EMPLOYER OR CONTRACTOR?

(Is that contractor working for you an employee?)

Use this guide to find out.

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Introduction

Despite various pieces of legislation and (many, many) written judgements there still many instances where a person has been engaged as a contractor, has subsequently been found to be an employee.

This raises issues for your business that can relate to taxation, superannuation, leave payments and unfair dismissals/adverse action claims.

The consequences for a worker incorrectly engaged as a contractor, instead of hiring as an employee can include:

- Lack of job security.
- Lack of income security.
- Award entitlements do not apply.
- Having to make their own arrangements for workers compensation, superannuation and taxation.
- Lack of career advancement and training.

Therefore the purpose of this report is to set out the vexing question of whether that person you put on as a contractor is actually an employee (employed under a "contract **of** service) or a "contractor" (engaged under a contract **for** services).

• Legislation

Legislation adopted to protect against (what is called) "sham contracting" includes the Fair Work Act 2009 and the Independent Contractors Act 2006. Both are federal pieces of legislation. There are in fact many pieces of legislation that can be applied to contractors.

Under the *Fair Work Act 2009*, the main part (there are more) is:

Division 6—Sham arrangements

357 Misrepresenting employment as independent contracting arrangement

(1) A person (the ***employer***) that employs, or proposes to employ, an individual must not represent to the individual that the contract of employment under which the individual is, or would be, employed by the employer is a contract for services under which the individual performs, or would perform, work as an independent contractor.

Note: This subsection is a civil remedy provision (see Part 4-1).

(2) Subsection (1) does not apply if the employer proves that, when the representation was made, the employer:

(a) did not know; and

(b) was not reckless as to whether;

the contract was a contract of employment rather than a contract for services.

358 Dismissing to engage as independent contractor

An employer must not dismiss, or threaten to dismiss, an individual who:

(a) is an employee of the employer; and

(b) performs particular work for the employer;

in order to engage the individual as an independent contractor to perform the same, or substantially the same, work under a contract for services.

Note: This section is a civil remedy provision (see Part 4-1).

359 Misrepresentation to engage as independent contractor

A person (the ***employer***) that employs, or has at any time employed, an individual to perform particular work must not make a statement that the employer knows is false in order to persuade or influence the individual to enter into a contract for services under which the individual will perform, as an independent contractor, the same, or substantially the same, work for the employer.

Note: This section is a civil remedy provision (see Part 4-1).

Whilst the *Independent Contractors Act 2006* covers the following:

3 Objects of this Act

(1)The principal objects of this Act are:

(a) to protect the freedom of independent contractors to enter into services contracts; and

(b) to recognise independent contracting as a legitimate form of work arrangement that is primarily commercial; and

(c) to prevent interference with the terms of genuine independent contracting arrangements.

(2) The Act achieves these objects, principally, by providing for the rights, entitlements, obligations and liabilities of parties to services contracts to be governed by the terms of those contracts, subject to:

(a) the rules of common law and equity as applying in relation to those contracts; and

(b) the laws of the Commonwealth as applying in relation to those contracts; and

(c) the laws of the States and Territories as applying in relation to those contracts, other (in general) than any such laws that confer or impose rights, entitlements, obligations or liabilities of a kind more commonly associated with employment relationships.

.1 Independent Contractors Act 2006

Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd & Ors [2015] HCA 45

- Unanimous decision of the High Court overturns the previous "Odco" decision of the Full Court of the Federal Court of Australia.
- "Triangular contracting" arrangement with its former employees and a labour hire company (also known as an "Odco" arrangement).

The "Odco System" explained

- The Odco system is a method of engaging workers through commercial contracts (contracts for services) as opposed to employment agreements (contracts of service).
- Under the system, the "contractors" were hired through a third party "labour-hire" company (so that there would no direct hiring by the principle company that used the services).
- Prior to this High court decision, this type of arrangement had been found to be legitimate by way of a 1991 decision of a Full Bench of the Federal Court of Australia

in Building Workers Industrial Union of Australia & Ors v Odco Pty Ltd (1991) 29 FCR 104 (thus "Odco-system").

- Odco supplied contract carpenters, labourers, shopfitters and other construction workers to the commercial building industry in Melbourne. The workers supplied were self-employed contractors and not employees of either Odco or Odco's client builders.
- Odco met with opposition from building unions, who opposed Odco workers from entering building sites. Odco brought proceedings in the Federal Court against the then Building Workers Industrial Union (BWIU) (now the CFMEU). That action alleged that the union had breached section 45D of the then Trade Practices Act 1974 (Cth), in that their actions in requiring builders to remove Odco contractors from building sites were secondary boycotts. The core decision which the Federal Court was required to make was whether, at common law, Odco workers were contractors or employees.
- The Court determined that the Odco workers were contractors and not employees of anyone. The BWIU appealed the decision, however, the Full Federal Court unanimously dismissed the appeal. The BWIU then sought special leave to appeal to the High Court. Special leave was unanimously refused.
- Making the "Odco-system" lawful and legitimate.

- Quest South Perth Holdings Pty Ltd (Quest) operated a business of providing serviced apartments.
- Contracting Solutions Pty Ltd (Contracting Solutions) operated a labour hire business.
- In 2009, two housekeepers and a receptionist of Quest were moved onto what are commonly known as "Odco" triangular style independent contracting arrangements with a company named "Contracting Solutions".
- Contracting Solutions met with the Quest employees and provided them with "contractor applications" which indicated that if the employees completed the form they would be:
  - "An independent contractor rather than an employee.
  - Rostering of shifts were unchanged.
  - Same "flat rate of pay" no matter when they carried out the work.
- The FWO was tenancies; taking the matter first to the Federal Court (losing), the appealing to the Full Bench of the Federal Court (again losing) and finally succeeding in the High Court.
- The FWO argued that:
- Full Federal Court's "restrictive construction" of section 357 does not reflect its wording; is "contrary to its obvious purpose and is plainly wrong" and "allows for the provision to be easily circumvented through third party contracts".

- The FWO said that the Full Federal Court's ruling revealed a potential loophole in the application of section 357 to the triangular relationship of labour hire company, worker and "end-user" employer.

- The High Court unanimously allowed the appeal, holding that section 357(1) prohibited the misrepresentation of an employment contract as a contract for services with a third party.

- The Court declared that Quest contravened section 357(1) by representing to the employees that the contracts of employment under which they were employed by Quest were contracts for services under which they performed work as independent contractors.

Another nail in the coffin for labour-hire companies?

- At the time of writing the *Workpac issues* are yet to be heard in the High Court. This will deal with "sham" casual arrangements.

- ## Recent views of the Fair Work Commission

A number of applications for "unfair dismissals" before the Fair Work Commission have dealt with the employee/contractor issue. Specifically, if the FWC finds that the applicant is a contractor, there is no power for the FWC to deal with the matter.

Decisions of the FWC often cite:

> In *French Accent v Do Rosario*, a Full Bench of the Commission's predecessor stated that, in determining whether a worker is an employee or an independent contractor, the ultimate question is 'whether the worker is the servant of another in that other's business, or whether the worker carries on a trade or business on his or her own behalf: that is, whether, viewed as a practical matter, the putative worker could be said to be conducting a business of his or her own of which the work in question forms part.' The question is concerned with the objective character of the relationship and is to be answered by considering the terms of the contract and the totality of the relationship.

