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"making employment work"

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IS HE AN EMPLOYEE OR A CONTRACTOR?

Employer Faces a \$225,000 Problem

A recent determination by Leon Robinson in the Employment Relations Authority (Smith vs Pacific Palms International Resort & Golf Club Ltd) has ruled the contractor was in fact, an employee. Although there was a contract in place, monthly invoices submitted that included GST, the work completed in the name of a limited liability company, the company had a registered GST number and both parties agreed it was a relationship of Contractor and Principal the determination is now that the relationship was really one of employer and employee. This presents a \$225,000 problem for the employer.

How can this happen?

The answer lies in what happened 'on the ground'. Please don't be caught out.

The determination that was made in the case mentioned – quote 'The intention of the parties is relevant but is no longer decisive' – 'Contractual statements are not decisive either'. 'Industry practice is useful but not determinative'.

If the 'intention' of the parties and the 'parties to the contract' aren't offering the Principal the protection they might think they do - then what will offer the protection? And what we are saying here is that regardless of how well a contract might be drafted it may not offer the business owner the protection anticipated.

So What Does Work?

The answer lies in the analysis of the tests of 'Control', 'Integration' and 'Fundamental' (IRD).

Business owners are well advised to check their real status by auditing what happens 'on the ground' with those contractors already engaged as well as new ones. Examine the processes that are taking place – who makes what decisions, who pays for what etc., to ensure the relationship will stand examination.

There are many actions business owners can take that will offer them the protection they seek.

No single factor is determinative. To assist in exploring the true nature of the relationship, consider the following:
(If you are considering a new relationship, you should try and ensure that as far as possible all factors that are relevant to your business, are consistent with the status (employee or contractor) that you are aiming for. You may need to put in place special arrangements to ensure this. If you are unsure about the current status of a worker, this will give you some guidance. If you have been treating the worker as a contractor, but they are more likely to be an employee, (or vice versa), you should take advice without delay.)

The following is one of four tests. (The tests are in the [Independent Contractors book](#)). The greater the number of 'Yes' ticks, in the Contractor, or Employee column in the following form, the more likely the designated status:-

	Contractor	Employee
Do both parties agree that the worker is an independent contractor?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Do both parties agree that the worker is an employee?	No <input type="checkbox"/>	Yes <input type="checkbox"/>
Is there an employment agreement?	No <input type="checkbox"/>	Yes <input type="checkbox"/>
Is there an independent contractor's contract?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Does the worker pay GST and Self-employed ACC levy?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Does the employer deduct PAYE?	No <input type="checkbox"/>	Yes <input type="checkbox"/>
Does the principal deduct withholding tax	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Does the principal treat other similar workers as contractors	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Is the worker required to be employed on an independent contractor basis by virtue of a statute governing the industry?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Do the worker and the principal negotiate the price of the job?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Does the worker submit invoices to the principal?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Does the worker invoice the principal's customer?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Does the worker pay any overheads related to the job?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Does the worker bear the risk of his/her business failure?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Does the worker bear the cost of any abnormal expenses?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Is the worker paid on a lump sum basis?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Does the worker bear the loss if the principal's customer does not pay?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Has the worker previously been accepted as an independent	Yes <input type="checkbox"/>	No <input type="checkbox"/>

