SQUIRE PATTON BOGGS

WORKPLACE VIEW

September 2015

Risky Betting – Independent Contractor or Employee? Good Odds for Wagering Group On Appeal

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With the AFL finals fast approaching, the office tips are bound to get a little heated! However, you may want to think twice before taking a punt on whether a worker is an employee or an independent contractor.

In the recent appeal case of *Tattsbet Limited v Morrow* [2015] FCAFC 62, the Full Court of the Federal Court of Australia (**Full Court**) overturned the Federal Circuit Court's (**FCC**) employment finding at first instance, concluding that a woman operating a betting agency in Queensland was in fact an independent contractor despite a number of indicators suggesting the relationship was that of an employer and employee.

What Happened?

From 2004, Ms Morrow operated a shopfront betting agency for Tattsbet Limited (**the Company**) under four consecutive "Agency Agreements". The Company terminated the most recent agency agreement (**2010 Agency Agreement**) on 10 November 2011. As a result, Ms Morrow commenced a claim in the FCC alleging (amongst other things) that she was an employee.

Decision at First Instance

The FCC identified several factors pointing in the direction of Ms Morrow being an independent contractor. For example, the fact of Ms Morrow's accounting to the ATO, her remuneration by way of tax invoices, her Australian Business Number, her freedom to employ others, her negotiation of an enterprise agreement with her employees and her payment of GST on supplies provided to the Company.

Despite these factors, the FCC found that Ms Morrow was an employee. The FCC was influenced by factors such as the tight control which the Company exercised over the operation of the agency, the provision of plant and equipment by the Company, the prohibition on Ms Morrow providing services to similar businesses and the inability of Ms Morrow to make autonomous decisions about the conduct of the agency generally.

Ultimately, however, the FCC's decision was based on applying an "entrepreneur test", the central question being whether the person performs the work of an entrepreneur (i.e. do they own and operate a business?), rather than applying the traditional "multi-factorial" test embraced by the High Court in earlier decisions.

The Full Court Bucks the Trend

The Company subsequently appealed the FCC's decision to the Full Court and was successful in pursuing an "independent contractor" finding – a welcomed outcome for the Company after waiting a lengthy 20 months for the Full Court's findings! We note however the Full Court has remitted Ms Morrows' adverse action claim back to the Federal Circuit Court to reconsider on that basis.

In its decision, the Full Court held that the question is not whether the person is an entrepreneur but whether the person is an employee. This involves assessing the totality of the relationship between the parties. The Full Court held that the relationship between Ms Morrow and the Company involved a number of features that, in combination, compelled the conclusion that Ms Morrow was not an employee. Examples of those key features included:

- that the 2010 Agency Agreement was the fourth in a line of similarly-worded agreements which clearly stated that Ms Morrow was an independent contractor. Although this is not determinative, it was significant to the extent that it reflected what the parties understood the relationship to be;
- that Ms Morrow was not engaged or paid for her work alone. Rather, she was engaged to operate the agency and was paid by reference to the value of the business transacted there;
- Ms Morrow was able to employ others and had executed an enterprise agreement with her employees' trade union;
- Ms Morrow's net income was only a third of the gross remuneration she received from operating the agency; and
- not only did Ms Morrow collect and forward GST to the ATO but she spent significant time and resources meeting GST regulatory requirements.

Lessons Learned

Although the Full Court's decision may provide some comfort to businesses engaging independent contractors, caution should still be taken. This is because the distinction between an employee and independent contractor is not always clear and will always depend on the specific circumstances. Businesses who engage independent contractors should ensure that agreements are carefully drafted and accurately reflect the actual relationship between the parties on the ground, and not just the label the parties wish to use to describe that relationship.

