

## **Fair Work Australia allows “Contractor” to claim Unfair Dismissal**

Fair Work Australia (FWA) has allowed a worker who submitted invoices to his employer, was not subject to PAYG taxation and was not paid any employment entitlements to proceed with an unfair dismissal application.

FWA heard that the trainer engaged by Geelong, Victoria-based training organisation Create in February 2009 also determined his own hours, and had his own business, JMB Training, business card and business email address.

But Commissioner Anne Gooley ruled that the trainer was an integral part of Create's business and that he was subject to its control in performing his work.

Create allocated work to [the trainer] and supervised the work," she said.

"While [he] could determine the method by which he trained the trainees, the curriculum and assessment methods were dictated by Create," she said.

As a trainer Mr Barrett's typical duties were:

- “undertake monthly work based training and assessment sessions for CREATE trainees;
- prior to the commencement of any training and assessment be party to the trainee and the workplace supervisor's induction to the traineeship program;
- marketing to and identifying new employers and trainee placements;
- maintain documentation of trainee participation, lesson plans, assessments and evidence submitted by trainees in accordance with standards set by the Australian Quality Training Framework (AQTF) and AVETMISS;
- participate in monthly monitoring and evaluation of individual trainee progress at CREATE Traineeships Osborne Park Office;
- prepare appropriate lesson plans for the units of competency being developed and ensure appropriate Learning Principles are employed to enhance the learning environment;
- be an active team member of CREATE Traineeships and attend relevant meetings as directed.”

## **Summary of the evidence**

The features that support the contentions of the applicant that he was an employee

- He worked exclusively for CREATE;
- He was not able engage others to perform his work;
- He was subject to supervision by CREATE;

- Training was an inherent part of the business of CREATE;
- The content and assessment of the training provided to trainees by Mr Barrett was controlled by CREATE.

The features that support the contentions of CREATE that the applicant was an independent contractor

- Mr Barrett submitted invoices to CREATE and charged CREATE GST;
- Mr Barrett had his own business, JMB Training, business card and business email address;
- Mr Barrett was not subject to PAYG taxation;
- Mr Barrett was paid by result;
- Mr Barrett was not paid annual leave, sick leave or any other entitlement normally associated with employment;
- Mr Barrett determined his own hours;
- Mr Barrett brought trainees with him when he commenced with CREATE and took trainees with him when he left;
- Mr Barrett completed BAS statements for JMB Training during the period of his engagement with CREATE and paid wages to an unnamed person and paid drawings to himself;

In her conclusion Commissioner Gooley made the following observations:

*This was a case which exposed “the ill defined dividing line between employment and independent contract.”*

*“Much of the evidence appears to favour a conclusion that Mr Barrett is a contractor, after all employees don’t invoice their employer, charge GST, get paid only if someone is assessed as competent, and pay themselves drawings.”*

*“However these practices arose from the presumption by both CREATE and Mr Barrett that this is how trainers are engaged. It is not based on an analysis of the actual relationship between Mr Barrett and CREATE. It is the nature of that relationship that leads to the conclusion that Mr Barrett was an employee of CREATE.”*

*“Mr Barrett was an integral part of the CREATE’s business and in performing his role as trainer he was subject to control by CREATE. CREATE allocated work to Mr Barrett and supervised the work. While Mr Barrett could determine the method by which he trained the trainees the curriculum and assessment methods were dictated by CREATE. Mr Barrett was not conducting his own business when he performed work for CREATE.”*

Commissioner Gooley therefore allowed him to proceed with his claim of unfair dismissal against the organisation.

### **Lesson for Employers**

The lesson in this for employers is simple, just because you or your subcontractor label him/her as a sub-contractor does not necessarily mean that they are one. The arrangement must fit within the legal definition of a sub-contractor otherwise it may be deemed a sham arrangement and expose the employer to claims for employee entitlements including access to unfair dismissal remedies.