Independent contractor or employee? Take your pick.

PERSONALISED TRANSPORT SERVICES PTY LTD V AMP SUPERANNUATION LTD & ANOR

INTRODUCTION

On 31 January 2006, the New South Wales Supreme Court handed down its decision in *Personalised Transport Services v AMP Superannuation*[2] *("Personalised Transport Services")*, a case that dealt with superannuation contributions mistakenly paid by an employer in respect of independent contractors. The Court awarded the plaintiff restitution of superannuation contribution amounts it had mistakenly paid.

FACTUAL BACKGROUND

The plaintiff carries on business as a freight courier and transport broker. In 1992, the plaintiff entered into a contract ("the Contract") with the defendant who is the trustee of a superannuation fund. Under the Contract, the plaintiff paid superannuation contributions to the defendant for the benefit of 71 freight couriers working in the plaintiff's business. In the period between March 2000 and November 2001, the plaintiff paid a total of $133,475 ("the payments") to the defendant in superannuation contributions, in the belief that it was required to do so by the *Superannuation Guarantee (Administration) Act 1992* (Cth).

This case has arisen on the ground that the plaintiff believed that the payments made by it to the defendant under the Contract were incorrect and should be repaid. The plaintiff argued that the freight couriers were independent contractors and not employees. Accordingly, the plaintiff is not required to make superannuation contribution payments in respect of the contractors under Commonwealth Law.

The plaintiff reduced its claim against the defendant from $133,475 to $85,644 in consideration of amounts already allocated and paid by the defendant to some beneficiaries, as well as fund administration fees and insurance premiums.

RELEVANT LEGISLATION

The *Superannuation Guarantee (Administration) Act 1992* (Cth) ("the Act") introduced compulsory superannuation payments by employers on behalf of all employees. An employer who fails to make superannuation contributions will be liable to pay a further 9 per cent of notional earnings base to the Australian Taxation Office ("ATO").

Barrett J's decision revolved around s 12 of the Act, which defines an "employee" for the purposes of superannuation. When a person falls under the meanings outlined in this section, an employer is required to provide superannuation on their behalf.

Section 12 (1) provides that the term "employee" is to have its ordinary meaning which, although not defined in the instrument itself, has been given its common law accepted meaning, as a person in receipt of salary or wages. Section 12 also extends the common law meaning of an employee to (among other things):

- a person who is entitled to payment for the performance of duties as a member of the executive body (whether described as the board of directors or otherwise) of a body corporate is, in relation to those duties, an employee of the body corporate s 12 (2);
- 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, s 12 (3); and
- a person who is paid to do work wholly or principally of a domestic or private nature for not more than 30 hours per week is not regarded as an employee in relation to that work, s 12 (11).

The failure of the Act to set out factors to further determine whether a worker falls within these subsections (apart from who their employer is) means that the decision in this case will continue to be relevant for some time to come.

ISSUES

In this case, the primary question raised was whether the freight couriers, as independent contractors, fell within the meaning of an "employee" under the Act and therefore, if the employer was correct in paying superannuation contributions on their behalf to the defendant.

The plaintiff argued that the contractors were not employees as defined in s 12 of the Act. To support this claim, the plaintiff presented evidence as to the nature of the business and the arrangements under which the contractors provided services to the plaintiff. A director of the plaintiff stated that it was the plaintiff's usual practice to use both the services of employees and the services of independent contractors. The number of employees remained "fairly constant"[3], whilst the number of independent contractors used by the plaintiff fluctuated with demand.

The plaintiff also used the contracts under which the contractors were engaged to

argue that they were in fact separate from their other employees. The contract contained the paragraph:

"I further acknowledge that I work as a casual sub-contractor only, and as such, I understand that it is my prerogative to work when and if I so desire, I also acknowledge that [Personalised Transport Services] Pty Ltd are under no obligation to supply work to me on a regular basis. It is also my prerogative to accept or reject whatever work is made available."[4]

The plaintiff implied that this paragraph from the contract of engagement gave the freight couriers a certain degree of control over their work. This would be important because in an employer–employee relationship there is a contract of service, whereby the employee provides the employer with service directly. However, in the relationship between an independent contractor and an employer there is a contract for service. This is where the contractor is carrying out services for the employer as promised to a client.

