

# WORKPLACE LAW

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# TOPIC 2: IDENTIFYING EMPLOYMENT RELATIONSHIPS

- ✚ It is important to accurately identify the nature of the work relationship at common law, as each of these relationships gives rise to different legal obligations between the parties.

## **DISTINCTION BETWEEN EMPLOYEES AND INDEPENDENT CONTRACTORS:**

- ✚ Distinction is important for many reasons – entitlements (leave, sick leave, super etc), vicarious liability.
  - VL makes employer liable for the acts of their employees performed in the course of their employment, and not by independent contractors.
- ✚ Some legislation provides specific protections for contractors who are subjected to adverse treatment by their principals. Eg:
  - The ‘adverse action’ protection in **s 342(1) Fair Work Act 2009** (Cth) where contractors are protected against ‘adverse action’ from their principals;
  - Workers’ compensation laws deem certain workers to be covered by workers’ compensations laws irrespective of whether they work as an employee or contractor;
  - Contractors must still be paid superannuation if they come under the extended meaning of ‘employee’ under s 12(3) *Superannuation Guarantee (Administration) Act 1992* (Cth); and
  - Contractors are also expressly protected by OH&S laws and discrimination laws.

## **THE MULTIPLE INDICIA/MULTI FACTOR TEST:**

- ✚ The multiple factor test seeks to determine the intent of the parties to the relationship by examining various factors.
  - The legal test was established in *Stevens v Brodribb*.
  - *Previous test used was the test of control.*
    - Control is important but now it is the totality of the relationship which matters.

- ✚ *Factors (Abdalla v Viewdaze Pty Ltd) – not exhaustive:*

- Performance of work for others;
- Separate place of work  
Provision and maintenance of significant tools, equipment;
- Right to delegate or subcontract;
- Representation as part of the business (eg uniform);
- Income tax deductions;
- GST;
- Remuneration;
- Rights of suspension/dismissal;
- Holidays, sick leave and other entitlements;
- Goodwill or saleable assets;
- Business expenditure out of own income;
- Express declaration of intent;
- Incorporation;
- Expressed intention of the Parties; and
- *Any other relevant factors.*

- ✚ ***Stevens and Gray v Brodribb Sawmilling Co Pty Ltd*** – Stevens was an independent contractor. He supplied and maintained expensive equipment, was free to delegate his work to others, was paid according to the number of logs delivered (and not according to the time served, eg by weekly salary), and was free to work for other hirers. The control exercised by Brodribb’s bush boss was not determinative of employment as its purpose was to facilitate overall operations at the mill and Stevens was not controlled with respect to how to carry out his own skilled work.
  - Issue – Was Stevens an employee or an independent contractor?
  - Held – Independent contractor.
    - Mason J stated the ‘test’ for determining whether a worker was an employee. The determination requires a consideration of the totality of the relationship between the hirer and the worker, taking into account a range of factors, such as the method of payment (with a regular salary indicating employment), whether sick leave and recreation leave were provided, who owned and maintained the equipment, whether the worker could delegate his or her tasks to another worker without the hirer’s permission, whether the worker could operate through a company or in partnership etc. A central consideration of employment is the right of the employer to exercise control over aspects of the work (as opposed to contracting for a result, and leaving the worker to decide how the result is best achieved).
  
- ✚ The hirer and worker may specify in their contract that their relationship is one of ‘principal and contractor’, however such statements will **not** be determinative.
  - Where the relationship is ambiguous however, such statements are taken into account along with other factors in determining the legal nature of the work relationship.
  
- ✚ ***Hollis v Vabu*** – saw through the contract and decided the couriers were employees because of the amount of actual control.
  - Broadened the scope of factors that are legitimately considered as part of the multiple factor test. The decision muddled the official boundary between an employee and an independent contractor.
  - The dissenting judgment of McHugh J addressed this and provided an alternative legal solution.
  
- ✚ ***ACE Insurance Limited v Trifunovski*** – Federal Court upheld a decision concerning 5 insurance sales representatives who were described as independent contractors in their contracts but were treated as employees by the Court.

- The Court was persuaded by the requirement for personal service in the workers' contracts, in order to discharge their obligations.
- The finding that the insurance sales' representatives were employees meant that the employer was required to pay more than \$517,000 in accrued entitlements.

### **SPECIAL TYPES OF EMPLOYMENT:**

- ✚ Businesses seeking flexibility in their workforce may engage practices such as outsourcing, franchising, labour-hire agencies, home- or out-workers and casuals.
  - Consider how these forms of work fit into the employee-independent contractor model.
- ✚ One of the consequences of these forms of work is the possibility of 'joint employment'.
  - The doctrine of joint employment was developed (in the US) as a response to employers trying to reduce labour obligations through using contract instead of 'employee' labour.

### **THE INDEPENDENT CONTRACTORS ACT 2006 (CTH):**

- ✚ The Act has the effect of ousting state jurisdiction to regulate independent contracts (although it does establish a limited fairness review of contracts under the Act).
- ✚ The Act does **not** propose a different definition of 'independent contractor' or of 'employee'.
  - Thus the common-law meaning is still alive and relevant.

