SQUIRE PATTON BOGGS

Hourly Rate Labour Hire Worker Found to be High Income Earner Without Unfair Dismissal Rights

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In *Herc v Hays Recruitment* [2022] FWC 1997, the worker made an application to the Fair Work Commission (Commission) claiming that she had been unfairly dismissed by a recruitment agency (Agency). The Agency had four jurisdictional objections to the application – which is a type of objection to be dealt with as a threshold matter by the Commission before it could hear the merits of the case.

The four jurisdictional objections were that:

- The worker was not an employee of the Agency
- She was not dismissed
- Her application was out of time
- She earned more than the (then) high income threshold of AU$158,500 per annum (noting that the high income threshold is now AU$162,000)

It was agreed between the parties that the high income threshold objection be determined first because, on its face, the worker earned more than the threshold.

In May 2017, the worker entered a contract with a payroll company (Payroll Provider), for payroll services for the "price" of 2.75% of her gross pay. In November 2020, the worker contracted through the Payroll Provider to provide her services on assignment to a client of the Agency. Under the assignment, the Agency made weekly payments to the Payroll Provider in relation to the worker's hours while on assignment, at an hourly rate of AU$104.97 at the time her engagement ended.

While the contractual arrangements did not specify an annual "salary", the arrangements did specify the number of hours that would be worked as part of the assignment, which was 880 hours for the first six months of the assignment, and a further 880 hours for the second six months, totalling 1,760 hours.

The worker argued that "there was no firm advance commitment" to pay an annual rate of earnings to her. She contended that the contractual terms, while asserting there was no employment relationship between the Agency and the worker, otherwise clearly indicated a casual form of engagement between them. Without a firm advance commitment, the worker argued, it could not be said that an hourly rate paid to her could constitute "earnings" for the purposes of the high income threshold.

The Commission did not accept this argument. It found that the number of hours to be worked was specifically provided for, that it was clear it was not a casual employment relationship, and it was clear that the worker understood and had the expectation that she would work (or be able to work) the specific number of hours at her hourly rate.

The worker submitted, in the alternative, that the Commission should make deductions from her hourly rate, being the 2.75% fee for the Payroll Provider's payroll services, 9.5% for superannuation contributions, and 10% for GST. However, the Commission found that the Payroll Provider's fee should be included in the worker's annual rate of earnings as "an amount dealt with on the employee's behalf or as the employee directs". The Commission also found that the worker's hourly rate was exclusive of GST and so no such deduction was justified. Because the Agency did not make any payments directly to her, there were also no "ordinary time earnings" payable to her under which the obligation to make superannuation contributions would arise.

The worker's annual rate of earnings was, therefore, AU$191,000, well over the high income threshold. Even if the Payroll Provider's fee and superannuation contributions should have been deducted, the Commission found that her annual earnings would have been AU$162,113.60, still above the high income threshold.

After finding that there was insufficient evidence filed to determine whether the worker was covered by a modern award, the Commission dismissed the application.

What Does This Decision Mean for Recruitment and Labour Hire Agencies?

Because the case was dismissed on the basis of the high income threshold question, there was no need to examine the other jurisdictional objections raised by the Agency. In particular, the question of who the true employer was (or whether the worker was an employee at all, rather than a contractor) did not need to be decided.

Agencies should remain cognisant of the risks of workers in multi-party contractual arrangements making termination claims in the event that their engagement is terminated. In particular, when engaging staff, agencies should ensure that their contractual arrangements are well documented and expressed clearly, regardless of whether the individual is being engaged as a contractor or employed as an employee.

Should you require any assistance or advice in relation to potential claims from current or former workers, please get in touch with our Labour & Employment team.

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