

Different Forms of Work Relationships

Forms or work relationships –

- Contract for service
 - Independent contractors
- Contract of service
 - Permanent (on-going) employees
 - Casual employees
 - Part time employees
 - Fixed term employees
- Special types of work relationships
 - Ministers of religion
 - Army
 - Police
 - Judges
 - Other public servants

Identifying employment – Contractor or Employee?

- Employment is one of many types of work relationships. *Independent contracting, agency and other types of work involve different legal principles.* Issues arise where employment is disguised to avoid legal obligations.
- The **distinction** between types of work is key to:
 - Vicarious liability; Legislative rights & responsibilities; Non-delegable duties (common law);

Vicarious liability

- 19th Century English common law principle that a person or employment may only be 'vicariously' liable for the wrongful acts or omissions of its employees while *in the course of employment or acting incidental to it*. Attribution of one's liability to another. Employer more likely to be sued as they would have deeper pockets/insurance cover.
- Liability of employer for the actions or omissions of employee Liability is regardless of whether employee was complying with employer directions (unauthorised actions)

Sweeney v Boylan Nominees (2006)

Principle: Vicarious liability is not applicable to independent contractors.

Facts: Service station/convenience store customers injured when opening door of fridge. Service station operator and owner of fridge were sued for negligence. Customer failed

against both. The fridge owner did not employ the contractor who was responsible for the maintenance of the fridge, and the operator had not been negligent and had done all that was reasonable to ensure the safety of the fridge.

Held: The independent contractor or the refrigerator company had no vicarious liability.

Non-Delegable duties

- An organisation may still be liable for a contractor where there is a non-delegable duty of care. The organisation must take reasonable care to avoid harm from certain activities. Employer-employee duty of care is non-delegable to its employees even if they go to work for someone else or in a foreign working environment. I.e. school teachers to students.

Leichhardt Council v Montgomery (2007)

Facts: The categories which bring a duty are not lightly determined by courts.

Held: Road authority does not have a non-delegable duty to footpath users. As such the council could not be held liable for a contractor who caused injury to the plaintiff.

Definition of employee

- Legislation does not define who an employee is. It relies on **common law** to identify employment relationships, and to distinguish them from other work relationships. It is assumed the courts, tribunals or agencies know the definition of the term. It is necessary to turn to the doctrine of vicarious liability to make the distinction.
- Courts generally use the multi factors approach: *Stevens v Brodribb Sawmilling* (1986)

Stevens v Brodribb Sawmilling (1986)

Facts: Company was owner of large sawmill and conducted extensive logging operations. They engaged workers to carry out 3 distinct functions as part of their operations; felling, loading and truck driving. Logging was overseen by the bush boss (employee of the company). During the logging operation involving a truck driver, Stevens, and loader, Gray, Stevens was injured as a result of Gray's negligence. Stevens claimed the company was liable for his injuries.

Held: The workers were independent contractors and so there was no vicarious liability.

Independent contracting

- Independent contracting relationships are covered by general **commercial law**, not the law of employment.
 - Performance of work is still often the subject of the contract.

- Specific legislation governs independent contractors; some is in common with employees (e.g. *work health and safety*).
- Blurring of distinction in practice:
 - Another entity is involved in the work relationship, e.g. labour hire, one director companies
 - Legal distinction remains and is determinative of liability, rights and obligations.

Reasons for independent contractor:

- Employer -
 - Avoids –
 - On-costs
 - Workers compensation
 - Vicarious liability for worker’s negligence (but not non-delegable duties)
- Employee –
 - Feeling of running one’s own business – *if* genuine contractor, much more flexibility
 - More tax deductions, but not subject to PSI rule
 - Coerced/bluffed into it

Tests for independent contractor v employee

It remains possible for a business to obtain work from individuals who are virtually indistinguishable from employees, in terms of the close connection to the organisation and subordination to its managers/supervisors, yet whom the common law does not recognise as employees.

- Achieved through well drafted contracts
 - Especially if it includes unqualified right of delegation

Common law tests

- 1) **Control test**
 - Nature and degree of detail control - The right to control rather than its actual exercise

PRS v Mitchell

Held: Court held that band members engaged to perform, were employees of the occupier of the dance hall as the agreement “the right of continuous, dominant and detailed control on every point, including the nature of the music to be played”.

