

CG LAW BULLETIN

THE PERILS OF INFORMAL FRANCHISE ARRANGEMENTS

A recent decision by Fair Work Australia (FWA) has highlighted the importance of establishing whether or not a franchise arrangement exists between two parties.

The applicant (S) operated an administration and dispatch centre for a transport company (Langmana) out of a shed in Melbourne for a period between 2008 and 2009 and for a second period between 2010 and 2011. While the initial period of engagement was conducted under a franchise agreement, no written agreement governed the 2010 to 2011 period, as a franchise agreement had been given to S for signing in 2010, but he had never signed it.

S believed that during the second period of engagement he was employed as the manager of the shed. Consequently, when Langmana terminated the arrangement, S lodged an unfair dismissal claim with FWA.

The question before FWA was whether S was in fact an operator of a franchise or rather an employee of Langmana, in which case FWA would have jurisdiction to hear the claim.

FWA concluded that S was not an employee, by applying well-established tests for identifying an employee/employer relationship, found in case law.¹ FWA also concluded that it was reasonable for Langmana to presume that the former engagement, which was a franchise arrangement, was simply being extended to the new engagement.

The decision highlights not only the importance of clearly defining the type of employment relationship that exists between parties, but also the importance of being aware of what type of relationship actually exists in reality. This is important as courts have been willing to look past contractual descriptions and instead consider the realities of the economic relationship between the parties when determining what type of relationship exists.

It is likely that a person is **not** an employee if the following factors are evident in their work:

- able to control aspects of the work;
- supplies and maintains their own tools and equipment;
- able to perform similar work for other parties;
- paid subject to the completion of jobs or stages of the job;
- does not receive holiday pay and sick leave;
- PAYG tax is not deducted from wages;
- required to make their own worker's compensation and superannuation contributions;
- able to delegate work to others (without reference to the engager);
- does not usually wear a uniform provided by the engager.

Failure to be aware of what type of relationship actually exists may result in complications arising between the parties in the future.

¹ *Federal Commissioner of Taxation v J Walter Thompson (Australia) Pty Ltd* (1944) 69 CLR 227; *Stevens v Brodribb Sawmilling Company Pty Ltd* (1985) 160 CLR 16; *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21.

If you are unsure about what type of employment relationship exists in a current relationship you may be party to, please contact the members of CG Law's workplace team.

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