WORKPLACE VIEW

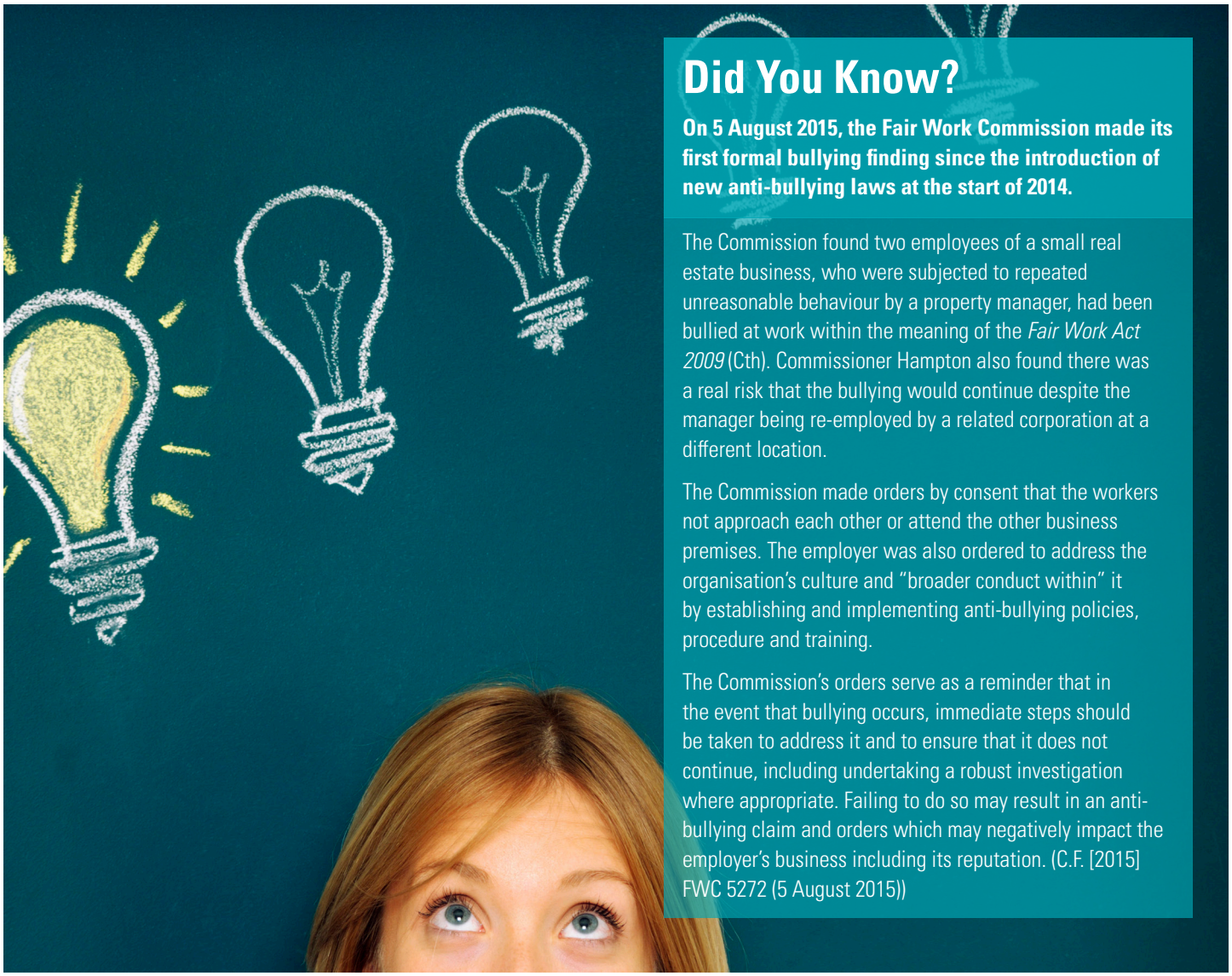
Employer Reminder

The recent case of *Scullin v Coffey Projects (Australia) Pty Ltd* [2015] FCCA 1514 provides an important reminder to employers to ensure that they keep their policies up to date and in line with the National Employment Standards (**NES**), which contain the minimum entitlements for Australian employees whose employment falls under the *Fair Work Act 2009* (Cth).

In that case, the employer's Parental Leave Policy stated that an employee was only able to take unpaid parental leave if they were the "primary caregiver" of a child and accordingly denied the employee's request for 12 months unpaid parental leave to care for his newborn twins. As a result the employee took a mix of paid and unpaid leave and was only offered part-time work when he returned from leave. His position was made redundant 12 months later and he received redundancy pay on the basis that he was a part-time employee.

The policy was found to be in breach of the NES which permits an employee to take 12 months unpaid parental leave if they have responsibility for the care of a child and are entitled to return to the same or substantially similar position.

The Federal Circuit Court ordered the employer to pay the employee a significant sum of AU$170,000 in unpaid wages and redundancy pay that the employee would have received if he had been allowed to access the leave and its flow on benefits.



Did You Know?

On 5 August 2015, the Fair Work Commission made its first formal bullying finding since the introduction of new anti-bullying laws at the start of 2014.

The Commission found two employees of a small real estate business, who were subjected to repeated unreasonable behaviour by a property manager, had been bullied at work within the meaning of the *Fair Work Act 2009* (Cth). Commissioner Hampton also found there was a real risk that the bullying would continue despite the manager being re-employed by a related corporation at a different location.

The Commission made orders by consent that the workers not approach each other or attend the other business premises. The employer was also ordered to address the organisation's culture and "broader conduct within" it by establishing and implementing anti-bullying policies, procedure and training.

