



Monthly Information Newsletter – Tax & Super

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Superannuation and the right to delegate

Another key Federal Court case may have a bearing on whether you owe certain workers you engage superannuation guarantee or not.

For background, early last year the High Court made a game-changing decision in determining whether a worker is an employee or contractor at common law. It ruled that this is determined by the employment contract / agreement and whether it contains the usual indicators that tend toward a finding that a worker is an employee at common law including:

- Does the business have control over the worker (e.g., what hours they work and how they do they do the work)?
- Must the worker perform the work personally (rather than having the ability to delegate or subcontract the work to an outside party)?
- Is the worker paid like an employee (e.g., hourly rate)?
- Does the business supply the tools and equipment for the worker?
- Does the business bear the risk and liability to outside parties for any defects in the work?

Where the answer to most of those questions is yes, then the worker is an employee at common law.

Up until the High Court's decision, lower courts were looking at how individual work arrangements were playing out in practice when answering the above questions. The High Court however ruled that you should instead look at the rights and obligations set out in the respective contract between the parties rather than how the situation plays out after the contract is signed. This is provided that the contract was not a sham.

With this new approach in mind, in early June 2023 a case came before the Full Federal Court where it was asked to determine whether a worker was an employee or contractor. Adopting the High Court's new approach, the Full Federal Court examined the contract and found that the answers to some of the above questions were yes, while the answers to others were no. However, ultimately it found that because the worker had the ability to delegate/subcontract the work

(although a limited ability subject to the approval of the business) the worker was not an employee for superannuation purposes at common law:

... if a person engaged to perform work has a contractual right to have someone else perform that work, that is a matter which at the very least tends against a conclusion that the person is an employee. The existence of the right is inherently inconsistent with an employee relationship. In the absence of significant countervailing considerations, how can you be an employee if, within the scope of the contract, you can lawfully get someone else to perform the entirety of your contractual obligations, whether for a short period, or for a longer period?

Because the worker had the ability to delegate, he was also not entitled to superannuation under the wider definition of "employee" in the superannuation legislation either which provides that if a person works under a contract that is wholly or principally for the labour of the person, the person is an employee of the other party to the contract. The ability to delegate meant that this test was not met.

The take home message for employers is that the terms of the written agreement will determine whether a worker is owed superannuation at common law (but that contract cannot be a sham). However, where there is the ability of the worker to delegate, this will generally be decisive – no superannuation will be owed at common law or under the superannuation legislation.

All told, this is a complex area. Reach out to us if you are unsure of whether a superannuation obligation is owed to a worker.

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