- Independent contractor is one who undertakes to produce a given result, but so that in the actual execution of the work he is not under the order or control of the person for whom he does it

FCT v Walter Thompson (1944)

Facts: Company engaged artists to perform radio plays for purpose of advertising. The actors were paid a fee for the actual performance, but not the rehearsals. The company argued the actors were independent contractors.

Held: They were employees because the producer exercised detailed and extensive control over the actors during the rehearsals and final performance. However, they may use their own discretion in things not specified.

- Broader control test: Does not require detailed and specific control in practice but requires legal authority to control.

Zujis v Wirth Bros (1955)

Principle: The test is not about the actual control an employer exercised over a worker but an employer's rights to exercise that control.

Facts: Circus trapeze acrobat fell and was injured. He was one of a number of artists who had been engaged as part of a team after demonstrating a routine to circus management, The Circus proprietors had no control over the method of performance, or precise timing of the act, which was devised by the performers themselves. Each artist had their own unique or special skill not shared by the employer.

Held: A contract of employment existed. The reason being that the acrobat was subject to the direction of the proprietor in most other aspects of work. Including the obligation to work, be at the circus at certain times, observe certain safety measures and take part in the grand parade.

2) Organisation test

- Is the worker 'part and parcel' of the organisation?: *ATWU v Monaro Sawmills*
- Test does **not** displace control test *
- Organisational integration is merely one factor that may be relevant in categorising a relationship: *Stevens v Brodribb Sawmilling Co Pty Ltd*
- Power of control over the manner of doing the work is very important.

3) The Integration Test

- The integration test considers how integrated the worker is into their "employer's" business. If a worker is part of the business in the sense that their work is an integral part of the business, it is more likely they are an employee, but if their work is only an accessory to the business, it is more likely they are a contractor - *Stevens v Brodribb Sawmilling Company Pty Ltd(1986)* 160 CLR 16.

4) Business/Economic reality Test

- The test requires is 'an examination of the practical realities of the economic relationship between the parties, rather than detailed scrutiny of the terms (whether written or oral) on which the worker is formally engaged'.

On Call Interpreters and Translators Agency v Commissioner of Taxation (2011)

Principle: A worker will be an employee if they are considered to be economically dependent on an employer

Facts: On Call had not made superannuation contributions for interpreters and translators working for them. The Commissioner alleged these workers were employees and, consequently contributions should have been made.

Held: The translators were performing work for On Call and not for their own business and thus were employed by On Call and therefore the company had to make superannuation contribution on their behalf. Among other factors the workers did not actually run the risk of profit/loss, create goodwill, advertise to the public, negotiate fees, have independent banking and finance accounts and did not subcontract to others.

Abdalla v Viewdaze (2003)

Principle: Determination should be guided primarily by whether the worker is running their own business or enterprise with the independence in the conduct of their operations as distinct from operating as a representative of another business with little or no independence.

Facts: A travel agent claimed he had been unfairly dismissed by the company. The agent conducted business at the company's premises and received a commission from sale. He brought an existing clientele to the company, worked his own hours and was under little control in relation to the work performed.

Held: The agent was an independent contractor. The Court recognised the agent's conduct of his own business rather than his representation of the company. This was despite the agent being taxed as an employee, the contract being titled and described as an employment contract and the superannuation contributions being made on his behalf of the company.

5) The Ready/Mixed Concrete test

Ready Mixed Concrete Ltd v Minister of Pensions and National Insurance (1968)

Principle: A power of delegation is inconsistent with a contract of service even if the principal has the right to approve or qualify any replacement worker

Facts: A driver contracted with the company to deliver concrete. He brought a lorry and painted it with the company's colours and adapted it to the company's mixing unit. The driver was responsible for the running costs of the vehicle, maintenance and repair but it was insured by the company. The company had exclusive use of the driver and he wore the uniform. While the driver could hire a substitute a driver the company had the right to require a different substitute. The driver was paid mileage.