The tests

.1 Introduction

Over previous decades, many courts have considered the question of "what is a contractor" and these judgements have resulted in a number of tests. The following are examples:

.2 Control Test

Zuijs v, Wirth Bros. (1955) 93 CLR 561. High Court. Dixon CJ, Williams, Webb & Taylor JJ. Set out the following which would be indicative of an employer having "control":

- Power of selecting person engaged.
- Remuneration takes the form of wages.
- Right to suspend or dismiss for misconduct.
- Some degree (read large) of superintendence and control over the way the worker carries out work.
- Scheduled time.
- Manner to be carried out.
- Safety measures to be observed.
- Uniform (costume) must be worn.
- "Place where dress" (changing rooms provided?).

Jamsek v ZG Operations Pty Ltd [2020] FCAFC 1934

- Lack of control:
  - The degree of control enforced by the company.
  - The drivers maintained visible logos of the company on their vehicles and clothing.
  - Worked full working weeks solely for the company- making it impracticable to conduct work outside of the arrangement as a result.
  - It is not sufficient for independent contractors to have some control, but instead that control must be substantial.
  - It also implies that the ability to conduct business outside of the arrangement can be key.
- Goodwill
  - The drivers were also unable to generate goodwill on behalf of themselves.

- All benefit derived from the good business and conduct of the drivers was reflected on the company, not the drivers themselves.
- A key factor in defining an independent contractor is their ability to represent themselves independently of the company they are contracting for, and to derive the resulting benefits.

- Nature of the Contract:
  - The drivers were offered "take-it-or-leave-it" contract.
  - The company made it clear that either the men accept the new arrangement or face redundancy.
  - The "ultimatum-like" nature of the offer did not represent a true independent contracting arrangement, as the drivers had little ability to dictate terms.
  - The truck drivers did not have influence over the contract itself.
  - The contract, once entered into, was not revisited as much as a contract of employment.

.3 Organisation of Integration Test

- One feature which seems to run through the instances is that, under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business; whereas, under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it.
- It depends on whether the person is part and parcel of the organisation.

.4 "Mixed" or "Multiple" test.

Montreal V Montreal Locomotive Worker (1947) 1 DLR 161.

- Control.
- Ownership of tools.
- Chance of profit.
- Risk of loss.

Ready Mixed Concrete (South East) Ltd v. Minister of Pensions and National Insurance (1968) 2 Q.B. 497.

- Truck was painted in Ready Mix colours.
- Wear the company's uniform.
- Truck was adapted to carry the company's mixing unit which was fitted at its expense.

- Latimer was responsible for the repair and maintenance of the truck.
- Obliged to deliver concrete as and when required to do so by Ready Mixed, or to employ and pay a substitute.
- Not permitted to operate as a haulier or carrier of goods other than under his contract with Ready Mix.
- Obliged to carry out all reasonable orders of a competent servant of the company 'as if he were an employee of the company' and to 'use his best endeavours to further the good name of the company'.
- Earnings were calculated by reference to a fixed rate per radial mile.
- He had to pay all running costs.
- Could not use the truck as security.
- Company had the right to deduct hire-purchase payments.
- Right to purchase the truck on the expiration of the contract.
- If he did not pay his bills, company could pay them on his behalf.
- Company insured the vehicle in Latimer's name, and again deducted premium payments from his earning.
- Ready Mixed had the right summarily to terminate the contract, contractor committed a breach of any term of the contract; bankruptcy, 'having been warned by the company of any grounds for dissatisfaction it may have in respect of the operation of the truck shall not within a reasonable time have removed the cause of such dissatisfaction'.
- Contract contained an express term to the effect that Latimer was an 'independent contractor'.
- There must be a wage or other remuneration.
- Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done. The right need not be unrestricted.
- Look first to the express terms of the contract, if they deal fully with the matter one may look no further.

Queensland Stations Proprietary Ltd v. Federal Commissioner of Taxation 1945) 70 C.L.R. 539.

- Written contract.
- Contract provided that he should obey and carry out all lawful instructions.
- Whole of his time, energy and ability in the careful droving of the stock.
- Provide at his own expense all men, plant, horses and rations required for the operation.

- Paid at a rate per head for each of the cattle safely delivered at the destination (held to be an independent contractor).

Hunberstone v. Northern Timber Mills (1949) 79 C.L.R. 389.

- Whether ultimate authority over the man in the performance of his work resided in the employer so that he was subject to the latter's order and directions.

- Not merely his own labour but the use of heavy mechanical transport, drive by power, which he maintained and fuelled for the purpose.

- The most important part of the work to be performed by his own labour consisted in the operation of his own motor truck and the essential part of the service for which the respondents contracted was the transportation of their goods by the mechanical means he thus supplies.

- The essence of a contract of service is the supply of the work and skill of a man.

- But the emphasis in the case of the present contract is upon mechanical traction.

- This was to be done by his own property in his own possession and control.

Short's case, His Lordship restated Lord Thankertons' 'four indicia' of:

- Right of selection,

- Payment of wages,

- Right of control, and

- Right of suspension or dismissal, and continued: "He must do all this, at his own expense…"

- Being paid a rate per mile for the quantity which he delivers.

- The ownership of the assets, the chance of profit and the risk of loss in the business of carriage are his and not the company's".

- Free to decide whether he will maintain the vehicle by his own labour or that of another.

- Free to choose whom he will employ and on what terms.

- Free to use another's services to drive the vehicle when he is away because of sickness or holiday.

- Free to choose where he will buy his fuel or any other of his requirements.

In *Stevens v. Brodribb Sawmilling* (1986) 160 C.L.R. 16, for example, Mason J. had this to say about the continuing relevance of the traditional concept of 'control':

- Mode of remuneration.

- The provision and maintenance of equipment.

- The obligation to work.
- The hours of work and provision for holidays.
- The deduction of income tax.
- Delegation of work by the putative employee.
- Not guaranteed work.
- Free to seek other work.
- Partnership with their wives.
- Brodribb's bush boss was responsible for the overall co-ordination. Except in relation to the placement of ramps and various roads and the choosing of logs, he was left entirely to exercise his own skill and judgement.
- Brodribb retained lawful authority to command either Stevens or Gray in the performance of the work which they undertook to do. As I have said, they provided and maintained their own equipment, set their own hours of work and received payments, not in the form of fixed salary or wages, but in amounts determined by reference to the volume of timber which they had been involved in delivery.
- "Brodribb's bush boss seems to have been confined to the organisation of activities in the forest".
- "What is more, Brodribb and the men, including Stevens and Gray, regarded their relationship as one of independent contract, not one of employment".
- "The power to delegate is an important factor in deciding whether a worker is a servant or an independent contractor: Australian Mutual Provident Society v. Allan (1978) 52 A.L.J.R. 407".
- Windeyer J. in Marshall v. Whittaker's Building Supply Co. (1963) 109 C.L.R. 210 at 217 said that the distinction between a servant and an independent contractor 'is rooted fundamentally in the difference between a person who serves his employer in his, the employer's, business, and a person who carries on a trade or business of his own'.

Bank voor Handel en Scheepvaart N.V. v. Slatford (1953) 1 Q.B. 248 at 295.

- 'Depends on whether the person is part and parcel of the organisation'.
- Still appropriate to apply the control test in the first instance.

Montreal v. Montreal Locomotive Works (1947) 1 D.L.R. 161 at 169.

- Observation that it is the right to control rather than its actual exercise.

.5 Other indicia

- Right to have a particular person do the work.
- Right to suspend or dismiss the person engaged.
- Right to the exclusive services of the person engaged.
- Right to dictate the place of work, hours of work and the like.
- Provision by him of his own place of work, own equipment.
- Creation by him of goodwill or saleable assets in the course of his work.
- Payment by him from his remuneration of business expenses of any significant proportion and the payment to him of remuneration without deduction for income tax.

