

TOPIC ONE – Introduction to Workplace Law

-Labour law is concerned with the most basic relationships within society

These relationships include:

-Employer and the worker (not employee as there are many different relationships, including independent contractor's, seasonal workers etc)

-Unions and their members (union is an organisation set up to collectively represent the interests of the workers. Unions are found in every democracy)

-Unions and employers

-State (government of the day either state or federal) and all parties being employers/employees/unions

Themes of Labour Law

-Three themes give Labour law its cohesions conceptually

1. Individual employment relationship. That is, contract of employment
2. Regulations of unions and its industrial conflict
3. Moderation of the market

Assumptions that Define the Scope of Labour Law

1. Concept of work: (Paid work: work given over for money)

-What underlies this is that if you only study paid work, you only focus on a part of the population

2. There is a differentiation between employment category (employer and employee) and the Independent Contractors

-The law defines different obligations by using that contrast. The law has been using this dichotomy for centuries and it still exists today

-Legislators and common law define many of the theories in labour law by reference to independent contractors and employees

-Employees are those who work for organisations/company or a person

-Independent contractors are those who contract out of their services without dependent status

-The distinction is becoming less and less obvious

-This can be contrasted with the self-employed, that is those employed by nobody

Protective Goals

-Aim is to protect workers and address the 'perceived' power imbalance

-There are 'individual' aspects as well as 'collective' aspects of relations between employers and employees

1. Individual Employment Rights:

-Individual Employment Contract (terms)

-Fair Work Act imposed statutory obligations on employers to afford or comply with minimum standards on certain employment issues

-Legislative intervention imposed eg. Discrimination legislation

-Remedies for breach under common law and industrial legislation

2. Collective Rights

- Enterprise bargaining and agreements
- A right to join (or not to join) a trade union, who will represent you in collective bargaining with your employer to improve your working conditions

Philosophies: Role of Government/ State

Protectionist view:

- Protects employees in the marketplace because of the perceived inequality of bargaining power between employers and employees
- People of the protectionist view want the government to intervene to protect the labour market
- This is where we get the justification for unions
- Unions are needed to strengthen the employee's power in the bargaining process

Collective aspects of work place law:

- The organisation of unions collectively represents the interests of the members of the unions
- They therefore collectively bargain which is supported by the protectionist view
- Upon Federation, Australia have been largely protectionists
- There are other countries, often northern European countries, that are protectionists in nature and intervene to protect employees
- The nature of these systems is collective bargaining, not individual bargaining

Economic Rationalism or Libertarian approach:

- Individual aspects of the workplace law are important and significant
- Businesses wanting deregulation, less intervention from the state and radical reforms because it is necessary to promote greater freedom and choice. No need to interfere and impose undue burden or restraints on business
- What underpins much of the rhetoric is that if we want economic prosperity we must resort to private bargaining (i.e. contractual private bargaining in the work force) or private contracts
- You cannot have economic prosperity through collective bargaining
- The present reform states this and promotes individual bargaining over and above collective bargaining

Theme 1: Individual Contract Of Employment

- Contract between employer and employee that contractually regulates the relationship between them
- Contract whereby employees are given time and labour for money
- The consideration is the wages paid

Relationship seen as an inadequate model as:

1. It fails to take into account the changing nature of the market place
2. It fails to take in to account other forms of employment
3. It makes control the basis of the relationship (that is no longer the dominant factor when trying to identify a working relationship. Many work from home and there are several characterisations but control is not one of them. It is only obvious where one is working in a factory and is supervised)

Theme 2: Regulation of Collective Relations

-One principle way in which the power imbalance between employers and employees is the power employees have to strike. This is why employers must control industrial action or its possibility. The reasons are obvious. An employer has to ensure their investment gets bigger and as a result they must control their labour force and to do this they must control industrial action

Theme 3: Moderation of The Market By State Forces

-For a long time we had OHS laws to protect people from unsafe workplaces
-Discrimination laws at state and federal levels
-Basic termination rights

Enforcement and compliance of Labour Law:

-Common action in industrial commission
-Power for employees to bring action to get their money

2 layers of law:

-State and federal legislation governs labour law
-Kennett government referred the power to federal law since 1996 (referral of powers)

Sources of Workplace Law

-The Employment Contract
-The Common Law
-The Commonwealth Constitution
-Federal, State and Territory laws and regulations
-International Labour Organisation and labour standards

Also:

-Modern Awards
-Enterprise Agreements
-Government policies
-Organisational policies and procedures

Federal System: Summary of Key Dates

1901 – Federation & Commonwealth Constitution:

-No Commonwealth power to regulate industrial relations
-Intended for the States to hold primary responsibility

1904 – Conciliation and Arbitration system was set up after Federation (and the Australian Constitution was drafted):

-Commonwealth had very limited law-making power in this area
-Section 51(35) industrial arbitration power
-Influence restricted to resolving interstate industrial disputes between unions and employers
-Decisions took effect as awards, resulted in a network of Federal awards (legal documents) stipulating minimum wages and other working conditions

1993 – Industrial Relations Reform Act (Paul Keating introduces enterprise bargaining):

-Before this time workplaces governed predominantly by awards (legal documents that outline the minimum pay rates and conditions of employment)

- Keating introduces and encourages enterprise bargaining – process of negotiating over conditions at an enterprise level. Collective in nature
- Agreement took effect as certified agreements
- Individual rights such as unfair dismissal also introduced

1996 – Workplace Relations Act (Howard Coalition – brand new act - introduced Australian Workplace Agreements):

- Can do more than set up mechanism to resolve disputes
- Introduces option of registering AWA's between employers and individual employees
- Extended operation in Victoria – referral of most industrial relations powers to the Commonwealth

2006 – Work Choices (Howard):

