Employee or Sub-contractor? The High Court speaks

A very common enquiry received by Andersons' **Employment Law** team is whether a particular worker is correctly classified as a sub-contractor (contract FOR service) or an employee (contract OF service). The distinction is important, and has significant legal consequences.

An employee is entitled to:

- Considerable legal protections (e.g., protection from unfair dismissal)
- Minimum conditions as set out in the National Employment Standards (including maximum hours of work, and paid leave for permanent employees) and,
- Covered by a Modern Award which sets out minimum rates of pay and other conditions of employment.

In contrast, the terms and conditions applying to a sub-contractor are, with minor exceptions, established by contract / agreement and are not subject to any legal minimum rates of remuneration.

The importance of the issue is demonstrated by the fact that the High Court of Australia – which only accepts cases of national significance – has recently heard two separate cases addressing this question. These cases have provided some further guidance as to when a worker is correctly classified as a sub-contractor or employee.

Briefly, the law around this issue which existed prior to the recent High Court decisions generally involved a "multi-factorial test" which required the weighing up a number of "indicia" to determine whether the relationship is one of employment.

Those indicia include various other factors including:

- whether and on what basis tax is deducted from the remuneration;
- whether superannuation and workers compensation premiums are paid;
- whether the worker has to issue an invoice in order to be paid;
- the basis of payment – is payment made by the job / task or by the hours worked;
- whether the worker has to wear a uniform or use other "branding" of the putative employer;
- whether the worker provides their own tools and equipment;
- whether the worker works exclusively for the putative employer and, whether the worker is entitled to send someone else to do the work in their place without having to seek approval;
- whether or not the worker is "running a business", and
- to what degree the putative employer exerts "control" over the worker in relation to the way the work is done – this is usually determined by looking at the terms of any written contract or agreement and, more significantly, by looking at the actual practice of the parties.
- The last of these factors is referred to as "the control test" and, traditionally, has been a very important factor in determining whether the relationship is one of employment or is a sub-contractual relationship.

Under the "multi-factorial test" whatever any written contract or other document says about the nature of the relationship, is not necessarily decisive – what is more important is the actuality of the relationship, including what the parties did and how they acted after any written contract was signed.

What this means is that the terms of a written contract or agreement have not generally been given precedence over other factors traditionally and Courts have instead given more weight to the actual circumstances of the relationship rather than what any written contract or agreement says.

However, the recent High Court decisions suggest that the balance between written contact or agreement and the actual circumstances is, with greater weight placed upon the words of any written contact or agreement.

Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd [2022] HCA 1

This case involved a backpacker with limited work experience who had signed up with a labour hire company. The labour hire company sent the worker to work for a construction company. The contract between the labour hire organisation and the worker referred to the worker as a "self-employed contractor" but required the worker to cooperate with the labour hire company and its client, the

construction company.

The worker, through his union the CFMEU, brought a legal claim based on the assertion that he was an employee of the labour hire company. Both the Federal Court and the Full Federal Court applied the "multi-factorial test" and concluded that the worker was a contractor. However, on appeal, the High Court held that the worker was an employee of the labour hire company, because – despite the reference in the written contract to the worker as a "self-employed contractor", it was evident from the terms of the written contract that both the labour hire company and the construction company could exert considerable control over the worker as to the way he worked and when he worked.

The significance of this decision is that the majority of Judges in the High Court held that, where the terms and conditions of the parties' relationship are detailed in a written contract, the legal rights and obligations outlined in that written contract should be decisive in deciding the true legal nature of the relationship. Unless the contract is found to be invalid as a "sham".

It is important to note that it is not the name or title that the parties give to the relationship in a written contract which is decisive. In this case, the written contract described the worker as a "sub-contractor". Rather, it is what the contract states about the rights and obligations of the parties which is important. The High Court stated that the indicia traditionally referred to in the "multi-factorial" test should only be considered in the context of the rights and duties established by the contract.

ZG Operations Australia Pty Ltd v Jamsek [2022] HCA 2

A number of truck drivers who had been employees of the company sought a pay rise and the company offered to sell them the truck they used, and engage them as contractors but indicated that, if they did not agree, it could not guarantee them continued employment.

The drivers agreed to this arrangement, purchased the trucks, set up partnerships with their spouses and signed a written contract with the company for the provision of delivery services. This contract referred to them as "contractors".

After many years the drivers brought a legal claim which was based upon their assertion that they were actually employees.
The Full Federal Court found in the drivers' favour, applying the multi-factorial test and the 'totality of the circumstances' including the unequal bargaining power at the start of the sub-contractual relationship.

However, on appeal the High Court disagreed and concluded that the drivers were sub-contractors. In its decision the High Court stressed that, where there is a written contract which contains an accurate and comprehensive statement of the parties' rights and obligations, there is no need to look beyond the contract to what is happening in practice unless there is a reason to consider that the contract no longer represents what is happening in practice or is a 'sham'.

The High Court was not swayed by factors that had influenced the Full Federal Court, such as the unequal bargaining power, the drivers' lengthy service, or the fact that the drivers did not work for any other companies. In the High Court's view these factors provided no basis for disregarding the effect of the contracts between the drivers and the company.

These High Court decisions are likely to have an impact on those workers who sign contracts to work as sub-contractors but who later assert that they are actually employees, and therefore entitled to the

legal protection afforded to an employee. Such claims will be now more difficult to establish if there is a written contract in place which comprehensively addresses the parties' respective rights and obligations.

How can Andersons help?

If you have any questions about **employment law** or your employment status and think you might have a case, please contact **Andersons' Employment and Industrial Law Special Counsel Margaret Kaukas.**