Re Porter; Re Transport Workers Union of Australia (1989) 34 I.R. 179.

- Economic considerations dictate that work will only be accepted from the other party to the contract…
- Income tax is deducted from the remuneration of a person.
- Dixon J. in *Humberstone*. There are many persons who perform work for others, undoubtedly in the capacity of employees, and who provide their own equipment for the purpose of performing such work. A carpenter, plumber, electrician or butcher may provide tools of trade, without that provision being regarded as a conclusive factor.
- ….the amount of capital invested. Often, however, the exercise of a choice to own a truck may be no more significant than a change of job to one that pays more.
- Provide maintain, register and ensure a vehicle suitable for the carriage of goods.
- Sub-contractor who employs any other person is responsible for insuring against **workers compensation** claims.
- Sub-contractor is also responsible for **public risk insurance,** in the joint names of the sub-contractor and the prime contractor.
- Sub-contractor is also obliged to ensure that any person employed by him to drive the vehicle has a driver's licence.
- The sub-contractor is required to maintain a **personal accident insurance** policy.
- Remuneration, which is fixed at an hourly rate.
- Refusal to carry goods may only take place if sub-contractor the goods are unsuited for carriage in or on the vehicle., two-way radio prime contactor's expense. Paint and decorate the vehicle and to affix signs and devices to it.
- Substitute another driver.

- Substitution of a driver can only occur if the sub-contractor is prevented by sickness, disability, or other urgent cause from driving the vehicle, notice is given to the prime contractor, and the prime contractor approves the substitute driver. Similarly, a substitute vehicle can only be used because of breakdown or accident and must be approved by the prime contract.

- No cost to the sub-contractor.

- 'Stand down' any sub-contractor if the vehicle does not meet requirements two weeks' notice of intention to stand down must be given.

- "There is also provision for retrenchment, involving the principle of 'last on first off'. Financial membership of the union is a requirement. Provision is made for annual leave, the cost of which is to be borne by the sub-contractor".

.6 Economic reality test

- MacKenna J. in *Ready Mixed* concluded that Latimer was 'a small businessman', rather than a 'servant'.

- "Whether the worker can be said to be an entrepreneur who was in business on her or his own account".

Cooke J. in *Market Investigations Ltd v. Minister of Social Security* (1969) 2 Q.B. 173.

- Paid for the number of days which the company estimated the interviews would take, plus expenses.

- She could work when she chose.

- Permitted to work for other parties.

Montreal, Denning L.G. in *Bank voor Handel* and the United States Supreme Court in *United States v. Silk* 331 U.S. 704 (1946). He continued:

Fundamental test to be applied is this:

- 'Is the person who has engaged himself to perform these services performing them as a person in business on his own account?'. Perhaps no exhaustive list can be compiled.

- Provides his own equipment.

- Whether he hires his own helpers.

- What degree of financial risk he takes.

- Degree of responsibility for investment and management he has.

- Opportunity of profiting from sound management in the performance of his task.

- Fixes remuneration.

- Degree of the control exercised by the company.
- Contract is looked at as a whole.
- Inconsistent with existence of a contract of service.
- Company felt it could not dismiss her during an assignment.
- The absence of provision for time off, sick pay and holidays.
- Free to work as an interview for others, though I think (no finding that she did so).

Nethermere.

- 'business on his own account' test as the 'fundamental test'.

.7 Mutuality of obligations

Dietrich v. Dare (1980) 30 A.L.R. 407.

- 'lacked the element of mutuality of obligation that is essential to the formation of … a contract (of service)'.

O'Kelly v. Trust House Forte (1983) I.C.R. 728. The industrial tribunal took into account the following factors which they considered consistent with a contract of employment:

- The applicants provided their services in return for remuneration for work actually performed.
- They did not invest their own capital or stand to gain or lose from the commercial success of the functions organised by the banqueting department.
- They performed their work under the direction and control of the company.
- When the casual workers attended at functions they were part of the company's organisation and for the purpose of ensuring the smooth running of the business they were represented in the staff consultation process.
- Carrying on the business of the company.
- Clothing and equipment were provided by the company.
- The applicants were paid weekly in arrear and were paid under deduction of income tax and social security contributions.
- Their work was organised on the basis of a weekly rota and they required permission to take time off from rostered duties.
- There was a disciplinary and grievance procedure.
- There was holiday pay or an incentive bonus calculated by reference to past service.

The following additional factors in the relationship the industrial tribunal considered were ***not*** *inconsistent* with the contract of employment:

- The applicants were paid for work actually performed and did not receive a regular wage or retainer.
- The method of calculating entitlement to remuneration is not an essential aspect of the employment relationship.
- Casual workers were not remunerated on the same basis as permanent employees and did not receive a regular wage or retainer.
- The method of calculating entitlement to remuneration is not an essential aspect of the employment relationship.
- Casual workers were not remunerated on the same basis as permanent employees and did not receive sick pay and were not included in the company's staff pensions scheme and did not receive the fringe benefits accorded to established employees.
- There is, however, no objection to employers adopting different terms and conditions of employment for different categories of employee (for example, different terms for manual and managerial staff).
- There were no regular or assured working hours.
- It is not a requirement of employment that there should be "normal working hours".
- Casual workers were not provided with written particulars of employment.
- If it established that casual workers are employees there is a statutory obligation to furnish written particulars'.
- The following factors were considered by the industrial tribunal to be inconsistent with a contract of employment:
- The engagement was terminable without notice on either side.
- The applicants had the right to decide whether or not to accept work, although whether or not it would be in their interest to exercise the right to refuse work is another matter.
- The company had no obligation to provide any work.
- During the subsistence of the (744) relationship it was the parties' view that casual workers were independent contractors engaged under successive contract for services.
- It is the recognise custom and practice of the industry that casual workers are engaged under a contract for services.

.8 Expressed intention of the parties

High Court in *Cam & Sons v. Sargent* (1940) 14 A.L.J.R. 162

- Typically such 'clarification' takes the form of an express stipulation to the effect that the worker 'is not an employee of the company but is an independent contractor and shall perform his duties free from the direction and control of the company'.

Australian Mutual Provident Society v. Chaplin (1978) 18 A.L.R. 385 (the *A.M.P* case).

The first principle:

- Subject to one exception, where there is a written contract between the parties whose relationship is in issue, a court is confined, in determining the nature of that relationship, to a consideration of the terms, express or implied, of that contract in the light of the circumstances surrounding the making of it; and it is not entitled to consider also the manner in which the parties subsequently acted in pursuance of such contract. The one exception to that rule is that, where the subsequent conduct of the parties can be shown to have (421) amounted to an agreed addition to, or modification of, the original written contract, such conduct may be considered and taken into account by the court (see A.M.P case (at 392-393)).

Third principle

- "Written contract an express provision purporting to define the status of the party engaged under it either as that of employee on the one hand, or as that of independent contractor on the other".

.9 The elephant test

Narich Lord Brandon stated that:

- Wedderburn (1986:116) characterises this 'intuitive process' and the 'elephant test' 'an animal too difficult to define but easy to recognise when you see it'.

- By way of a more rational approach to the categorisation issue Davies and Freedland (1984: 88 -89) suggest that:

- 'In business on own account' test on the other hand, creates a primarily economic frame of reference, in which the question is approached from the perspective of the worker that than that of the employing enterprise, whether the worker constitutes an independent economic unit'.

The following extract is taken from Mills (1979: 229): **The control test** consists essentially of:

- The right of the employer from time to time during the performance of the contract to issue directions as to the way the work is to be done,

- So that failure by the employee to obey such directions is a breach of the contract.

