
EMPLOYEE VS CONTRACTORS: NEW RULES



Following on from two prominent High Court decisions in Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd [2022] HCA 1 and ZG Operations Australia Pty Ltd v Jamsek [2022] HCA 2, the ATO has issued a Ruling clarifying the issue of whether certain individuals are employees or independent contractors.

In brief, the High Court's decisions deal with the distinction between employees and independent contractors in the context of a labour hire company and two truck drivers operating through partnerships to provide delivery services to their former employer. In the first case, the High Court ruled that a labourer engaged by a labour hire company to work on construction sites under the supervision and control of a builder was an employee of the labour hire company.

The High Court noted that this right of control, and the ability to supply a compliant workforce, was the key asset of the business as a labour-hire agency and constituted an employment relationship. That the parties chose the label "contractor" to describe the labourer did not change the character of that relationship, the High Court said. This decision also overruled a earlier Full Federal Court decision which held that the labourer was an independent contractor after applying a "multifactorial approach".

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In the second case, the High Court held that two truck drivers were not employees of a company for the purposes of the Fair Work Act 2009 and Superannuation Guarantee (Administration) Act 1992. The Court also observed that the provision of such services has consistently been held, both in Australia and in England, to have been characteristic of independent contractors (and not employees). In the present case, the High Court said there was no reason to reach a different conclusion.

Due to these landmark High Court decisions, the ATO has now released Taxation Ruling TR 2023/4 which states that whether an individual (ie worker) is an employee of an entity (“engaging entity”) under the term's ordinary meaning is a question of fact to be determined by reference to an objective assessment of the totality of the relationship between the parties, having regard only to the legal rights and obligations which constitute that relationship.

In addition, where the worker and the engaging entity have comprehensively committed the terms of their relationship to a written contract and the validity of that contract has not been challenged as a sham, nor have the terms of the contract otherwise been varied, waived, discharged or the subject of an estoppel or any equitable, legal or statutory right or remedy, it is the legal rights and obligations in the contract alone that are relevant in determining whether the worker is an employee of an engaging entity.

The Ruling notes that evidence of how the contract was performed including subsequent conduct and work practices cannot be considered for the purpose of determining the nature of the legal relationship between the parties. However, this evidence can be considered to establish the contractual terms or to challenge the validity of a written contract with general contract law principles.

It should be noted that the Ruling now states that the various indicia of employment that have been identified in case law (ie control and right to control, ability to delegate subcontract or assign work, achieve a specified result, bearer of risk, or generation of goodwill) remain relevant, but are only to be considered in respect of the legal rights and obligations between the parties.

Therefore, according to the Ruling, the most important factor is the holistic consideration of the contract between the parties to determine whether, on balance, the worker is an employee or independent contractor. This requires an approach which involves standing back and viewing the contract from a distance such that an informed, considered, qualitative appreciation of the whole can be undertaken. In conjunction with the Ruling, the ATO has also released a Practical Compliance Guideline (PCG 2023/2) which sets out its compliance approach for businesses that engage workers and classify them as employees or independent contractors.

CONTACT

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