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Employment by authority of a law of the Commonwealth

The Full Federal Court has held that a person who was engaged by the Department of Defence as an independent contractor, and who had been found by the Australian Industrial Relations Commission (the Commission) to be an employee of the Commonwealth, was not entitled to bring an action for unfair dismissal in the Commission.

The Court found that the issuing of a radiographer's contract under an administrative instruction made under the *Defence Act 1903* (Cth) (Defence Act) could not constitute 'employment … by authority of a law of the Commonwealth', in accordance with section 170CD(1) of the *Workplace Relations Act 1996* (WR Act), where the administrative instruction only allowed contracting for services rendered.

Re Australian Industrial Relations Commission and Arends; ex parte Commonwealth of Australia

Federal Court of Australia – Full Court, 16 September 2005, [2005] FCAFC 204

Mr Arends worked as a radiographer for the Department of Defence (the Department) for approximately 8 years, from 6 July 1994 to 24 April 2002. During that period, he signed six contracts, five for a term of one year and one for 14 months. In each contract, Mr Arends was described as an 'independent contractor'. The Department entered into the contracts with Mr Arends under the 'Defence Instructions (General) Administration 24.1' (DI(G) ADMIN 24.1), made under section 9A(2) of the Defence Act.

Shortly before the end date of the last contract, the position held by Mr Arends was advertised. Mr Arends applied for the position but was unsuccessful. On 26 April 2002, he filed an application with the Australian Industrial Relations Commission, under section 170CE of the WR Act, seeking relief on the basis that the termination of his employment was harsh, unjust or unreasonable and/or that the Commonwealth was in breach of section 170 CK of the WR Act.

Senior Deputy President Drake determined that Mr Arends was an employee of the Commonwealth, despite being described as an independent contractor, on the basis that the type of work, hours of work, method of work, method of payment of salary, payment of superannuation contributions and other financial arrangements indicated an employment relationship. She did not decide whether Mr Arends had been a 'Commonwealth public sector employee' within the meaning of section 170CD(1) of the WR Act, but held regardless that the Commission had jurisdiction in the matter and granted relief to Mr Arends accordingly.

The Commonwealth sought leave to appeal against the decision to a Full Bench of the Commission, contending that, in order for the Commission to have jurisdiction, the contractual relationship between Mr Arends and the Department would need to fall within one of the three areas of engagement by the Commonwealth set out in the definition of 'Commonwealth public sector employee' in section 170CD(1) of the WR Act and that Mr Arends did not fall into any of the three categories. The Full Bench of the Commission granted leave to appeal but dismissed the appeal on the basis that Mr Arends fell within paragraph (c) of the definition by virtue of being a 'person in employment ... by authority of a law of the Commonwealth', namely DI(G) ADMIN 24.1.

Decision of the Full Federal Court

The Commonwealth sought orders in the High Court against the Commission's jurisdiction and on 24 November 2004 the High Court made an order remitting the matter to the Full Federal Court. The Full Federal Court quashed the decision of the Full Bench of the Commission. It found that Mr Arends did not meet the test of employment by authority of a law of the Commonwealth in the definition of 'Commonwealth public sector employee' in the WR Act:

- He was not employed as an employee under the *Public Service Act 1999* or any other Act or instrument under an Act.
- DI(G) ADMIN 24.1 authorised the making of a contract for services, not a contract for employment. The authority conferred by the law (to engage a contractor) determines the relevant character of the relationship established under the law. It is insufficient that the relationship of contractor established under the law may in practice develop features of an employment relationship.

Mr Arends relied on DI(G) ADMIN 24.1, but this instrument specifically provided that 'the contractual arrangements … in this instruction only apply to situations where the contract is to be a contract for services rendered. It would not be appropriate to use these arrangements where the practitioner will be … deemed to be the Department's common law employee'. Thus, DI(G) ADMIN 24.1 did not disclose any intent to apply the authority of the Commonwealth to make a person with whom a contract was entered into, under that instrument, an employee of the Commonwealth.

The Court held that '[t]he fact that subsequent "operational" factors such as method of work and performance would have the hypothetical effect at common law that Mr Arends was an employee does not mean that he was in employment by authority of a law of the Commonwealth, particularly in circumstances where the instrument under which the contract was made was specific in stating that the contract did not effect employment'. Consequently, Mr Arends was not a 'Commonwealth public sector employee' under section 170CD(1) of the WR Act and thus the Commission had no jurisdiction to grant relief under subdivision B of Division 3 of Part VIA of the WR Act, which contains the provisions relating to unfair dismissal.

Implications of the decision

Generally an employee in the APS will be covered by the unfair dismissal provisions of the WR Act only where the employee is employed as an APS employee under the *Public Service Act 1999.* Contractors generally will not be covered, even if they are common law employees. Similar observations apply to Commonwealth public sector employees who are engaged under other legislation governing their employment.

It is desirable that any statutory instruments relating to engagement of contractors in the Commonwealth public sector should specifically indicate that an employment relationship is not established or intended.

It is important to note that this decision relates only to the application of the unfair dismissal provisions of the WR Act. In other contexts when construing the relationship between the parties, the law will look beyond the legal authority for the relationship and will assess all the circumstances to determine whether an employment relationship exists.

The decision also provides another endorsement for the much quoted judgment of Brennan J in *Director-General of Education v Suttling* (1987) 162 CLR 427 at 437–8:

> The relationship between a civil servant of the Crown and the Crown has often been described as contractual, though the civil servant has been appointed pursuant to statute … If the relationship is contractual, the contract must be consistent with any statutory provision which affects the relationship. No agent of the Crown has authority to engage a servant on terms at variance with the statute. To the extent that the statute governs the relationship, it is idle to inquire whether there is a contract which embodies its provisions. The statute itself controls the terms of service.

The text of the decision is available at:
http://www.austlii.edu.au/au/cases/cth/FCAFC/2005/204.html

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