- That is to be distinguished from the case where express provisions in the contract (or in subsequent variations of the contract agreed to by the parties) directly specify the way the work is to be done.

- Sir Otto Kahn-Freund has more recently asserted the general proposition that: 'there can be no employment relationship without a power to command and a duty to obey, that is without this element of subordination in which lawyers rightly see the hallmark of the "contract of employment".

Full Bench decision rules on employee/contractor appeal

Introduction

Read the full decision here.

This is a Full Bench appeal of a decision by a Commissioner who found that the person who claimed an unfair dismissal was an "employee" not a "contractor. In this current "gig" economy it is increasingly important that businesses ensure that they put in place practices that ensure they are either "employing" an employee or "engaging" a contractor.

Read on…

Whilst the Full Bench "allowed" this appeal (as it enlivened the "public interest') – the appeal was ultimately dismissed, with the original Commissioner's decision finding that even though the Nurse had a "contractor's agreement", she was in fact an employee and therefore eligible to bring an unfair dismissal.

However, this does not reduce the fact that it provides an excellent guide for practitioners that are faced with the question which has kept courts, from the High Court down, busy for decades: "employee or contractor?" That is, just because you call an apple a lemon, does not mean it is a lemon – it remains an apple.

This decision is also a useful addition to my FREE "Employee or Contractor?" guide.

Background

The Company lodged an appeal, for which permission to appeal is required, against a decision of Commissioner Simpson in relation to an unfair dismissal application by what the company argues was a contractor that was found, by the Commissioner, to be an employee.

The contractor/employee provided home care services on behalf of the company.

The Company is a business which provides nursing services to patients in their homes:

- Its patient base and revenue are obtained via contractual arrangements with government and other health organisations, principally the Department of Veterans Affairs (DVA).
- It engages qualified nurses for the purpose of providing its services.
- The [Nurses Name] was engaged by the Company in November 2013 as a community registered nurse.
- It was a term of her engagement that she obtain an Australian Business Number (ABN) and enter into an agreement as a contractor.

The contractor agreement

The [Nurses Name] has entered into three successive contractor agreements with the Company during the period of her engagement. Each of these were in a standard form determined by the Company for the purpose of the engagement of all its in-home nursing workers. Her latest (the 2020 Contract) is entitled "Independent Contractor Agreement" and relevantly provides that the [Nurses name] is required to:

- Have an ABN.
- Provide Community Nursing Services…and to provide the Services to a commercially acceptable and professional standard.
- Immediately notify the Company so that the Company may engage another contractor to provide the Services if the Contractor becomes incapable of performing the Service through illness or involuntary injury.
- The Company may vary the Services by increasing, decreasing, or omitting any of them, changing their character or content, changing their direction or dimensions, or requiring the Contractor to perform additional duties.
- To ensure that the Services are provided properly and carefully, in a reasonable and professional, businesslike manner, and promptly and to industry standard.
- Comply with the DVA Service Charter and Australian Public Service values.
- Follow any lawful direction of the Company in providing the Services.
- Ensure that the performance of the Services are not interfered with, delayed, or hindered by any other work the Contractor may be doing under any other contract or arrangement with any other person or organisation.
- Provide its own tools of trade to enable it to provide the Services.
- Provides that the "Service Fee" (specified in Schedule 1 Item 3 in a table of monetary amounts payable for visits which vary depending upon when the visit is conducted and how long is spent at the client's premises to deliver the requisite care) is payable within 7 days of receipt by the Company of a fortnightly tax invoice and worksheet.
- Allows the Company to vary the Service Fee by notice in writing to the Contractor.
- Provides that the Contractor may engage in other work and assignments provided that they do not involve a conflict with their duties and responsibilities to the Company.
- To give absolute priority at any time to the provision of the Services to the Company…over any other work or assignments they may be engaged in.
- "The relationship of the parties is such that the Contractor is appointed as an independent contractor and not as an agent or an employee of the Company. Nothing in this Deed shall be deemed to create an employment relationship between the Company and the Contractor".
- That the "Contractor is solely responsible for all payments to the Contractor" in respect of annual leave, sick leave, long service leave, public holidays, redundancy payments and other similar benefits under any law or industrial instrument, superannuation, workers' compensation and taxation "for and on behalf of the Contractor and any other persons

employed or engaged by the Contractor to provide, or assist in providing, the Services to the Company".

- The Contractor to hold and maintain any necessary insurance relating to or arising out of providing the Services, including workers' compensation insurance, public liability insurance and other insurances required by law or regarded as good commercial practice, and provide proof of such to the Company on request, provided that the Company may elect to assist the Contractor in taking out professional indemnity insurance and/or reimburse the Contractor for the cost of this.
- "The Contractor acknowledges that, as an independent contractor, it is responsible for the cost of providing the Services and for any loss or damage to any third party caused by the manner in which the Services are provided, or arising out of providing the Services, or any related activities or conduct by the Contractor in providing the Services" and provide for an indemnity in this respect.
- A restraint clause which requires among other things that the Contractor not seek or accept the custom of any of the Company's customers and not interfere with the relationship between the Company and its customers, franchisees, employees, or suppliers.
- The Contractor assigns all intellectual property rights to the Company.
- The 2020 Contract may be terminated by either party on 4 weeks' notice, and that the Company may in its sole discretion terminate the 2020 Contract immediately without notice upon the occurrence of various specified events, including that the Contractor in the Company's reasonable opinion fails to remedy its failure to properly perform the Services within one week of the Contractor being advised in writing by the Company of any complaint or performance issues relating to the provision of the Services.
- "The Contractor must not sub-contract all or part of its obligations under this Deed without the prior approval of the Company. Any permission to sub-contract all or part of the Contractor's obligations under this Deed does not discharge the Contractor from any liability for the performance of its duties and obligations under this Deed".

The work of the [Nurses name]

The [Nurses Name] was provided with induction training upon engagement. She was assigned patients to whom she had to provide home nursing services. She initially worked only part-time hours providing the services, and also provided nursing services for another business. However, after a period of time, the Company increased the work assigned to her to a degree which constituted full-time hours, and the Company either instructed or requested that she resign from her role with the other business.

It was up to the [Nurses Name] to determine when and how regularly services would be provided subject to the patient's requirements and management's approval. When the [Nurses Name] visited a patient's residence, she would wear the Company's name badge and provide the patient with a business card with the Company's branding. The business cards were provided to the [Nurses Name] by the Company.

Branding

Patient paperwork and folders were supplied by the Company and bore the Company's logo. At the time of the termination of her engagement, the [Nurses Name] had ordered uniforms from the Company, which were provided to nurses to wear on a voluntary basis at their expense.

Management

The Company had a management structure which oversaw the provision of the services. It would from time-to-time issue instructions to the [Nurses Name] about the performance of her nursing work, including instructions to attend staff meetings from time to time. If the [Nurses Name] wished to take any period of unpaid leave, the approval of management was required. As a matter of practice, if the [Nurses Name] was going to be absent and unable to provide nursing services to the patients allocated to her, she had to arrange another of the Company's nursing contractors to cover for her. The [Nurses Name] assisted in the training of other newly engaged nursing contractors.

Tools of trade

The [Nurses Name] used her own car to travel to and from patients' homes, and she bore the expense of this. The [Nurses Name] has also provided "tools of trade" at her expense, at least on a replacement basis, including a stethoscope, oximeter, pen torch, blood pressure monitor, thermometer and blood sugar measurer. Consumables such as gloves, aprons, sacrum protection, anti-microbial alginate dressings, bandages, wound care dressings, numerous creams, incontinence pads, protective sheets and catheter packs were provided by the Company, and the [Nurses Name] took these as needed from the Company's storeroom at its place of business. Any administrative duties were performed by the [Nurses Name] in her own home using her own computer.