DECISION OF THE COURT

In the present case, the New South Wales Supreme Court held that the contractors in the plaintiff's business were not employees within s 12 of the Act. In his reasoning, Barrett J considered that the freight couriers were in a similar position to that of courier drivers considered in the decision of *Vabu Pty Ltd v Federal Commissioner of Taxation*[5] ("*Vabu*").

In *Vabu*[6], the court held that courier drivers were independent contractors and did not fall within the common law meaning of "employee" or under the extended definition in s 12 of the Act. In determining whether the courier drivers were independent contractors the court regarded the ultimate question on this issue to be "whether a person [was] acting as the servant of another or on his own behalf".[7]

Barrett J examined the factors considered in *Vabu* in relation to the present case:

- the degree of control exercised over the contractors by the company (eg specifying uniform, starting time, vehicle safety, number of hours worked and conduct whilst at work);
- the couriers had supplied their own vehicles and bore the expenses of providing and maintaining those vehicles including repairs, registration, petrol and insurance fees;
- the couriers had provided their own equipment; street directories, telephone books, trolleys and rope;
- the couriers had been taxed as independent contractors; and
- the couriers had received no wage or salary but were paid in relation to how many deliveries they completed and the fee paid to the company for those deliveries.

On balance, the court held that the courier drivers were neither employees in the ordinary meaning or under the extended meaning in s 12 (3) of the Act. In addition, it stated: "[the] contracts between the appellant and the couriers were neither wholly nor principally for the labour of the couriers. Each courier agreed … to produce the result the appellant had contracted with the client to produce."[8] Therefore, the employer was not required to make superannuation contributions on their behalf.

Barrett J was satisfied that, in the circumstances, the contractors were placed in the same position as the couriers in *Vabu*[9], that is, outside the statutory interpretation of an "employee" for the purposes of superannuation contribution. In conjunction to this conclusion, Barrett J specifically referred to the nature of the contractor's engagement highlighted in the extracted paragraph from their contract of engagement, the nature of work undertaken and the circumstances in which that work was done.

COMMENT

The decision from *Personalised Transport Services* will have on-going importance for the interpretation of s 12 of the Act and for the interpretation of "employee" generally for the purposes of superannuation contribution. Perhaps its real importance is in reinforcing the distinction made between independent contractors and employees, and the factors that could be used to determine this distinction. This is important particularly where the true relationship between the parties may not be readily discernable from the facts. However, the relevance of each factor in the overall equation may change depending on the specific factual scenario.

In establishing these factors the courts have placed greater weight on the whole relationship between the parties, rather than just examining the "control" that is exercised over a person by their employer. Consequently, these factors are much more flexible than the previous common law test of control, especially in more complex factual scenarios. It also recognises that employees and contractors cannot be pigeonholed into one category or the other because of the title of their employment, but rather the substance of the relationship with their employer is a paramount consideration.

Examining the entirety of the employer-worker relationship was also a key consideration in a recent Victorian Civil and Administrative Tribunal case of *Eastern Football League Inc v Commissioner of State Revenue*[10] ("*Eastern Football League*"). In addition, *Eastern Football League* examined many other factors considered relevant in *Personalised Transport Services* and the *Vabu* taxation cases, including the nature of a worker's engagement and the provision of equipment. The Eastern Football League case highlights the flexibility of a factors-oriented approach to many different factual scenarios.

