BUDDLE FINDLAY

Contractor by name but employee by nature

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12 March 2009

Employees are defined by what they do, rather than by what they're called.

"When I use a word, it means just what I choose it to mean," a rather scornful Humpty Dumpty said to Alice.

However, what works in Wonderland doesn't always apply in the world of employment law – especially when it comes to deciding whether a worker is an employee or an independent contractor.

Even a written agreement to treat a worker as an independent contractor may not be sufficient: the law says that how the parties characterise their working relationship is only one factor to be taken into account and can never be determinative. Rather, the entire conduct of the working relationship is relevant to deciding whether a worker is a contractor or an employee.

Business owners who engage independent contractors should regularly double check that their relationships with their contractors are not in reality employment relationships when viewed as a whole. If there is any doubt, it is best to act cautiously and expressly redefine the relationship where necessary. Getting it wrong can be costly.

The recent determination of the Employment Relationship Authority in *Ross-Taylor v Chief of Defence Force* usefully sets out the key questions that must be asked.

Navy doctor terminated as a contractor

Dr Fiona Ross-Taylor was a civilian medical officer at the navy hospital in Devonport for almost 12 years. For most of that time she was engaged on a series of agreements that expressly stated she was an independent contractor and not an employee. There was nothing to suggest that either the Navy or Dr Ross-Taylor had intended their relationship to be one of employment.

When their relationship soured toward the end of 2007, the Navy terminated Dr Ross-Taylor's engagement on the basis of the independent contract between them. The Navy did not, therefore, accord Dr Ross-Taylor the sort of fair and reasonable treatment that employers must give employees before reaching a decision to dismiss.

In response, Dr Ross-Taylor brought a personal grievance in the Employment Relations Authority claiming she was in fact an employee and had therefore been unjustifiably dismissed.

Key questions

After accepting that the parties had intended the relationship to be one of independent contract, and had crafted their contract to reflect that intention, the authority moved on to consider whether that was really the true nature of their relationship from an objective stance. It did this by asking 3 key questions that have been developed over previous cases. In essence, those questions are:

Does the business owner exert a significant degree of control over the way the individual works? The greater the degree of control, the more likely that the individual is an employee.

Are the services provided by the individual an integral part of the owner's business? If so, that would also signal that the individual is an employee.

In providing services, does the individual function as an independent business? The more they look like an independent business owner, the more likely that the individual is a contractor.

In reality an employee

In this case, the answers to all 3 of these key questions suggested Dr Ross-Taylor was in fact an employee.

Her day-to-day work was controlled significantly by the Navy. She worked to the Navy's roster, had her lunch and meal breaks at regular times, needed authorisation for unrostered work, had no say in the services she provided, saw only those patients the Navy approved and booked for her, and was required to attend team meetings, training and staff committees. In addition, the Navy provided all of the equipment and resources for her work.

The authority found that Dr Ross-Taylor's services were core to the Navy hospital's function, they were not merely an add-on service. This was exemplified by the fact that the Navy twice sought to have Dr Ross-Taylor excused from jury duty so that her work would not be disrupted.

Neither could it be said that Dr Ross-Taylor was operating a business on her own account. Her work with the Navy was her sole source of income, she had no corporate structure in place and there was no ability for her to increase her annual profits. Though she submitted invoices for payment, the authority viewed that as simply an administrative arrangement which was in no way determinative.

Consequences

Given its conclusion that Dr Ross-Taylor was an employee, the authority resolved that it could hear her personal grievance. Understandably, the Navy was found to have failed to treat her fairly and reasonably at the time of her dismissal. The authority ordered that the Navy pay her $20,000 as compensation for the emotional trauma and distress she suffered, and a further $81,000 representing wages lost since the time of her dismissal.

Dr Ross-Taylor was also entitled to payments for annual and public holidays that she had never received during her time at the hospital, and the parties were ordered to come to some agreement about how they apportion the PAYE back-payments in view of the fact Dr Ross-Taylor had paid GST in respect of her services. Working through 12 years worth of holiday pay and various tax calculations is a headache any employer would be keen to avoid.

Lessons

The Navy might have avoided these consequences if it had been careful to treat Dr Ross-Taylor consistently as an independent contractor in all aspects of its dealings with her, or to the extent that was not possible, redefined their relationship as one of employee and employer.

Business owners who assume their workers are independent contractors when they are in reality employees would be wise to learn from the Navy's errors.

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