

Week 2: The Employment Relationship

Readings: Macken ch 2 pp 13-53 + online case readings

- Contract of employment regulated employer-employee r'ship.

Historical meaning of 'employee' (pg 14):

- **Contract for services (indep contractor) vs contract for service (servant)**, though various categories of 'employee'.
- Early British 'Master and Servant' legn (criminal penalties for breach- only lower class type r'ships) > Employers and Workman Act 1875 (though practically giving even short notice would avoid legislative liability).
- Also, early Workers Compensation Acts were **only about work injury comp** (didn't cover higher paid middle class employees earlier).
- National Insurance Act 1946 (UK) changed diff employee categories (i.e. not labourers/professionals/clerks/managers diffs) > broader tests for determining 'employee'.
- In Australia (sim Master/servant legn) + (pg 15- also excluded vulnerable indep contractors but later they were included in expanded employee defn) **> from 1983 HCA accepted 'all classes of employees could be involved in industrial disputes** and covered by the federal industrial legn'. Also, earlier on similar to Britain, Unemployment and Sickness Benefits Act 1994 (Cth) didn't distinguish betw/ classes (Director-General wide discretion re: refusal unemp benefits) + 1920s workers compensation legn only covering 'workers' + prescribed amounts of money earnt couldn't be exceeded (e.g. Workers Compensation Act 1926 had 750 pound limit). But, now Australian Worker's Compensation statutes cover all 'employees, professionals, clerks, managers and blue collar workers and a range of vulnerable workers' through expanded defn of employee ('worker') or through deemed employees (pg 16).

'Contract of employment' (pg 16):

- Master and Servant Acts set foundations for implied obligations under contract of employment (Merritt, 1982)- criminal penalties for leaving, misconduct, loss of employer property, not paying wages, ill treatment/detention of servant's property + gradual spreading of social legn re: worker's comp, social insurance + employment protection (Deakin, 2000)- redistribution of social/eco risk.
- **Earlier, lower-status workers (e.g. farms/factory workers) were called 'servants' under r'ship of service + had wages paid** reg through legn + social security legn. whereas managers/professionals were 'employees' (had their terms in contract of employment). Lower status workers needed to use awards for rights/obs but higher status employees used the employment contracts (pg 17).
- Employment contract wasn't very imp't for blue-collar workers + **most employees looked to award protection/indust agreements/unfair dismissal legn.**
- 'Employment' idea is linked to rights/obs for industrial relations (FWA 2009 Cth), worker's comp, WHS, compulsory super contribs, tax deductions, annual/long service leave/other leave, taxes like payroll tax, fringe benefits tax.
- Employer is liable (usually) for wrongdoing acting w/in course of employment but generally won't be liable for indep contractor's wrong actions.

- Contracts shift risk from employer to contractor; previously indep contractor could be created either through: i) substitution clause: in contract allows person providing services the absolute/unlimited right to delegate the task, ii) person providing services must incorporate.

Employer and employee (pg 21)

- Increased growth in part-time, fixed contract, casual labour + labour-hire arrangements (+ves- flexibility, less admin/employment costs) > 'multi-factor' test now used (not just control) > adapting to changing work patterns (e.g. person can be employee despite working flexible hrs, have opps to refuse work, work for multiple employers in diff locations, not paid fixed salary etc.
- Labour market has 'deepening inequality' over last 20yrs (Watson, Buchanan, Campbell + Briggs 2003)- workers 'working harder...longer, and working in jobs that are more insecure' (pg 22).
- Stats: By Nov 2013 22% of current employees were w/ current employer for 10yrs+ vs 20% <1yr. More part time/casual work, fixed term contracts, out-sourcing, labour hire agencies utilised + more contractors being used now than prev. By Nov 2013 69% employees were full time (local/global competitiveness + political issue).
- 'Dual labour market idea' (full time perms vs casual/part timers)- Deakin 2000- perhaps broader notion of work is needed based on social rights/protections? But it's not too practical/how would it be implemented?
- Casuals: Old defn looked at occasional/irreg work but now some work reg hrs over longer time. Short/long term casuals. Is about employer only offering the work if they wish (Reed v Blue Line Cruises Ltd 1996, Moore J)- more uncertain. If casuals work over long period of time is series of sep emp contracts each time the person undertakes work (Predl, 2014). Around 20% were casuals (2014), casual > perm is below 30% (2013)- issues: age, lack of paid emp, living area, small businesses etc. Also is 'differentiation in work entitlements, the lack of training and career opps, adverse health outcomes...lack of job security, irregular hrs, fluctuating pay and marginalisation in DMing in the workplace' (pg 25), lack bargaining power. -ves: don't get redundancy, termination notice, paid annual/sick/compassionate/long service leave/parental leave, lack of job security.
- 'Disguised employment' (pg 26): Courts are not bound by labels parties give their agreement (i.e. employee vs indep contractor- Hollis v Vabu)- existing system/work practices examined. The agreement could even be a sham (no legal consequences- see ss 357-359 FWA)- often shams w/ clauses intended to exclude employment r'ship (FWA Ombudsman v Ramsey Food Processing 2011). At CL will be sham where both parties intend to give false appearance so the contract appears to be something it isn't. Autoclez Ltd v Belcher (2011) UK case- car cleaners had contracts labelling them as 'contractors'- found as employees b/c not working their own businesses, detailed direction + control held over them, had to provide their own personal services (clauses in signed contract aren't determinative whether they are employee or not)- the 'totality of the r'ship' must be examined (Hollis).
- Dependent contractors (i.e. linked to one employer)- e.g. plant machinery operators/drivers. If person is a contractor under the Independent Contractors Act 2006 remedies available for harsh/unfair contracts. See pg 28-30.