Taxation

The [Nurses Name] was responsible for the payment of tax on her income, and no tax was deducted by the Company from the fees which it paid to her. The [Nurses Name] began charging for GST only towards the end of her engagement, when she was prompted to do so by the Company after it became aware her annual income exceeded $75,000. The [Nurses Name] reported to the Australian Taxation Office (ATO) that she was a Sole Trader/Contractor in her tax returns. She claimed deductions for business expenses in her tax returns over the course of her engagement, with the highest amount claimed being $26,563 in 2015.

The Commissioner's decision under appeal

In his decision, the Commissioner proceeded on the basis of the **multi-factor test** for distinguishing between employer-employee relationships and principal-independent contractor relationships as summarised, on the basis of the relevant court authorities, in the Full Bench decision in *Kimber v Western Auger Drilling Pty Ltd*. The Commissioner also identified the ultimate question to be determined, by reference to the Full Bench decision in *Abdalla v Viewdaze Pty Ltd t/a Malta Travel*, as being whether **the worker is the servant of another in that other's business**, or whether the worker carries on a trade or business on his or her own behalf such that the worker could be said to be conducting a business of his or her own.

Control?

The Commissioner then proceeded to analyse and make findings in relation each of the factors in the multi-factor test identified in the *Kimber* decision. The Commissioner first dealt with "[w]hether the putative employer exercises, or has the right to exercise, control over the manner in which work is performed, place or work, hours of work and the like" and, after referring to the evidence given and some of the provisions of the 2020 Contract, made the following findings:

> "[47] On the basis of the evidence it is apparent that the patients were assigned to [the Company] by [the Nurses name] and [the Nurses name] did not seek to obtain patients to

provide care herself independently of [the company]. Further, she needed approval for leave and any work not performed by her was required to be performed by another nurse connected to [the company]. I am also satisfied on the evidence that [the Nurses name] was directed to assist in the training of others in connection with the performance of nursing work for [the company…and the company] retained the ability to reallocate a particular patient from one nurse to another if for example a patient raised a concern about a particular nurse. The evidence was also that in the event of a patient ceasing to use the services provided to [the company], the patient file was returned to [the company].

"[48] While the Independent Contractors Agreement on its face is written with a clear intent to establish a contracting and not employment agreement, a range of clauses within the Agreement provide [the Company] a greater right of control and direction over [the Nurses name] then is often the case in a contracting arrangement. The overall picture also includes that of [the respondent] appearing to be required to report through a structure of management at the Company. This is indicative of the Company exercising a level of control more indicative of employment than a contracting arrangement."

Able to work for others?

The Commissioner then dealt with "[w]hether the worker performs work for others (or has a genuine and practical entitlement to do so)". The Commissioner found:

"[51] The evidence established that [the Nurse name] performed hours of work for the Company commensurate with what would be regarded as approximating full-time employment. While [the Nurses name] did perform brief periods of work for other entities in years gone by this had not been the case for a lengthy period of time. Whilst her most recent employment contract included a term allowing her to engage in other work, the reality is given the amount of work provided by the [company] to [the Nurses Name], that such work could only have been performed on the two days of the week she was otherwise not engaged by the Company, or in the evening after 5.30 pm when she had already completed a full day of work with the Company. This indicia [sic] tends more to indicate employment rather than a contracting arrangement."

As to "[w]hether the worker has a separate place of work and or advertises his or her services to the world at large", the Commissioner found that "The evidence does not indicate [the Nurses name] had a separate place of work and [the Nurses name] did not advertise her services to the world at large. This indicia [sic] is more indicative of employment than of contracting." In relation to "[w]hether the worker provides and maintains significant tools or equipment", the Commissioner stated the following conclusions:

"[65] The Full Bench decision in *Gupta v Portier Pacific Pty Ltd, Uber Australia Pty Ltd t/a Uber Eats* ([2020] FWCFB 1698, 296 IR 246 at [65]) did not consider that because Ms Gupta in that matter was required to provide her own vehicle in order to carry out her work necessarily pointed to her being an independent contractor as the vehicle in that case was not a specialised item of equipment and was already owned and used for personal purposes, and the provision of a vehicle is common feature of employment relationships. The same can be said in this case.

. . . .

"[69] Based on the evidence…it would appear that besides the fact [the Nurses name] used her own vehicle to travel, virtually all equipment and medical supplies required by [the Nurses

name] to perform her nursing role were provided to her by the Company. [the Nurses name] gave evidence concerning the Company maintaining an inventory of such supplies. The [Nurses name] appears not to have made any significant investment in capital equipment. This evidence is indicative of employment and not an independent contracting arrangement."

Able to delegate work to others?

In relation to "[w]hether the work can be delegated or subcontracted", the Commissioner found:

> "[78] Based on the evidence it is apparent that [the Nurses name] did not have an unfettered ability to delegate or subcontract work in that it was not a matter entirely within her discretion. The evidence is that [the Nurses name] had to follow certain protocols in providing work to someone else and it was also the case that such work had to be provided to another person also engaged by the Company, presumably so the Company could still retain a degree of control over the performance of that work.
>
> "[79]…Overall the evidence concerning the extent that [the Nurses name] could delegate or subcontract her duties tends more to indicate employment than independent contracting."

The Commissioner found in relation to whether the putative employer has the right to suspend or dismiss the person engaged that clause 10.2(f) of the 2020 Contract tended to indicate employment rather than contracting. As to "[w]hether the putative employer presents the worker to the world at large as an emanation of the business", the Commissioner found that "Given [the Nurses name] wore the Company name badge and had a business card, used the Company email address, and used the Company paperwork, folders and a Company bag during consultations with patients, [the Nurses name] was presenting to the world at large as a emanation of the Company which tends to indicate employment rather than a contracting arrangement".

Taxation?

In relation to "[w]hether income tax is deducted from remuneration paid to the worker", the Commissioner referred to the evidence given by…a taxation accountant who was called by the Company to give evidence, to the following effect:

> "[92] In cross-examination, [the accountant] was asked whether [the Nurses name] would be able to claim expenses if she was an employee. [The accountant] said she would. [The accountant] was asked whether she could claim the same amount on her motor vehicle if she were an employee and was entitled to a travel allowance. [The accountant] said the ability to claim as an employee would not be impacted by a travel allowance.
>
> "[93] It was put to [the accountant] that if an employee uses equipment as part of their role, they could still claim these and that there would be no difference between an employee and a contractor making these claims and Mr Molesworth agreed."

[18] The Commissioner then concluded: "The evidence is that The Company did not deduct income tax from remuneration paid to [the respondent] which tends to indicate a contracting arrangement and not employment. It is notable however that much of what was claimed by [the respondent] could also be claimed by an employee." [7]

Paid by results or wages?

[19] As to "[w]hether the worker is remunerated by periodic wage or salary or by reference to completion of tasks", the Commissioner found:

> "[101] The evidence is that [the respondent] was paid fortnightly on the basis of the amount of time she had recorded spent with clients as provided by her. Its seems the method of payment does not fall neatly into the category of a periodic wage or salary in that it was subject to [the respondent] reporting the number and length of visits with clients. However, it also cannot be said that the method of payment is based on purely completion of tasks in that it is not based on a completion of a tasks such, but on the amount of time spent with a client. If anything, the overall method of remuneration tends more to indicate contracting then employment."

Paid holidays or sick leave?

