, now is the time for businesses wishing to review existing 'contractor' engagements to ensure:

- clarity as to who the parties to the agreement are, noting that it is likely to be more difficult for contracts with legal entities (e.g. partnerships, companies) to later be found to be contracts of employment;
- the terms of the agreement properly reflect arrangements for the services/labour to be provided;
- the duties and obligations under the agreement are clearly stated;
- a sufficient level of control is granted to the business regardng the manner in which services are provided, being mindful that the greater the right to control, the higher the risk of a finding of an employment relationship;
- there is clarity on which party is responsible for the provision of tools and equipment;
- there is clarity regarding the absence of an expectation for the contractor to wear any applicable uniform of the business;
- clarity regarding superannuation obligations;
- that the contractor is responsible for paying their own tax and GST for the services they provided to the business; and
- whether the contractor can delegate their work to other parties.

Businesses that fail to engage workers under comprehensive written contracts will be faced with the risk that the courts will apply the 'multi-factorial' approach and will assess the 'reality' of the relationship rather than the contract itself to determine whether a work relationship is an employer/employee or principal/contractor relationship.

Where to from here?

If you are concerned about your current contractors in the workplace, or require further information or assistance in the creation of casual or contractor agreements, please contact us today to see how we can assist!