## **TOPIC 3: TERMS OF THE COMMON LAW CONTRACT**

- ✚ The sources of rights and obligations include:
  - The general law (common law and equity);
  - Legislation;
  - Industrial instruments made up of awards and enterprise agreements (collective agreements);
  - Minimum national standards – the NES; and
  - Human resources policies and manuals.

✚ The terms of AWARDS are **not** automatically part of an employment contract: *Byrne & Frew*.

- Must be expressly incorporated or implied by way of established tests (Business Efficacy test etc).
  - Business Efficacy test – It is necessary to incorporate these matters into the contract in order to give business efficacy to the contract. I.e, the contract cannot function properly without these terms being implied.

## **CONTRACT FORMATION ISSUES:**

✚ Not all work arrangements will be deemed contractual.

✚ General contract law principles with regard to contract formation issues still apply:

- Offer, acceptance and consideration;
- Lawful objects;
  - Contracts can only be made about promises, which it is lawful to perform and are otherwise consistent with public policy.
- Voidability of contract (at the option of the potentially injured party) due to mistake, unconscionability, misrepresentation, or lack of capacity; and
- Intent to form legal relations.
  - Whether the parties intended a formal business relationship such that it would give rise to contractual rights and obligations.

## **TYPES OF CONTRACTS:**

✚ At general law, there are 3 types of employment contracts:

- Fixed-term contracts;
  - The parties expressly agree upon the term of the employment and the date of termination.
- Casual employment; and
  - Ill-defined at common law. Workers work under arrangements characterised by informality, uncertainty and irregularity.
- Ongoing/continuing employment.
  - The most common form of employment.
  - Can be full or part-time.
  - This type of employment is indefinite and can be terminated by either party by giving the proper notice at law.

## **CONTRACTUAL TERMS:**

## EXPRESS TERMS:

- ✚ Terms actually agreed to by the parties – either orally or in writing.
- ✚ They may be overridden by any better terms that may apply by law because the employee is covered by an industrial instrument.

## EXPRESS TERMS INCORPORATION BY REFERENCE:

- ✚ Express terms may also be incorporated by reference into an employment contract.
  - I.e., the contract refers to other documents (eg personnel procedures, employee handbooks etc).
    - The contents of these documents then become express terms.
  - The terms of documents incorporated by reference are then legally binding on employers, as well as employees.
- ✚ ***Riverwood International Australia Pty Ltd v McCormick*** – The plaintiff (McCormick) entered into an oral contract of employment in a packaging company. Over the years, the company was owned by a series of differing corporate entities associated with the same principal. The business was then sold to a third (un-associated) company (MMP), which then created a separate corporate entity (Riverwood) to run the packaging systems division where McCormick worked. The Riverwood entity retained close ties to MMP. Although his duties had not changed, Riverwood then sent McCormick a letter of offer of employment. The letter was a ‘take it or leave it’ offer which contained matters regarding remuneration, superannuation, annual leave, notice, etc. It also contained a heading of ‘company policies and practices,’ stating: ‘You agree to abide by all Company Policies and Practices currently in place, any alterations made to them, and any new ones introduced.’ McCormick signed and returned an ‘acceptance’ of the letter of offer, agreeing to the terms. Subsequently, a redundancy agreement was executed with the union and later placed in MMP’s ‘Human Resources Policies and Procedures Manual’, a document which was updated over time. Both MMP and a substantial part of Riverwood were sold years later to a NZ firm and redundancies resulted. McCormick was made redundant after almost 37 years of work at the same job under the various companies. He claimed a substantial redundancy payment was owed him under the policy.
  - Issue – Was McCormick entitled to a substantial redundancy payment?
  - Held – No. The manual was expressly incorporated by reference into the contract of employment through the letter of offer.
    - North J – viewed the ‘abide by’ language as meaning ‘acceptance and continuing to observe’. This should be interpreted as a mutual obligation as related to the company policies even if the employee was not specifically burdened by them.

- Mansfield J – the policy clause in the letter of offer was not clear on its face and that it was reasonable to assume that, as the drafter of the documents in question, the company intended to be contractually bound by the documents.
- Whether a document is incorporated by reference depends upon the facts of each case.

🚩 **Goldman Sachs JB Were Services (GSJBWS) Pty Ltd v Nikolich** – A former financial advisor developed a depressive disorder following a long dispute with management over the way clients were allocated. He was ultimately terminated. He claimed the company had breached his employment contract by not adhering to the provisions of its 'Working With Us' (WWU) policy which set out a wide range of procedures and corporate HR values, including grievance handling procedures, the company's goals in providing a healthy and safe working environment, strict policies against bullying and harassment of staff, and a code of conduct dealing with 'integrity'.

- Issue – Was the WWU policy incorporated into the employment contract?
- Held – Yes. The employer's workplace HR policies were incorporated by express reference as part of workers' employment contracts.
  - The company had breached the employment contract by failing to follow the procedures in the policy.
  - GSJBWS were found liable in breach of contract principally relating to the OHS clauses in the WWU policy.

🚩 **Romero v Farstad Shipping (Indian Pacific) Pty Ltd** – Ms Romero received a letter of engagement referring to her need to comply with the policies.

- This was taken to assume that the policy was a part of the contract.