In relation to "[w]hether the worker is provided with paid holidays or sick leave", the Commissioner found that [the Nurses name] was not paid for holidays or sick leave and on that basis this was more indicative of contracting. As to "[w]hether the work involves a profession, trade or distinct calling on the part of the person engaged", the Commissioner found that: "Given that in order to practice as a Registered Nurse, a tertiary level qualification and specialist skills are required, this tends to favour the prospect of the engagement being a contracting relationship rather than employment."

Creates goodwill?

In relation to "[w]hether the worker creates goodwill or saleable assets in the course of his or her work", the Commissioner accepted [the company's] evidence that she did not obtain goodwill or saleable assets in the course of her work over 6½ years, and this tended to support a conclusion that the engagement was employment and not independent contracting.

Business expenses?

Finally, the Commissioner considered "[w]hether the worker spends a significant portion of remuneration on business expenses" and made the following findings:

> "[115] The primary costs [of the Nurses name] incurred were in relation to running costs associated with her vehicle. However, as was observed in the matter, in the event that [the Nurses name] was an employee there are means to recover a significant portion of these costs. [The Nurses name] said that she purchased gloves on one occasion when she could not access the inventories of the Company and replaced the blood pressure machine, she had initially been given by the Company on commencement herself when it became outdated.
>
> "[116] Besides expenses associated with her vehicle I have not been persuaded that [the respondent] did spend a significant proportion of her remuneration on other business expenses despite her submitting a number of tax returns which appeared to claim significant business expenses that on her own evidence she is unlikely to have incurred. For example, her evidence was to the effect that she did not do a significant amount of work from home however has claimed reasonably significant home office expenses in several tax returns."

The Commissioner concluding…

[22] The Commissioner then stated the following overall conclusions:

"[117] I have made findings in relation to each of the indicia as set out above. I have considered the various employment contracts which describe the relationship as one of contracting however as was stated in *French Accent* ([2011] FWAFB 8307) **the parties cannot alter the true nature of their relationship by putting a different label on it**.

"[118] I have also given consideration to the fact while [the Nurses name] said the much of the work was equivalent to that of Assistant Nursing or Enrolled Nursing work, at times [the Nurses name] would have exercised a high degree of skill and expertise given her qualifications as a Registered Nurse. As was observed in *Stevens v Brobribb* ((1986) 160 CLR 16) the absence of control over the way in which work is performed is not a strong indicator that a worker is an independent contractor where the work involves a high degree of skill and expertise.

"[119] Using the **multi-factorial approach**, whilst certain indicia would indicate the relationship was that of independent contracting, and it is clear [the Nurses name] submitted tax returns and claimed expenses as if she were an independent contractor, the overall picture on the evidence is not ambiguous to the extent that the Independent Contracting Agreement of itself sways the matter in favour of the Company. The evidence is sufficiently clear to weigh in favour of concluding that [the Nurses name] was performing work for the Company in the capacity of an employee rather than an independent contractor.

"[120] In the recent Full Bench decision of the FWC in *Gupta v Portier Pacific* ([2020] FWCFB 1698, 296 IR 246) the Full Bench gave significant weight in that matter to there being no control over the when and how long Ms Gupta performed work, Ms Gupta's ability to accept work through other competitors, and Ms Gupta not presenting as an emanation of Uber ([2020] FWCFB 1698, 296 IR 246 at [69]). This matter is distinguishable on all three counts. The evidence indicates that in practical terms the Company did exercise a degree of control over when and how long [the Nurses name] worked. Given [the respondent]'s ongoing commitments to the same patients the Company had allocated to her to provide care for on a week in week out, year in year out basis occupying the equivalent of full time employment, and given her contract required her to ensure performance of the service is not interfered with or delayed by the performance of any other work with any other person or organisation (clause 3.1) it is not realistic to say that [the Nurses name] was free to accept work from others of her own choosing. Finally, as was concluded earlier unlike the case in *Gupta*, [the Nurses name] did present as an emanation of the Company.

"[121] The ultimate question is whether [the Nurses name] was a servant in the Company's business or viewed practically, she was carrying on a trade or business of her own. I am satisfied on the evidence that in **practical terms** the Company retained rights of control over [the Nurses name] to such an extent that [the Nurses name] was an employee of the company and was not conducting her own business..."

The Full Bench's decision

Consideration

The FB reviewed the facts and the Commissioner's previous decision (ie the decision under appeal):

> "We consider that it is in the public interest to grant permission to appeal in this case. The question of whether [the Nurses name] for an unfair dismissal remedy was, at the time of the alleged dismissal, an employee of the party against which a remedy is sought is one of jurisdictional fact. This means, for the purpose of the exercise of the appellate function, that

the decision is not be treated as one involving the exercise of a discretion; rather it involves **the application of a legal standard to a given set of facts**. Appealable error will be found if on appeal a different conclusion on the facts and the law is reached than that arrived at by the primary decision-maker. Further, notwithstanding the conclusion we reach later in this decision, it cannot be said that the question of whether [the Nurses name] was an employee of the Company or performed services for the Company in the capacity of an independent contractor has an easy and obvious answer. **Appellate review is appropriate in these circumstances. Accordingly, permission to appeal is granted.**

The company's appeal

"For the most part, the Company's grounds of appeal invite us to reach a different conclusion concerning [the Nurses name] status than the conclusion reached by the Commissioner by reconsidering the proper conclusion to be reached on a number of the factors relevant to the multi-factor test identified in a number of High Court decisions, most notably *Stevens v Brodribb Sawmilling Co Pty Ltd*...[I]t is necessary at the outset to consider...by which The Company contends that primacy in the analysis is to be given to the characterisation of the relationship between the Company and [the Nurses name] in the 2020 Contract and its predecessors, and that the way in which the contracts were implemented in practice should not have been given more significance than the contractual labelling".

The contract

"We do not accept this contention, and we agree with the approach taken by the Commissioner whereby he considered the substance of the rights and obligations under the 2020 Contract, and how those rights and obligations were applied in practice, to be the primary considerations. The correct approach, derived from the relevant court authorities, was described in the recent Full Bench decision in *Gupta v Portier Pacific Pty Ltd* as follows:

"However all the above provisions may be regarded as merely **labelling** or characterising the nature of the contractual relationship between Ms Gupta and Portier Pacific/Uber; none of them set out the substantive rights and obligations of that relationship. It is well established that such labels cannot alter the substantive nature of the relationship. As was stated by Isaacs J in *Curtis v Perth & Fremantle Bottle Exchange Co Ltd* ([1914] HCA 21, 18 CLR 17):

'Where parties enter into a bargain with one another whereby certain rights and obligations are created, they cannot by a mere consensual label alter the inherent character of the relations they have actually called into existence. Many cases have arisen where Courts have disregarded such labels, because in law they were wrong, and have looked beneath them to the real substance.'"

The way the work is carried out

"More recent decisions of the Federal Court Full Court have elucidated this principle in the context of the identification of whether an employment relationship exists. In *ACE Insurance Limited v Trifunovski*, Buchanan J (with whom Lander and Robertson JJ agreed) said that "the nature of the relationship may be legitimately examined by reference to the **actual way in which work was carried out**" ([2013] FCAFC 3, 209 FCR 146, 235 IR 115 at [91]). In *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd*, North and Bromberg JJ (with

whom Barker J relevantly agreed) said that: "…appellate courts in Australia and the United Kingdom have been particularly alert, when determining whether a relationship is one of employment, to ensure that form and presentation do not distract the court from identifying the substance of what has been truly agreed. It has been repeatedly emphasised **that courts should focus on the real substance, practical reality or true nature of the relationship in question**…" ([2015] FCAFC 37 at [142], Barker J agreeing at [316]). And in *WorkPac Pty Ltd v Skene* the Full Court said "The conduct of the parties to the employment relationship and the real substance, practical reality and true nature of that relationship will need to be assessed ([2018] FCAFC 131 at [180])."

