

Despite an employer's intentions to the contrary, if it looks like a contract of service, it's more often than not a contract of service

The Supreme Court of Tasmania allowed the appellant worker's appeal against a decision of the Workers Rehabilitation and Compensation Tribunal, finding that the appellant was a worker for the purposes of the Workers Rehabilitation and Compensation Act 1988 (the Act).

In issue

- Whether the Tribunal erred in law in finding that the appellant was not a worker for the purposes of the Workers Rehabilitation and Compensation Act 1988.

The background

The appellant made a claim for compensation against the respondent for an injury he sustained to his spine. The respondent disputed liability to pay compensation and the appellant referred his claim to the Workers Compensation and Rehabilitation Tribunal. A preliminary issue was whether the appellant was working for the respondent as an independent contractor or engaged under a contract of service.

The decision of the Tribunal

In finding that the appellant was not a worker for the purposes of the Act, the Commissioner was of the opinion that appellant had "not discharged the onus to

show that he was engaged under a contract of service”

The Commissioner relied on the evidence that the appellant had an ABN, paid his own tax, issued his own invoices, obtained income protection and public liability insurance, was able to work for others and tell his employer when he was unavailable for work, and knew that he was not entitled to sick or personal leave, to conclude that the totality of the relationship between the parties indicated that they were conducting themselves as if the appellant was an independent contractor.

The Commissioner noted that there was evidence to suggest that the worker was not an independent contractor, namely: the respondent determined the remuneration and provided tools and equipment, in addition to the fact that the appellant did not promote his own business or build goodwill, wore the respondent’s clothing and drove the respondent’s vehicle, had no capacity to delegate, worked only for the respondent, and had little autonomy in his hours of work and was subject to the direction of others. However the Commissioner considered that the factors of delegation, autonomy, and direction had little weight.

The issues on appeal

The primary issue for determination on appeal was whether the Tribunal erred in law in finding that the appellant was not a worker.

The decision on appeal

The appellant contented, and his Honour accepted, that none of the factors which led to the Tribunal’s decision should have been given the weight that was attributed to them, and that the evidence of the totality of the relationship necessarily led to the conclusion that the appellant was a worker. Additionally, the appellant contented that the payment of remuneration without a tax deduction as well as the absence of annual and sick leave were all common features of casual contracts for service.

His Honour found that the personal circumstances of the appellant prior to seeking employment with the respondent were relevant. In particular his limited language skills, the fact that he had no business experience or skills and the fact that he was a self taught “handy man” with no formal qualifications. Additionally, his Honour noted that the appellant was given an invoice template by the respondents, and only obtained an ABN and personal insurance because the respondent told him to

do so.

Unlike the Commissioner, his Honour considered the fact that the appellant was unable to delegate, had little autonomy and was subject to the direction of others, were factors of considerable weight and necessarily determinative of the referral. His Honour went on to highlight the same factors that the Commissioner had noted which suggested that the appellant was a worker, including the fact that the appellant was paid for the time he worked rather than for a result he achieved, took no commercial or business risk, had no independent business of his own, and worked only for the respondent.

Implications for you

Whilst it may be the intention of the employer, and appear to be the intention of the worker, that the relationship is not one of employment, factual circumstances such as the ability to delegate, the level of autonomy, the structure of the remuneration, the control over the hours worked, the clothing worn and the equipment and tools used, can create a relationship of employment.

Employers should always ensure that the circumstances of the relationship are clear so as to ensure that the intentions of the parties are not lost.

[Laghaifar v Sealasash Window Renewal System Pty Ltd \[2019\] TASSC 9](#)

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