The distinctions between employees and independent contractors: further reinforced

Shortly after the decision was handed down in *Personalised Transport Services*, the ATO released a *Superannuation Guarantee Ruling*[11] ("the Ruling") that dealt with this issue. The Ruling set out a list of factors which the ATO considered relevant in determining employee status. These factors were similar, if not the same as those considered in the case law. Consequently, there is now a list of issues to consider when determining whether a worker is an "employee" for the purposes of superannuation contributions. It is also accepted that no one factor of itself is determinative of the employer–employee relationship, but some that should be considered as a guide include the following:

- the totality of the relationship between the employer and the worker[12]
- the terms and the circumstances of the formation of the contract[13]
- the degree of control that can be

exercised over the worker by the employer (uniform, hours worked, conduct whilst at work)

- whether the work can be delegated or subcontracted
- whether the worker bears any commercial risk in carrying out their work (eg independent contractors bear the commercial risk of faults or poor work and often have their own insurance)
- the provision of tools and equipment and payment of business expenses[14]
- the taxation position of the worker
- the factors contributing to the calculation of the worker's remuneration, wage, or salary
- whether the relationship will fall within any of the subsections listed in s 12 of the Act.

Conflicting decisions: *Hollis v Vabu* (t/as Crisis Couriers)[15]

The decision in *Personalised Transport Services*[16] has been decided differently to the 2001 High Court case of *Hollis v Vabu*[17] ("*Hollis*"). In *Hollis*, the court held that bicycle couriers were employees of Vabu and not independent contractors, as had been found in the Vabu taxation case. At both first instance and on appeal the court had followed the Vabu taxation case, but it was overturned at High Court level.

Although the Hollis case was decided differently to both *Personalised Transport Services* and the Vabu taxation case, it may be distinguished from those cases on their facts. The Hollis case considered the employment status of a bicycle courier in relation to a negligence claim. The *Personalised Transport Services* and *Vabu* related to superannuation and to couriers in general, regardless of which mode of transport they used (bicycle, car, van, etc.). One particularly significant factor in all of these cases was the cost to the courier in providing their own equipment and therefore the type of transport used was an important issue. In *Hollis* the cost was determined to be minimal[18], however in *Personalised Transport Services* and *Vabu* it was considered that the cost could potentially be significant.

The finding in the *Hollis* High Court case indicates that although the factors indicating employment status have been accepted and applied by the courts and the ATO, the weight given to these factors, and the results that ensue, are unpredictable and may change depending on the factual scenario.

CONCLUSION

Independent contractors and employees must be distinguished to determine superannuation contributions required by law under the *Superannuation Guarantee (Administration) Act 1992* (Cth). Existing case law on this issue such as *Vabu v Federal Commissioner of Taxation* and the High Court case of *Hollis v Vabu* have all used the same approach, the use of indicating factors to determine whether a worker is an independent contractor or an employee. However, the results reached in each of these decisions reinforces that consideration of the factual scenario is vital. *Personalised Transport Services v AMP Superannuation* has further reinforced the indicators used by the court to determine employment status. Since this decision, the ATO has released a ruling which further reinforces the approach taken in these cases. In consideration of all these authorities it is clear that each indicator of employment status must be carefully analysed before any distinction between independent contractor and employee can be made. •

Vanessa Johnston, Articled Clerk
Julie Ling, Solicitor
Ambry Legal

Reference Notes

1 [2006] NSWSC 5.

2 [2006] NSWSC 5.

3 [2006] at [7].

4 [2006] at [7].

5 (1996) 33 ATR 537, BC9604112.

6 (1996) 33 ATR 537; (1996) 81 IR 150, BC9604112.

7 BC9604112 at 6.

8 BC9604112 at 7–8.

9 (1996) 33 ATR 537, BC9604112. See [2006] at [9].

10 [2006] VCAT 233.

11 2005/1.

12 SGR 2005/1 at [9].

13 SGR 2005/1 at [27].

14 Personalised Transport Services v AMP Superannuation [2006] NSWSC 5, Vabu v Federal Commissioner of Taxation (1996) 33 ATR 537, BC9604112 and SGR 2005/1 at [52].

15 (2001) 181 ALR 263.

16 [2006] NSWSC 5.

17 (2001) 181 ALR 263.

18 (2001) 181 ALR 263 at [267-7].