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Employee v Contractor – are you willing to take the gamble?

By ,

In the recent case Tattsbet Limited v Morrow (Tattsbet), the full Federal Court turned its attention to the difference between an employee or a contractor. The case, on appeal from the Federal Circuit Court, has highlighted the risks in companies taking the gamble over whether a person is an employee or contractor – a decision which can and does often present business with difficulties.

Background

Morrow was engaged by Tattsbet to run its Logan betting agency. She launched action against Tattsbett after it terminated her agreement, the initial claim was two-fold:

- Morrow claimed that she was an employee of Tattsbet (and not a contractor as claimed by Tattsbet); and
- Morrow was dismissed for exercising a workplace right (that is an adverse action claim).

This article focuses on the employee v contractor aspect of the claim.

Federal Circuit Court decision

The court in the first instance held that Morrow was an employee. Looking at Morrow's actual work place environment (in isolation of all else) it was difficult to distinguish her role from that of an employee as all other employed managers were working in essentially the same manner.

Full Federal Court Appeal decision

On appeal the Full Federal Court examined a number of other features that, in combination with the way she worked, led to the conclusion that she was in fact a contractor, and not an employee. In overturning the original judgement, the Full Federal Court said it was important to look to all the totally of factors of the particular case. In summary, the five determinate factors were:

- (The agreement) The agreement held out that she was an independent contractor;
- (Autonomy) Morrow ran the Logan Tattsbett with little interference from Tattsbett and could employ others directly;
- (Employing others) Of those she employed directly she acted as an employer (ie paid workers compensation premiums);
- (Remuneration) Her net personal income was only about a third of the gross income she received from operating the agency; and
- (Taxation issues) Morrow did not receive PAYG deductions, and in addition, she collected GST and complied with those requirements.

We examine each of these in more detail.

The Agreement

The agreement itself provided an acknowledgement that she was an independent contractor. While, on its own, such a clause does not necessarily extend a contractual right, it helps to lay the groundwork to establish intention between the parties. The court said that agreement was not about “labelling” the relationship, but rather understanding the reality of the relationship. It assisted the court’s decision that the agreement was the fourth in a line of agreements between the parties.

This helped confirm that the parties knew the distinction between an employee and a contractor. Together with the fact that Morrow structured her own arrangements and by the time she entered the agreement she knew exactly what was proposed and intended, that is an independent contractor relationship.

Autonomy

Secondly, although the way she worked looked like she was an employee, she was not engaged or paid for own work alone. She was engaged to operate the agency, and was paid by commission. She was also free to employ others to assist her or, on occasion, to work in place of her.

Employing others

Thirdly, and relatedly, in the employment of staff Morrow undertook the obligations of the employer, for example, by paying the required workers’ compensation premiums.

Remuneration

Morrow’s net personal income was only about a third of the gross income she received for operating the agency, that is, there was a difference between the overall payment for the duties and the personal income which she received. In those instances it will be harder to concluded an employment relationship.

Taxation treatment

Finally, the way Morrow dealt with the tax implications of her mode of operation was influential in the court’s decision. Morrow did not receive PAYG deductions, and in addition, she collected GST and complied with those regulatory requirements. The court stated that it wasn’t just the absence of PAYG deductions but also the presence of GST collections as well as Morrow’s compliance with the regulatory requirements that point quite strongly against the relationship being characterised as one of employee.

Conclusion

The issues in this case highlight the continued difficulties most employers have in ensuring that an independent contractor continues to remain as such. The Full Federal Court reaffirmed the multi-factor test in determining whether some is an employee or a contractor. However, for business, the distinction between the two is not always clear and consideration needs to be given to each circumstance to ensure that the contract appropriately reflects the circumstances. While you can never completely contract out of the risks, you can take steps to reduce the risks.

Take the gamble out of your employment and independent contractor agreements contact **Broadley Rees Hogan Lawyers** today.

Should you wish to discuss any matters arising out of this article, please contact the author:

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