



## Précis Paper

### Independent Contractors or Employees: Lessons from the Federal Court of Australia

A discussion of the recent decision of *Putlands v Royans Wagga Pty Ltd* [2017] FCA 910.

#### Discussion Includes

- Key Facts
- Determination of employee vs independent contractor
- Implications of the employment relationship
- Misrepresentation
- Reasonable notice
- *Independent Contractors Act 2006* (Cth)
- Adducing evidence
- Orders made

## Précis Paper

### Independent Contractors or Employees: Lessons from the Federal Court of Australia

1. In this edition of BenchTV, Nicholas Furlan (Barrister – Tenth Floor Wentworth Selborne, Sydney) and Richard Serop Aslanian (Solicitor – Connect Legal, Sydney) discuss the recent decision of *Putlands v Royans Wagga Pty Ltd* [2017] FCA 910.

#### Key Facts

2. The case was concerned with whether the applicants, Mr and Mrs Putland were employees or independent contractors of respondent, Royans Wagga.
3. Royans conducts a vehicle repair business.
4. The Putlands had done work for Royans since 2007. In 2012 the Putlands considered themselves to be employees of Royans, however Royans considered them to be independent contractors.
5. The issue before the court was whether, having regard to the totality of the respective relationships of the Putlands with Royans, the Putlands were properly categorised as employees or as independent contractors.

#### Determination of employee vs independent contractor

6. The Court analysed a number of leading cases on the distinction between employee and independent contractor including *Zuijs v Wirth Bros Pty Ltd* [1955] HCA 73; 93 CLR 561, *Stevens v Brodribb Sawmilling Company Pty Ltd* [1986] HCA 1; 160 CLR 16, and *Hollis v Vabu Pty Ltd* [2001] HCA 44; 207 CLR 21.
7. One of the things which the judge focused on in determining whether the Putlands were employees or independent contractors was the importance of control as one of the leading indicators of an employment relationship.
8. In the present case, control was the single most important factor which led the judge to conclude that both Mr and Mrs Putland were employees of Royans.
9. The judge paid close attention to a range of other indicia to describe the test of determination as multi-factorial.
10. There were many factors pointing in the direction of the Putlands being employees, including
  - i. the fact that they conducted a lot of the work from a demountable office from 2012 to 2015 that was physically located at Royan's premises;
  - ii. that there was a proximity between the Putlands and other employees who were performing the same work on behalf of Royans;

- iii. that the Putlands, like other employees were being paid by the hour as opposed to for a particular piece of work
11. Further, an indicator which points to someone or some entity being an independent contractor is that they run a business of some kind
  12. This was a factor which separated Mr and Mrs Putland from a number of the contractors Royans engaged for other various services as the Putlands had not established any separate, independent undertaking of their own.
  13. The judge concluded that there was no evidence that the Putlands were conducting the work they were doing for Royans for anyone else.
  14. Although the Putlands had been working for Royans since 2007, the way the case was pleaded and run was on the basis that they were only employees from 2012 onwards.
  15. The question for the court was whether the test for determining whether a party is an employee or an independent contractor was on the basis of a subjective view of how the parties saw themselves or on the basis of a more objective view of what the relationship between the parties actually was.
  16. The court determined that it is far more important to analyse the relationship by reference to its objective indicia as opposed to looking at how the parties had chosen to characterise their relationship.
  17. Therefore, even if the employer does not pay annual leave or PAYG tax, such factors may be more of an indication of one party's subjective characterisation of the relationship.
  18. It is much more important to analyse the relationship in its totality and by looking at whether or not there is a requirement that the work needs to be performed personally by the worker as opposed to a delegation of the work by the employer.
  19. It is necessary to look very closely at the reality of the relationship and this means that each case will be decided upon its own facts.
  20. The respondent's case focused heavily on tax returns and how the Putlands claimed certain equipment for tax deductions.
  21. However the tax arrangements were merely reflective of what the parties thought the relationship was at that time.
  22. Therefore whilst it was important it was not determinative.
  23. Uniforms would be a telltale sign of an employment
  24. The judge concluded that because there was a lack of face to face interaction, the fact that nobody actually saw them in uniform meant that uniforms were not that critical.
  25. In regard to the equipment, whilst some of it was paid by the Putlands, most of it was reimbursed by Royans.
  26. The judge reflected on the difference between the exercise of control as an indicator of an employment relationship and the ability to exercise control, focusing on the latter being more an indicator of an employment relationship.
  27. What helped convince the court that Royans was exercising control. It was the relationship that the Putlands had with Mr Andrews, the managing director.

28. Anytime there was an operational issue, the relationship was such that they always had to phone Mr Andrews and seek permission.

#### Implications of the employment relationship

29. The court concluded that both Mr and Mrs Putland were employees from July 2012 until their relationships with Royan ended in 2015.
30. Part of the case concerned breaches of section 45 of the *Fair Work Act 2009* (Cth) which compels compliance with award requirements and in particular remuneration.
31. In the present case the central allegation was that as employees, Mr and Mrs Putland had been underpaid by reference to the particular award.
32. One of the issues the judge had to determine was if the Putlands were employees and if so whether they were they casual, part time or full-time employees.
33. The judge approached this question by looking at the hours worked by them over the relevant period of time and also what work was done and when it was done.
34. The judge concluded that on the basis of the evidence, the arrangement was a full-time employee arrangement.
35. In regard to the award issue, there were two awards being put forward.
36. The Putlands contended that they were properly classified under the Clerks Award whereas Royans contended that the proper award was the Vehicles Award.
37. The judge began his deliberation by reading the relevant award carefully and interpreting it in accordance with established principle.
38. He then analysed the kind of work that Mr and Mrs Putland were doing and concluded that whilst they were in the vehicle industry, they were not covered by the specific award that deals with that industry. This is because their core work was answering phones and directing Royans to the sites of motor vehicle accidents, which was administrative and clerical work.
39. The judge looked at the coverage provisions of each award to ascertain which award was a better fit and it was concluded that they were properly categorised under the Clerks Award.
40. Once upon a time it is likely that if a person was doing work from home it would have been a strong indicator that that person was a contractor.
41. As workplaces change and arrangements become more flexible, employees are increasingly doing work from somewhere more remote than the core workplace.
42. His Honour considered the fact that whilst some of Mrs Putland's work was done from home and he took into consideration the modern realities of working life in Australia and gave that consideration appropriate weight.