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contractor (doing similar work) by the IRD?		<input type="checkbox"/>	<input type="checkbox"/>
Is the worker liable to provide indemnity insurance?	Yes	<input type="checkbox"/>	No <input type="checkbox"/>
Is the worker responsible for correcting faulty work?	Yes	<input type="checkbox"/>	No <input type="checkbox"/>
Must the faulty work be corrected at the worker's expense?	Yes	<input type="checkbox"/>	No <input type="checkbox"/>
Can the worker make a loss from his/her activities?	Yes	<input type="checkbox"/>	No <input type="checkbox"/>
Does the worker have funds invested in plant/machinery etc?	Yes	<input type="checkbox"/>	No <input type="checkbox"/>
Can the worker employ staff?	Yes	<input type="checkbox"/>	No <input type="checkbox"/>
Does the worker have his/hers own client base?	Yes	<input type="checkbox"/>	No <input type="checkbox"/>
Does the worker have his/hers own accounting system?	Yes	<input type="checkbox"/>	No <input type="checkbox"/>
Does the worker benefit from increased productivity?	Yes	<input type="checkbox"/>	No <input type="checkbox"/>
Does the worker advertise for work?	Yes	<input type="checkbox"/>	No <input type="checkbox"/>
Does the worker use the principal's admin/support services?	No	<input type="checkbox"/>	Yes <input type="checkbox"/>
If the task requires a physical presence on site, is it the worker's responsibility to find a replacement if they are absent?	Yes	<input type="checkbox"/>	No <input type="checkbox"/>
Is the worker responsible for compliance with industry and government regulations?	Yes	<input type="checkbox"/>	No <input type="checkbox"/>
Does the worker have a permanent relationship with the principal?	No	<input type="checkbox"/>	Yes <input type="checkbox"/>
Can the worker simultaneously work for another principal?	Yes	<input type="checkbox"/>	No <input type="checkbox"/>
Does the worker do the same work for another principal on an independent contractor basis?	Yes	<input type="checkbox"/>	No <input type="checkbox"/>
Does the worker supply: materials	Yes	<input type="checkbox"/>	No <input type="checkbox"/>
Does the worker supply: own tools/equip.	Yes	<input type="checkbox"/>	No <input type="checkbox"/>
Does the worker supply: machinery	Yes	<input type="checkbox"/>	No <input type="checkbox"/>
Does the worker supply: the place where he works?	Yes	<input type="checkbox"/>	No <input type="checkbox"/>
Can the worker decide what hours he/she should work?	Yes	<input type="checkbox"/>	No <input type="checkbox"/>
Does the worker report to an employee of the principal?	No	<input type="checkbox"/>	Yes <input type="checkbox"/>
Does the worker supervise employees of the principal?	No	<input type="checkbox"/>	Yes <input type="checkbox"/>
Can the worker delegate or sub-contract the work?	Yes	<input type="checkbox"/>	No <input type="checkbox"/>
Can the worker refuse a job?	Yes	<input type="checkbox"/>	No <input type="checkbox"/>
Was the worker trained by the principal to do the job?	No	<input type="checkbox"/>	Yes <input type="checkbox"/>
Does the worker submit progress reports to the principal?	No	<input type="checkbox"/>	Yes <input type="checkbox"/>
Is the worker bound by the principal's rules/policies etc?	No	<input type="checkbox"/>	Yes <input type="checkbox"/>
Can the worker take time off whenever he/she desires?	Yes	<input type="checkbox"/>	No <input type="checkbox"/>
Does the worker decide what he/she will do?	Yes	<input type="checkbox"/>	No <input type="checkbox"/>
Does the worker decide how the work shall be done?	Yes	<input type="checkbox"/>	No <input type="checkbox"/>
Does the worker make all the major decisions concerning the job?	Yes	<input type="checkbox"/>	No <input type="checkbox"/>
Is the worker legally responsible for the final product/service?	Yes	<input type="checkbox"/>	No <input type="checkbox"/>
Does the worker's vehicle /uniform bear the principal's logo?	No	<input type="checkbox"/>	Yes <input type="checkbox"/>
Does the worker decide which geographic area to work in?	Yes	<input type="checkbox"/>	No <input type="checkbox"/>
Can the worker take work home?	Yes	<input type="checkbox"/>	No <input type="checkbox"/>
Is the worker entitled to overtime or sick pay?	No	<input type="checkbox"/>	Yes <input type="checkbox"/>
Can the principal's employees do the same work if the worker is absent?	No	<input type="checkbox"/>	Yes <input type="checkbox"/>
Does the worker enjoy the same privileges and facilities available to Employee's of the principal?	No	<input type="checkbox"/>	Yes <input type="checkbox"/>
Was the worker previously an employee of the principal doing the same work?	No	<input type="checkbox"/>	Yes <input type="checkbox"/>
Does the worker belong to a union?	No	<input type="checkbox"/>	Yes <input type="checkbox"/>
Is it normal to employ independent contractors in that industry?	Yes	<input type="checkbox"/>	No <input type="checkbox"/>

Unfortunately the only conclusive way to answer the question is to seek a declaration from the court about the worker's status. This needs to occur before something goes wrong.

There are some good ideas when employing an independent contractor:-

- | Have a written contract that sets out your intentions AND accurately reflects what is really happening. Do not use an employment agreement unless you want an employee!
- | A contractor must invoice for their services, preferably at the conclusion of the job. A rate for the entire job is better than an hourly rate, although for labour only contracts, an hourly rate would be the norm.
- | The contractor must not be paid sick leave, bereavement leave, or holiday pay.
- | The contractor is not entitled to 'parental leave', so if you want to make special arrangements do not refer to parental leave (maternity and paternity leave).
- | Do not deduct PAYE
- | Do not pay the employee ACC levy
- | Remember the contractor is in business on their own account. Generally that means they should be able to work for other businesses (although there may be circumstances where it is appropriate to restrict this). If the worker only works for you, the relationship looks closer to an employer/employee relationship.
- | Agree who should take responsibility if things go wrong – who actually puts it right,

- and who pays.
- | Agree how disputes are to be resolved. In the event of a major dispute (for example, non payment of the contractor's invoice, or defective workmanship) one party may have a breach of contract claim against the other. These claims can be dealt with in the ordinary courts. The parties can alternatively agree to try and resolve the dispute by mediation before using the courts, or arbitration. Arbitration is frequently used instead of courts, to avoid the potential costs and delays in the court system.

We are experts in this area. Please phone us on **0800 15 8000** for assistance.

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