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how to tell the difference between a duck and a rooster (or when is an independent contractor really an employee)

Most people would be able to tell the difference between a rooster and a duck, but it would appear that some employers have difficulty with this concept.

What has poultry identification got to do with employment law? The reference came from a case called **Re Porter: Ex Parte TWU** where the court had to determine if the employers independent contractors were in fact employees. The court considered the totality of the relationship between the parties and not just the labels and definitions given to the relationship by the parties. In discussing the courts approach the Judge stated:

“the parties cannot create something which has every feature of a rooster, but call it a duck and insist that everybody else recognise it as a duck”

The use of contractors who are essentially employees has been termed “sham contracting”. Whilst it is sometimes a case of error on the employer’s part it can be an attempt by the employer to disguise an employee relationship by employing contractors who perform the duties of employees generally with the view to avoiding having to pay proper work entitlements.

What if an employer calls a rooster a duck?

If it was determined that a contractor was in fact an employee the employer may be liable for back-paying the employee their outstanding entitlements. Additionally the employer may be found to be contravening employment laws as well as other areas of law including workers compensation, superannuation and taxation law. Penalties exist for such contraventions.

What is the difference between a rooster and a duck?

In the poultry world this is simple; one has a beak and the other a bill; but in the employment context there is no simple answer, however some of the factors to take into account are:

Employee (Rooster)	Independent Contractor (Duck)
The work they perform is under the ongoing direction and control of their employer,	Make their own decisions as to how the work is carried out, work for a set time period or to achieve a set task.
Generally bear no financial risk	Bear the financial risk
Work set hours	Decide what hours to work to get the job done
Are entitled to Superannuation Guarantee Contributions from their employer	Generally pay their own super
Have tax deducted by the employer	Generally pay their own tax
Paid regularly	Submit an invoice for work done
Normally entitled to get paid leave if permanent	Are not paid leave

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There is no single test that makes a person either an employee or a contractor; rather an overall assessment of factors is needed. Employers that engage independent contractors should regularly review arrangements to determine if they are an employee or a contractor.

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