Held: The driver was an independent contractor with a contract for service of concrete delivery. Although some controls existed the driver was operating his own business

6) Multi-factored test ***

- Balance the indicia, but with control as the most important but not determinative.
- Power of control over the manner of doing the work is very important: ***Stevens v Brodribb Sawmilling Co Pty Ltd***.

Application of multi factor test:

- *Hollis v Vabu (2001)* – affirmed the multi approach test.

Factors to consider –

| Factors to consider | Employee | Contractor |
|----------------------------|--|--|
| Control over work | The employer has an implied right within industrial law to direct and control the work of an employee. The employee works in the business of the employer and the employer is free to manage their business as they see fit. | A payer has a right to specify how the contracted services are to be performed. However, such control must be specified in the terms of the contract, otherwise the contractor is free to exercise their own discretion. |
| Independence | An employee performs work for the employer in accordance with an employment contract. | A contractor performs services as specified in a contract with the payer and provides additional services only by agreement. Ability to engage in work with other employers |
| Payment | Payment is often based on the period of time worked, but an employee can also work on 'piece rates' or commission. | Payment is dependent on the performance of the contract services. |
| Commercial risks | An employee generally bears no legal risks in respect of the work; since the employee works in the business of the employer, the employer is legally responsible for any work performed by the employee. | A contractor bears legal risk in respect of the work. They have the potential to make a profit or loss, and must remedy any defective work at their own expense. |
| Ability to delegate | An employee performs the work personally and generally cannot subcontract the work to someone else. | Unless otherwise specified in the contract, a contractor can subcontract or delegate the work. |
| Tools and equipment | The employer, except when specifically agreed otherwise, usually provides tools and equipment. | Generally, a contractor provides their own tools and equipment. |

Other facts to determine (contractor) -

- Worker does not receive paid holiday or sick leave.
- PAYG tax is not deducted from their pay.
- Workers compensation premiums or superannuation premiums are not paid by the employer.

NOTE: persistent tendency of courts to treat the lack of such entitlements as relevant factors: ***Commissioner of State Revenue v Mortgage Force Australia Pty Ltd***, the better view is that these are matters which should receive little or no weight as whether they should be done is dependent on the relationship of employment and not determining it: ***Re Porter***

- Treatment of worker by the ATO is not relevant unless they have been previously audited

- Express intention or understanding as to the nature of their relationship may have some relevance where equation is finely balanced: ***Australian Mutual Provident Society Ltd v Chaplin***.
 - Description of something other than a contract of service will not be determinative if the balance of evidence indicates otherwise: ***Cam & Sons Pty Ltd v Sargent***

Exceptions:

No employment relationship if –

- Where a contract permits a worker to delegate or subcontract performance of the work to other persons, without any qualification or conditions. At common law, an employment contract is one that involves commitment of personal service – ***Queensland Stations v FCT (1945)***.
 - If it allows for sub-contractor for it to be performed by another person = inconsistent with the existence of a contract of service = contractor: ***Australian Mutual Provident Society v Chaplain***
 - Not precluded from finding that they are employee based on other aspects of the agreement: ***Ready Mix Concrete Ltd v Minister of Pensions and National Insurance***
- Whereas occasional delegation or subcontracting power = more likely contractor – ***Australian Air Express v Langford (2005)***; ***Tobiassen v Reilly***. But does not mean they won't be construed as an employee based on other factors – ***Sammartino v Mayne Nickless***.
- Subcontracting/delegating without consent = more likely employee – ***Baker v Markellos***.
- Contractual power to delegate has been discounted as a factor in recent cases – ***Autoclenz v Belcher***; ***Call on Interpreters and Translators v Commissioner of Taxation***.

Common Law provisions

- Common law implied terms – often implied into employment contracts.
- Common law implied terms – contracts for services (contractor contract) are subject to duties of loyalty and confidentiality which mirror employee obligations - see ***Fortuity v Barcza (1995)***; ***Equity 8 v Shaw Stockbroking (2007)***.
- Also an implied term exists to permit a client to end an indefinite contract for services if reasonable notice given – ***Energy World v Maurice Hayes & Associates (2007)***.