#### Misrepresentation

43. There was a further outstanding issue of section 357 of *Fair Work Act 2009* (Cth).
44. The Putlands argued that Royans had breached Section 357 of the *Fair Work Act* which precludes somebody from misrepresenting a particular relationship, be it a contractor or employment as a different kind of relationship.
45. In this case the allegation was that in Royans telling Mrs Putland that she was a contractor, not an employee, they had infringed section 357 of the *Fair Work Act*.
46. There was evidence of a phone conversation during which Mrs Putland asserted she was an employee and Royans told her that she was a contractor.
47. Section 357 is a strict liability provision, once it is established that a person is an employee and that a representation was made to them that they are not, it then falls upon the employer to prove by way of a positive defence that they did not know or that they were reckless as to the truth of what they were saying.
48. In this case the evidence did not rise high enough for Royans to defeat the strict liability that the section created.
49. Cross-examination is critical in this area as it is ultimately the evidence that the employer gives which is important to how the court decides these matters.

#### Reasonable notice

50. There was another ancillary claim regarding reasonable notice.
51. The Putlands contended that effectively, whether or not they were employees under their unwritten contracts, they had an entitlement to notice of termination.
52. There was no express term giving them that entitlement so the argument was that it was an implied term.
53. In virtually every employment contract that does not have an express termination clause dealing with notice, the law will imply an obligation to give an employee reasonable notice.
54. The court looks at a range of factors to imply such a term which include the seniority of the person, the level of remuneration they receive, their age, the length of service and how long it may take them to find another engagement that remunerates them in a similar way.
55. There are different tests that the courts use when deciding what length of notice would be appropriate for an employee as opposed to an independent contractor
56. It can be argued that if there is a statutory or award scheme, such as the National Employment Standards in NSW which deals with notice, then there is no room for a court to imply a term as to reasonable notice.

#### Independent Contractors Act 2006 (Cth)

57. There was an entire case ran in the alternative under the *Independent Contractors Act* 2006 (Cth).
58. The Act allows courts to review services contracts and if it comes to the view that a term or terms of the contract are unfair, it can make orders to provide some relief against the unfairness.
59. Further, if a term does not exist, it allows the court to read in a new term
60. In this case the argument was if the Putlands were not actually employees and were not entitled to be paid award rates, then in the alternative they were covered by the *Independent Contractors Act* and their remuneration arrangements were unfair in comparison to the people conducting the same work as Mr and Mrs Putland who were paid under an award.
61. This claim was not determined as it was not necessary to decide it as a result of the judge determining Mr and Mrs Putland as employees.

#### Adducing evidence

62. The evidence was given orally in this case, that is evidence in chief as well as cross-examination.
63. In many cases, especially commercial cases these days, evidence is given by way of affidavit.
64. In this case there were exchanges of written outlines of evidence, which meant that each witness got into the witness box and counsel took them through their evidence by examining them in chief.
65. This allowed the judge to hear, rather than read the party's version of events.

#### Orders made

66. The only order which was made was that there be a directions hearing so the case could progress to a further hearing to deal with the relief granted and determine the question of damages as well as penalties in relation to the breach of the *Fair Work Act 2009 (Cth)*.
67. The directions hearing was heard and Royans filed an Application of Leave to Appeal.
68. One of the key questions which arose on that application was whether there was actually anything to appeal against.
69. The Putland's position was that the judge had not actually made any orders capable of being the subject of an appeal.
70. The first argument was whether there were declarations or others orders that the court had made that Royans could appeal against.
71. The trial judge concluded that orders had not been made and so the application for leave to appeal could not progress.

## **BIOGRAPHY**

### **Nicholas Furlan**

**Barrister – Tenth Floor Wentworth Selborne, Sydney**

**Nicholas was admitted to practice as a solicitor in 2001 and admitted to the bar in 2007. Nicholas maintains a diverse practice including but not limited to commercial law, contracts and employment and industrial law. Prior to coming the bar, Nicholas was a solicitor at Baker Mackenzie and Tipstaff to the Honourable Justice Palmer in the Supreme Court of NSW.**

### **Richard Serop Aslanian**

**Solicitor – Connect Legal, Sydney**

**Richard was admitted to practice as a solicitor in 2014. He is a solicitor with Connect Legal and specialises in employment law and industrial relations. Richard has particular expertise in general protections claims and protecting the rights of independent contractors.**

## **BIBLIOGRAPHY**

### **Focus Case**

***Putland v Royans Wagga Pty Ltd* [2017] FCA 910**

### **Cases**

***Zuijs v Wirth Bros Pty Ltd* [1955] HCA 73; 93 CLR 561**

***Stevens v Brodribb Sawmilling Company Pty Ltd* [1986] HCA 1; 160 CLR 16**

***Hollis v Vabu Pty Ltd* [2001] HCA 44; 207 CLR 21**

### **Legislation**

***Fair Work Act 2009* (Cth)**

***Independent Contractors Act 2006* (Cth)**