"To the above summary might be added the following statement made by the High Court majority (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ) in *Hollis v Vabu Pty Ltd*:

> "It should be added that the relationship between the parties, for the purposes of this litigation, is to be found not merely from these contractual terms. The system which was operated thereunder, and the work practices imposed by Vabu go to establishing "the totality of the relationship" between the parties; it is this which is to be considered."

"Accordingly, although not irrelevant, the characterisation of [the Nurses name] status in the 2020 Contract and its predecessors as that of an independent contractor and not employee is of lesser significance in the face of substantive contractual rights and obligations which, as applied in practice, point in a different direction.

Arrangement of her affairs

"The Company…seeks that significant and indeed decisive weight be placed on the fact that [the Nurses name] arranged her affairs as if she were an independent contractor, consistent with the contractual characterisation of her relationship with the Company. This included that she operated with an ABN, issued tax invoices to the Company, eventually charged the Company with GST, and declared in her tax returns that she was a contractor. It is to be accepted that these are matters which weigh to some degree in favour of a conclusion that [the Nurses name] was a contractor. However, we do not consider that these matters are to be given the decisive weight contended for by the Company since they are all consequential upon the contractual characterisation of the relationship – a characterisation in substance determined by the Company through the standard-form contracts it used as the sole basis for the engagement of its in-home nursing staff, including [the Nurses name]. As was stated in the Federal Court Full Court decision in *ACE Insurance Limited v Trifunovski* (per Buchanan J, with whom Lander and Robertson JJ agreed):

> "One of the strongest arguments in favour of the appellant's position was that the agents themselves had organised their affairs on the basis that they were not employees, an arrangement which met Combined's requirements. The arrangements to which the trial judge referred, whereby for taxation purposes the agents were treated as non-employees, are clearly not decisive in their own right. They follow the prior assumption about employment (or more correctly non-employment). That assumption led to what was done about income tax deductions, GST, payroll tax, superannuation contributions and the like."

"Buchanan J added:

> "It is also difficult, in my view, to give much independent weight to arrangements about taxation, or even matters such as insurance cover or superannuation. These are reflections of a view by one party (or both) that the relationship is, or is not, one of employment. For that reason, in my view, those matters are in the same category as declarations by the parties in their contract (from which they often proceed). They may be taken into account but are not conclusive."

"In respect of [the Nurses name] **tax returns**, The Company submitted that the work expenses claimed by [the Nurses name] as deductions from her taxable income should have been treated as a substantial indicator of her being a contractor. **We disagree**, for a number of reasons. First, the mere fact that a person performing work for another claims expenses incurred in the performance of that work as tax deductions, even when the amounts claimed are of significance, is not of itself determinative of the person's status, as the decisions in *ACE Insurance Limited* and *Jamsek v ZG Operations Australia Pty Ltd* demonstrate.

"Second, the expenses claimed were primarily for the provision of [the Nurses name] motor vehicle and for her home office. It is not uncommon for workers who are undeniably employees to use their personal motor vehicle for work travel, and also to establish home offices for the purpose of working from home. In this connection it may be noted that clause 16.5(a) of the *Nurses Award 2010* provides for an allowance of $0.80 per kilometre for an employee "*required and authorised to use their own motor vehicle in the course of their duties*". The tax expert called by The Company to give evidence…said that there is no distinction in the capacity of employees or contractors to claim tax deductions for the cost of personal motor vehicle and home office use for work purposes…

"The **motor vehicle** provided by [the Nurses name] was not a specialised piece of equipment requiring particular skill or expertise to operate, but simply a car which could equally be used for private purposes. There is no basis to conclude that it constituted a capital investment of significance for the purpose of the operation of a business. The same can be said of the establishment by [the Nurses name] of a home office. The evidence as to the "tools of trade" did not establish that any substantial cost was involved in their purchase.

"Third, the Company's characterisation…of the amount of expenses claimed as deductions as being 'substantial' or 'significant' requires scrutiny. The tax returns for the earlier years of her engagement with the Company, which nominally show a high proportion of her income being consumed in business expenses, are problematic. In those years [the Nurses name] was also earning income from [another company], with this appearing to be her primary income source initially, so they do not necessarily provide an accurate picture with respect to her engagement with the Company. Additionally, in the 2014/15 financial year, [the Nurses name] seems to have obtained an instant asset write-off for the purchase of a car, which added $14,692 to her deductions for that year, resulting in an unusually high 63.9% of her income being deductible in that year. The later years for which tax returns were available, during which [the Nurses name] was working exclusively for The Company, give a more consistent picture: in 2016/17, [the Nurses name] earned $96,420 and had expenses of $13,858 and, in 2017/18, [the Nurses name] earned $104,155 and had expenses of $15,493. **We do not regard tax deductions of this order necessarily to be indicative of a contracting rather than employment relationship**.

Work was obtained by the company

"There are, as the Commissioner found, a number of indicia which firmly point to the existence of an employment relationship. The first is that it cannot be said that [the Nurses name] was conducting a business of her own. The patients she provided services to were obtained by the Company through its commercial contractual arrangements and allocated to [the Nurses name]. There was no evidence that [the Nurses name] had the capacity on her own initiative to increase the number of her patients and thus increase her income. The patients had no separate contractual or commercial relationship with [the Nurses name] and the 2020 Contract expressly restrained [the Nurses name] from such arrangements. As a consequence, [the Nurses name] acquired **no goodwill or saleable asset**...

No right to sub-contract or delegate

"The second is that there was no effective right for [the Nurses name] to subcontract or delegate the performance of the services under the 2020 Contract or its predecessors, as the Commissioner found, with the consequence that the arrangement was in substance one for personal service. Under clause 13.8 of the 2020 Contract, [the Nurses name] was not permitted to sub-contract her obligations under the contract without the prior approval of the Company, and there was no evidence that such approval was ever sought or obtained. She was not permitted or required to supply another nurse to replace herself if she were sick or injured, since clause 2.2 simply required her to immediately notify the Company in this eventuality so that the Company could arrange another contractor to provide the services. In practice, [the Nurses name] was required if absent to arrange for another nurse contracted to the Company to replace her. However, we reject the contention advanced by the Company...that this amounted to a right of delegation. The proper characterisation of this practice is that the Company assigned to [the Nurses name] its administrative task under clause 2.2 of arranging another contracted nurse to replace her. The evidence showed that she was certainly not allowed to arrange anyone external to the Company to replace her. We also reject the Company's contention that the requirement for [the Nurses name] to communicate instructions and advice to another contracted nurse if handing over a patient was in some way indicative of a right to delegate. This was a sensible administrative arrangement required by the Company to ensure quality and continuity of care and is indicative of [the Nurses name] being employed in a business conducted by the Company".

Control of work

"Third, The Company controlled the work of [the Nurses name] in important ways. The legal means of control were provided by the 2020 Contract (and its predecessors). Clause 2.3 of the 2020 Contract gave The Company the power to determine the quantity and nature of the services to be provided by [the Nurses name], and under clauses 2.1 and 3.1(a) [the Nurses name] was required to perform those services promptly to a commercially acceptable and professional and industry standard and to dedicate an appropriate time for the provision of the services. Clause 3.1(g) required [the Nurses name] to follow any lawful direction made by the Company as to the provision of those services. Assessed cumulatively, these provisions gave the Company legal control over what amount of work was to be performed by [the Nurses name], what the nature of the work was to be, and how it was to be performed.

