
THE COMMON LAW OF EMPLOYMENT

THE NATURE OF THE EMPLOYMENT RELATIONSHIP

EMPLOYEES AND CONTRACTORS

- Contract of employment= contract *of* service
- Independent contractor= contract *for* services
 - Subject of the contract is the service itself instead of the person performing the service

Differences between employee v contractors

- Contractors don't have the same entitlements as an employee
 - Eg. Sick leave, paid leave
- No statutory definition of what is an employee or an independent contractor - developed through common law

Zuijis v Wirth Bros (1955) 93 CLR 561

Facts

- A circus acrobat was injured during performance and claimed compensation for the injury received. The injury was caused by the actions of another employee trapeze artist.
- *Control test*
- The extent to which a person has the right to exercise detailed control over the work of another
 - The employer had the ability to control the worker and therefore was seen to be an employee
 - The nature of the duties or the circumstances in which they are to be performed may be such as to leave little room for direction or command in detail, but so long as there is lawful authority to command, though the scope for it be limited, the work is performed under a contract of service and not under an independent contract
- *Multiple indicia test*
 - As well as control, other factors are relevant in determining whether someone is an employee or contractors
 - These factors are referred to as 'indicia'
 - Tools
 - Uniform
 - Free to do work for others
 - Risk of financial loss or profit
 - Charges for services via an invoice rather than receiving wages

Does it matter how the parties describe the relationship?

- The court looks at the relationship rather than the contract to determine if the parties are engaged in a employee relationship or
- Court however places some weight to the contract and how the contract was devised
 - Unless you can establish there was deception or a sham to understand what the parties intended to do
 - Not the courts place to change the nature of the intended relationship between the parties.
 - *Re Porter [1989] FCA 226*

Crisis courier cases

- *CASE 1: Vabu v Federal commissioner of taxation (1996) 81 IR 150*
 - Vabu traded as crisis couriers and offered a delivery service
 - For the purposes of superannuation contribution liabilities, the company sought a declaration that the couriers were independent contractors, and not employees
 - ATO lost and were found to be independent contractors not employees
 - Applying the multi-factor test, the New South Wales Court of Appeal recognised there was a significant amount of control exercised by Crisis. However, the facts of self-ownership and maintenance of vehicles (cars, bikes, vans, etc), couriers looking after their own tax obligations, and payment by quantity of deliveries, were considered sufficient by the Court of Appeal to indicate that these workers were not employees.
- *CASE 2: Hollis v Vabu Pty Ltd (2001) 207 CLR 21*
 - Courier hit a pedestrian and wanted to argue that the employer was vicariously liable for the tortious actions of the employee claiming negligence
 - High Court found that an employment relationship existed- Vabu was found to be the employer of its couriers
 - They were wearing Crisis Couriers uniforms
 - The court recognises the workers were not necessarily in business for themselves- they could not generate 'goodwill'
 - All the work they are doing the goodwill is going to crisis couriers rather than the employee
 - Control: while they could choose their own route there still was found to be a degree of control over their work
 - Decision affected by a decision to deter companies from acting in an irresponsible manner in respect of acting in the good for society.

ODCO decision

- *BWIU v Odco Pty Ltd (the trouble shooters case) (1991) 37 IR 380*
- ODCO business model was a labour hire arrangement mainly tradies
- The person who needs the work to be done is not the employer because they go to ODCO and hire their employees. The labour is employed by ODCO.
- Fair Work Act 2009 (Cth) - sect 550 -- the closest Australia has got to joint employment
- Privity of contract- only the parties involved in the contract can sue for a breach in the contract

Framework for contractors

- The work contracts of independent contractors are regulated by:
 - Common law principles relating to contracts generally;
 - Legislation such as:
 - The *Competition and Consumer Act 2010*
 - Personal services income (PSI) legislation (in relation to tax obligations); and
 - The *Independent Contracts Act 2006* (Includes a national unfair contracts scheme for contractors)

Independent Contractors Act 2006 (Cth)

- Was introduced to protect the freedom of contract and the contractors freedom to contract
- Prevent state governments stopping or restricting an individuals ability to contract for their individual services
- The act does have a jurisdiction to make claim for what are unfair contracts
 - Have to show as it has been created has resulted in the person being paid less than or have less entitlements if an employee had been engaged in the same position or had the same work
 - Show that the company would have or should have or has in the past had an employee done the same work
 - Not a job usually done by a contractor
 - The contract can look at the contract retrospectively and fix the contract
 - Very few claims under this act
 - Increasing trend away from independent contracting to casual work

Sham contracting

- When you would be an employee but you structure yourself as a contractor for tax purposes
- Prohibitions
 1. Misleadingly saying an employee as a contractor
 2. Threatening to dismiss an employee in order to engage them as a contractors
 3. Having broadly misleading statements to mislead someone into engaging into an independent contracting relationship
- *The Habby Cabby Case : The Fair work Ombudsman v Habby Cabby Pty Ltd & Graeme Paff [2013] FCCA 397*

DIFFERENT TYPES OF WORKERS

Casual employment

- No guarantee or expectation of on going employment
- No guarantee of set hours
 - Normally no fixed hours
- No set definition
- Consequences

- No entitlements
- Not covered by unfair dismissal regime
- Not entitled to redundancy employments
- 25% higher rate for a part time or full time employment

Labour Hire

- Work contract between workers and labour hire agency
- Commercial agreement between host employer and labour hire firm
- Worker performs work for the host employer

Out workers

- Working some where other than the employees place of business

Trainees and apprentices

- Can be paid lower rates during their apprenticeship

Deemed workers

- Legislation can impose duties owed to other people, regardless of whether they are employees or not
- For example
 - Workplace health and safety
 - Definition of worker
 - Duties of person conducting a business or undertaking
 - Discrimination
 - Protections for employees and for others

THE CONTRACT OF EMPLOYMENT

Sources of the employment contract

- Express terms of the contract
- Implied terms
- Legislation
- (registered) awards and agreements
- Unregistered agreement
- International law
- Common law in employment

What you want in an employment contractor

- Employer perspective
 - Job description, requirements and expectations
 - Probation period

- Don't need to give notice to terminate you
- No unfair dismissal claims can be made
- Flexibility
 - Ability to change what your employees are doing
- Employee perspective
 - Remuneration
 - Hours of work
 - Superannuation
 - Length of the contract
 - Termination policy
 - Notice- includes statutory entitlements
 - Up to 12mths can be common for senior executives

Key elements of an employment contract

- A clear and definite offer of employment
- Terms of the agreement need to be certain
- There has to be valuable consideration
- Parties must have the legal capacity to be bound by the contract, and genuine consent
- The contract must be for a legal purpose
- Performance of the contract
- Not contrary to public policy (eg. Unreasonable restraint of trade)

Express terms

- Normally those in writing in a formal document
- It is also possible for a contract to be agreed verbally, or to be partly written and partly oral
- It is common to have express terms contained in one or more documents
- Meaning of express terms- objective test - what a reasonable person would understand them to mean

Statements made during negotiations

- What is the status of statements made during the negotiation process
- Can they be relied upon as a term of the contract
- *Service Corporation International Australia Pty Ltd v James Edwards* (AIRC decision, 5 March 2004, matter number C2003/5175)