- **Deemed employees (pg 30)- e.g. anti-discrim legn:** Workers can be deemed under particular legn as 'employees', and indep contractor for other purposes- only operate for the relevant statutory purpose.
- **Indep contractors generally:** Tradespersons/professionals are 2 biggest gps. +ves: could minimise taxation through partnership/corp structures, taxation deductions for travel/business expenditure like IT equipment/phones, large financial rewards, time/place of work flexibility, substitute labour etc. –ves: Capital costs of business insurance, business record keeping, loss of workers' comp benefits, annual/sick/long service leave, super contribs, lack of security from fluctuating demand, fewer holidays, 'chasing' work. Diff types of workers (e.g. lower-skilled cleaners, labourers, drivers like couriers/taxi drivers w/ lower improvement capacity vs professionals like engineers)- e.g. essay

Multi-factor test (pg 33)

- Earlier: control test used (what work + how it was done- about directing)- linked to more historical manual labour work. Issue: where work involved specialist skills/knowledge actual control of work + its perf would be difficult.
- In **Zuijjs v Wirth Bros Pty Ltd (1955)**: Circus trapeze artist injured during performance- found as an employee so they got worker's comp- is about lawful authority to command 'so far as there is scope for it...there must always be some room for it, if only in incidental or collateral matters' **(i.e. it's fine if there's scope for control over incidental matters)- they don't have to control the actual work)- control is a factor but it's quite a strong factor.**
- See 'organisation test' (pg 35)- Denning LJ idea- not used in Australia- is about whether the person is 'part and parcel of the organisation' (Bank Voor Handel en Scheepvaart NV v Slatford 1953).

Tests (pg 36):

- All employees must provide **personal service** to an employer.

Personal Relationship:

- Personal r'ship betw/ employer-employee (employee can't be transferred to new employer against their will).
- Employee owes duty of loyalty/fidelity to employer (Ready Mixed Concrete (South East) Pty Ltd v Minister of Pensions and National Insurance 1990)- i) Servant agrees to provide their own work/skill in performing service to master, ii) Expressly/impliedly agrees to be subject to employer's control AND iii) Other contract provs are consistent w/ it being a contract of service.

Mutuality of obligation:

- In UK- idea there is no contract of employment unless there's a duty on the employer to provide work/duty for employee to accept work ('irreducible minimum').
- However, in Australia courts have found employment contract even w/ casuals where there is no 'overarching contract' + casual is free to say no to work + employer doesn't have ob to keep offering work. Also, rarely casuals (e.g. long-term casuals) can be considered employees for periods they aren't working).

Hollis v Vabu (2001)

- **Bicycle courier was employee** (vicarious liability for neg case)- Hollis was hit by unidentified cyclist on a footpath wearing jacket w/ words 'Crisis Couriers' on it (who Vabu owned).
- Examine 'totality of the r'ship' betw/ parties. This **considers factors relevant to case circs, weighing factors, isn't 'tick box' exercise, you need to view it as a whole to gain an 'informed, considered, qualitative appreciation'**.
- **Couriers supplied own bikes + paid bike expenses, weren't running own business however: work didn't require special skills/qualifications, no opp to 'freelance'/build up goodwill, courier's finances were supervised w/ no scope to bargain for rates, company had extensive control over couriers (attendance/assignment of work rosters, they couldn't refuse work + assumed job was non-delegable), they wore uniforms w/ company logo + had personal dress standards, annual leave/leave requests.**
- **C.f. Reliable Couriers Pty Ltd (2005)-** couriers could decide what jobs they'd take, no fixed start time, could work for others if they wanted, were encouraged to wear uniform, could employ staff + delegate work + be incorporated as a company + couriers provided their own motor vehicles- found as **contractors**.
- Important factors: Personal services idea (won't be employment if the worker engages an employee/contractor to do the work/enterprise involves high levels of business risk + signif investment of capital vs high control over what/how person performs task is strong indicator of employment.

'In business on their own account' (pg 40)

- A business normally involves taking risks in pursuit of profits/capacity to create goodwill for the business (repetition/continuity).
- For **indep contractors, they can usually 'negotiate remuneration w/ the client, will not be dependent upon (or work exclusively for) one client, will have the potential for profit on the activity undertaken, be able to promote and generate goodwill for their own business and be subject to deductions for defective or inferior work'- not reqd to personally provide the work, often provide own equipment/pay for repairs/replacement, not subject to direction etc.**
- Interpreters who mainly worked for a couple of agencies, provided their own services, couldn't neg rates, didn't advertise, carried no risk in pursuit of profits + had no capacity to create goodwill/profit in relation to any business were not operating a business- i.e. were employees (On Call Interpreters and Translators Agency 2011). Were agency perf standards etc (pg 41).

Control

- **The supposed employer exercising detailed control over the worker's work + how it's done is a strong factor-** but just b/c there is no control doesn't pull it strongly toward being indep contractor.

Even if the employer cannot control how work is to be done, it is enough if the employer has the right to control so far as there is scope for it and even if limited to collateral/incidental matters. **Control can be shown through things like stipulating work hours, requiring uniform/certain type of clothing, workplace rules, detailed**