The Commission's orders serve as a reminder that in the event that bullying occurs, immediate steps should be taken to address it and to ensure that it does not continue, including undertaking a robust investigation where appropriate. Failing to do so may result in an anti-bullying claim and orders which may negatively impact the employer's business including its reputation. (C.F. [2015] FWC 5272 (5 August 2015))

International Spotlight

Have you ever wondered how our New Zealand neighbours stack up when it comes to minimum entitlements for permanent employees? Here are a few examples, you be the judge…

	Australia (* Federal system Employee)	New Zealand
Legislation	*Fair Work Act 2009* (Cth)	*Employment Relations Act 2000*
Employment agreement	Not required by statute to have a written employment agreement although it is best practice	Must have a written employment agreement with various mandatory clauses
Maximum hours of work	38 ordinary hours per week (additional hours only where reasonable)	40 ordinary hours per week
Minimum wage	AU$17.29 per hour	NZ$14.75 per hour
Annual leave	4 weeks per year, 5 weeks per year for shift workers	4 weeks per year
Personal leave	Personal/carer's leave 10 days per year and unpaid carer's leave 2 days per occasion	Paid sick/carer's leave 5 days per year
Compassionate/Bereavement leave	2 days per death/life threatening illness or injury per immediate family/household member	3 days per death of an immediate family member or 1 day for 'other' bereavement
Long service leave	Depending on state legislation, eligible to take first entitlement after 7 or 10 years	No entitlement to long service leave
Public holidays	11-14 days per year depending on state legislation	11 days per year
Parental leave	Eligible employees with 12 months' service: • 18 weeks' paid leave (capped); • 12 months' unpaid leave; • can request additional 12 months' unpaid leave; and • 2 weeks' paid paternity/partner leave (capped).	Eligible employees with 6 months' service: • 16 weeks' paid leave (capped); and • 1 week unpaid paternity/partner's leave Employees with 12 months' service: • 16 weeks' paid leave (capped); • 52 weeks' unpaid leave; and • 2 weeks' unpaid paternity/partner's leave.
Notice periods	1-5 weeks depending on age and length of service ** common law reasonable notice principles may also apply	No minimum statutory period of notice. Contractual notice or reasonable notice principles apply.
Redundancy pay	Eligible employees receive 4 – 16 weeks depending on length of service	No entitlement to redundancy pay

Legislation Update

Jurisdiction	Legislative Instrument	Status	Proposed Changes
New South Wales	*Industrial Relations (General) Regulation* 2015	This Regulation commenced on 1 September 2015	To remake the *Industrial Relations (General) Regulation 2001*. Includes minor amendments to the following matters: (a) enterprise agreements; (b) exemptions from the unfair dismissal provisions; (c) pay slips and records to be kept by employers; (d) the Industrial Relations Commission; (e) industrial organisations, including the seals of organisations; (f) public vehicles and carriers; (g) enforcement, including penalty notices for offences; (h) persons who are taken to be employees for the purposes of the *Industrial Relations Act 1996*; and (i) other miscellaneous matters.
New South Wales	*Workers Compensation Amendment Bill 2015*	Passed by both Houses - 13/08/2015	To amend the *Workers Compensation Act 1987* arising from reforms to the NSW workers compensation scheme, including: (a) limits on the payment of compensation for medical and related treatment and services; (b) the scheme for the payment of weekly compensation to injured workers during periods of incapacity will be changed; (c) an injured worker who is unable to return to work with the worker's pre-injury employer will be eligible for compensation (to a maximum amount of $1,000) for the cost of certain services and assistance provided to assist the worker in returning to work with a new employer; (e) the amount of lump sum compensation payable to a worker for permanent impairment will be increased, and indexed once a year; (f) the amount of lump sum compensation payable in respect of the death of a worker will be increased from $524,000 to $750,000; (g) the maximum amount of compensation payable in respect of the funeral expenses of a deceased worker will be increased from $9,000 to $15,000; and (h) other minor or consequential amendments will be made.

Events Update

Squire Patton Boggs Labour & Employment Breakfast Seminar Series 2015
Perth – Level 21, 300 Murray Street

Wednesday 16 September 2015
"Contractor or Employee: Getting the Relationship Right"
Speakers: Bruno Di Girolami and Dominique Hartfield

Wednesday 4 November 2015
"Modern Awards and Enterprise Agreement Making: Emerging Trends"
Speakers: Bruno Di Girolami and Kylie Groves

Sydney – Level 10, The Gateway, 1 Macquarie Place

Wednesday 11 November 2015
"Modern Awards and Enterprise Agreement Making: Emerging Trends"
Speakers: Kylie Groves and Anna Elliott

Squire Patton Boggs Employment Law Worldview Webinars

A number of our offices across the globe will present a webinar on key labour and employment issues in their jurisdiction as part of our new global webinar series. The jurisdictions covered will include the United Kingdom, Spain, Australia, Germany, Hong Kong, United States and France. Webinars for the United Kingdom and Spain have already been held.

The next featured country in the webinar series will be the **Australia** at **4 p.m. AWST** on **9 September 2015.** Anna Elliott (Of Counsel) and Dominique Hartfield (Senior Associate) will discuss issues associated with the hiring and firing of employees in Australia.

If you are interested in attending, you can register for the Employment Law Worldview Webinars online.

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