"The evidence showed that, in practice, The Company gave considerable latitude to [the Nurses name] as to when and how the work was to be performed. This may be regarded as consistent with allowing [the Nurses name] to exercise quasi-professional judgment as to

the degree and timing of the nursing care to be provided to individual patients. However, the Company certainly did exercise its legal powers of control over the allocation of work, to the extent that in or about 2016 it instructed or requested that [the Nurses name] resign her engagement with [the other company] in order for her to provide services to additional patients. Additionally, it exercised control through the arrangements required to be made when [the Nurses name] was sick or injured, as previously discussed, the requirement that [the Nurses name] attend staff meetings from time to time, and the requirement for her to obtain permission from the Company before taking any period of unpaid leave. We therefore agree with the Commissioner's conclusions that the extent of the Company's control over the performance of work by [the Nurses name] was indicative of the existence of an employment relationship…"

Work exclusively for the company

"Fourth, the Company had the legal right to, and did in practice, require [the Nurses name] to work exclusively for the Company. Although, as the Company submitted, clause 5.2 of the 2020 Contract allowed [the Nurses name] to engage in other work provided that this did not conflict with her duties and responsibilities to the Company, clause 5.4 empowered the Company to require [the Nurses name] to give absolute priority to the provision of services to the Company under the contract over any other work or assignments. This provision, together with the capacity of the Company under clause 2.3 of the 2020 Contract to require [the Nurses name] to provide a quantity of services amounting to full-time work, meant that the Company had the legal means to require exclusivity. The evidence did not establish that the Company invoked its equivalent powers under earlier contracts to achieve exclusivity, but it is clear that this is what it did by increasing the allocation of patients to [the Nurses name] to a level that required a full-time commitment and instructing or her requesting her to resign from her engagement with [the other company]. We consider that the Commissioner was correct in concluding that this indicium supported a finding that an employment relationship existed…"

System of payment

"Fifth, the payment system is one more relatable to [the Nurses name] being an employee rather than an independent contractor. Under the 2020 Contract, the rate of payment was as provided for in Item 3 of Schedule 1, or as varied by the Company on notice pursuant to clause 4.2. There was **no capacity for** [the Nurses name] **to set or bargain for a price** for the provision of her services to The Company. The rate structure provided for in the 2020 Contract was a hybrid of a piece rate and a time-based rate, in that [the Nurses name] was paid per visit to patients at their homes, but the payment varied depending on the length of the visit. Because, as earlier explained, the 2020 Contract was in substance one for personal services, the payments were made for the provision of [the Nurses name] personal labour, and not for the production of a result by whatever means [the Nurses name] selected".

Emanation of the company

"Finally, to a limited degree, [the Nurses name] presented herself to the patients as an emanation of the Company in that she had the Company-branded name badge, business card, folder and paperwork and, at the time of the termination of her engagement, she had the Company uniforms on order. There was no countervailing evidence to the effect that she presented herself to the patients or the public at large as operating her own business.

Disagreement with the Commissioner's decision

> "There is one conclusion reached by the Commissioner with which we disagree. In paragraph [113] of the decision, the Commissioner found that because [the Nurses name], as a Registered Nurse, held a **tertiary level qualification** and exercised specialist skills, this "tends to favour the prospect of the engagement being a contracting relationship rather than employment". **This cannot be correct**. The same proposition is true of all nurses, as well as other occupations such as teachers, engineers and lawyers, the large majority of whom work as employees. In the absence of evidence that [the Nurses name] performed her work as a nurse in a business of her own, we consider that this must be treated as a neutral consideration. This conclusion is, of course, not one that favours the Company in its appeal.

The FB's summary

> "The degree of **control** which the Company had over [the Nurses name] work, its capacity to require her to **work exclusively** for the Company, the system by which she was **remunerated**, her lack of capacity to **subcontract** or delegate her work, the lack of any evidence that [the Nurses name] **ran a business on her own account**, and her **presentation** as working in the Company's business rather than her own, lead us to conclude that she was an employee of The Company. These are matters going to the substance of the relationship. [The Nurses name] conduct of her tax affairs and the fact that she held an ABN, charged GST (at the Company's insistence) and rendered tax invoices are matters of lesser weight because they are **merely consequential upon the contractual label given to the relationship** – a label which arose because the Company required its nurses to contract with it on that basis".

Cases cited

1 [2020] FWC 4782

2 [2015] FWCFB 3704, 252 IR 1

3 [2003] AIRC 504, 122 IR 215 at [34]

4 [2020] FWC 4782 at [58]

5 Ibid at [80]

6 Ibid at [87]

7 Ibid at [97]

8 Ibid at [103]

9 Ibid at [113]

10 Ibid at [114]

11 [2017] FWC 1264

12 [2020] FWC 3122

13 [2020] FCAFC 119, 297 IR 210

14 [2011] FCA 366, 214 FCR 82, 206 IR 252

15 [2020] FWC 3122

16 *Sammartino v Foggo* [1999] FCA 1231, 93 IR 52 at [9]-[10]; *Jamsek v ZG Operations Australia Pty Ltd* [2020] FCAFC 119, 297 IR 210 at [2] per Perram J and at [171]-[174] per Anderson J

17 [1986] HCA 1, 160 CLR 16

18 [2020] FWCFB 1698, 296 IR 246

19 [2001] HCA 44; 207 CLR 21, 106 IR 80 at [24]

20 [2013] FCAFC 3, 209 FCR 146, 235 IR 115 at [122]

21 Ibid at [37]

22 [2013] FCAFC 3, 209 FCR 146, 235 IR 115 at [133], [137]

23 [2020] FCAFC 119, 297 IR 210 at [189]-[190]

24 Transcript, 23 June 2020, PNs 209-211

25 See *Roy Morgan Research Pty Ltd v Commissioner of Taxation* [2010] FCAFC 52, 184 FCR 448 at [40]-[41]; *ACE Insurance Limited v Trifunovski* [2013] FCAFC 3, 209 FCR 146, 235 IR 115 at [133]; *Jamsek v ZG Operations Australia Pty Ltd* [2020] FCAFC 119, 297 IR 210 at [206]-[207]

26 [2020] FWC 3122

27 Ibid at [68], [70]

About the Author

Greg Reiffel is a highly knowledgeable and accomplished consultant having:

- More than 30 years' experience in Human Resource Management, Employee and Industrial Relations, and OH&S.
- Greg has worked across many industry sectors, including peak employer bodies such as the Victorian Employers Chamber of Commerce and Industry (VECCI) and Civil Contractors Federation (CCF), Community-Based and Not-For-Profit Organisations, State and Local Governments, manufacturing (including FMCG), civil construction, utilities maintenance, Education and Registered Training Organisations.

Greg's qualifications include:

- Graduate Diploma of Business: Industrial Relations/Human Resource Management (equivalent to Bachelor (Hon's),
- Certificate IV in Training and Assessment,
- OH&S Lead Auditor Certification, and
- Work Effectively with Aboriginal & Torres Strait Islander People Certification.
- Greg is also a Certified Professional member of the Australian Human Resources Institute (AHRI).

Greg takes a pragmatic approach to each and every assignment. He identifies opportunities for improvement in your people management. Whether it be Workplace/Industrial Relations and/or Human Resources Management issues. He draws from his extensive strategic and practical experience to deliver effective solutions tailored to each client's individual needs and circumstances.

Greg's deep understanding of Workplace/Industrial Relations and Human Resources Management systems, legislation, and industry jargon, along with his longstanding commitment to implementing practical, affordable solutions, has made him a valuable asset to many businesses, saving them tens of thousands of dollars over the years.

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