- Same name as the 1996 Act but totally re-written and re-numbered
- Expanded reach and operation of Commonwealth over industrial relations through section 51(20) 'corporations' power
- Changed industrial relations landscape
- Aim to move towards a single unified system

2009 - The Fair Work Act 2009 (Cth)

WorkChoices

- Expanded the Commonwealth's reach into industrial relations through s 51(xx) of the Constitution (**New South Wales v Commonwealth**)
- Created greater flexibility for employers in the terms and conditions they offered employees through Australian Workplace Agreements
- Reduced Australian Industrial Relations Commissions role in determining employment conditions and resolving disputes – no power to make new awards
- Reduced employers exposure to unfair dismissal claims
- Limited unions' ability to enter workplace and bargain
- Australian Fair Pay and Conditions Standard introduced and Australian Fair Pay Commission given responsibility for fixing minimum wage to stop test cases
- At the time WorkChoices was being passed, the states were labour governments so the Commonwealth used the corporations power in the constitution to legislate
- High court ruled it was lawful in **New South Wales v Commonwealth (2006)**

The Fair Work Act (2009)

- All the states referred the power to the Commonwealth except WA
- Fair Work Commission to administer laws and make decisions
- Fair Work Ombudsman to regulate and assist
- National Employment Standards to protect minimum conditions
- Abolished Australian Workplace Agreement's and modernised awards
- Restored role of unions
- Restored unfair dismissal rights
- Introduced general protections regime

TOPIC TWO – Who is an Employee? Identifying the Employment Relationship

Contract of Service vs. Contract for Service

Contract of service:

-An employee-employer contract is a contract of service

Contract for services:

-A contractor-principal contract is a contract for services

Employee or Independent Contractor

Why Does Employment Status Matter?

- At common law different rights and obligations between the parties arise
- If parties are in an employment relationship then duties and obligations arise
- Employer is vicariously liable for actions of employee
- Master (employer) is only responsible for acts of servants (employees) and is generally not responsible for a contractor as it is a commercial relationship
- Industrial awards only apply to employees
- The law defines an employee as a distinction to an independent contractor
- The term employee comes out of the context of master and servant whereby the master had control over servant

Dichotomy Between Employee and Independent Contractor

Importance of the dichotomy:

- Employer's obligation towards employee and independent contractor differ
- Rights of employees to benefits like sick, recreation and long service leave, and the obligations on employers to pay the superannuation guarantee charge and the remit PAYG tax on behalf of employees. These obligations arise as a result of the existence of a common law employment contract
- Issue of vicarious liability arises through the commission of torts by employees and not by independent contractors
- Distinction distinguishes the rights and liabilities of the employer, worker or a third party to the relationship

-Control is the traditional test

- The right of control was developed in the Acrobats Case – **Zuijs v Wirth Bros**
- Changed to multiple-factor/indicia test established in **Stevens v Brodribb**
- In **Hollis v Vabu**, the court saw through the contract and decided that couriers could be employees in some circumstances because of the amount of actual control

The Control Test

- Control and obedience inherent to the master-servant relationship: **Federal Commissioner of Taxation v J Walter Thompson (Australia) Pty Ltd**
- Many skilled workers are however not amenable to detailed control: **Zuijs v Wirth Bros**
- The right to control, rather than its actual exercise, is a critical indicator of the existence of a contract of employment: **Zuijs v Wirth Bros**

Zuijs v Wirth Brothers Pty Ltd (1955)

- An acrobat in a circus fell and became injured
- Wanted workers compensation, however in order to obtain it, the acrobat had to be an employee
- The High Court was faced with a dilemma, because under the traditional control test he could not obtain workers compensation. The circus owners didn't really control or supervise him, he was skilled and knew what to do
- However, there were features of control
- The circus controlled the measures of safety to be observed, the number, time and manner of the rehearsals, the costume of the performers and the place where they got changed which all naturally call for control
- Basically, the control factor is not limited to putative employer's actual exercise of control, but also encompasses a right of control, even if only incidental aspects of the work
- If a right to superintend (oversee) and control the manner in which the servant fulfills his obligation must exist in some degree, a little consideration will show that the daily relations of a performer playing a regular part in the work of such an organisation as a travelling circus would demand a large measure of control and superintendence

The Multiple Indicia Test

- First established in **Stevens v Brodribb (1986)** which changed the test
- It is currently the legal test used in Australia today

- Classification made by applying the test is made by a matter of 'fact and degree' in respect of which views might legitimately differ: **Stevens v Brodribb Sawmilling Co Pty Ltd; Roy Morgan Research Limited v Commissioner of State Revenue**
- It has been made clear that the control test in its original form is no longer appropriate

In determining whether an employee or an independent contractor, judges consider all the circumstances of the work relationship. These commonly include, but are not necessarily limited to:

- The degree of control exercised over the worker in the doing of the work;
 - The obligation on the worker to do the work personally; or, to put it another way, their capacity to **delegate** work to others;
 - The freedom to work for others, including whether the worker advertises for, or seeks generally, work in the marketplace;
 - The place of work;
 - Ownership or maintenance of tools/equipment;
 - The mode of remuneration, especially whether the worker is paid for tasks completed;
 - The risks and responsibility for loss of profit;
 - The wearing of a uniform which can be evidence of a master-servant relationship;
 - The degree of integration of the worker into the organisation of the other party;
 - Payments for sick leave, annual leave and long service leave;
 - The arrangements made in relation to payment of taxation and workers compensation levies; and
 - The parties' own characterisation of the relationship
- In considering these factors, not one factor is determinative rather all must be considered together
- This approach was endorsed by the High Court in **Stevens v Brodribb Sawmilling Company Pty Ltd** and affirmed in **Hollis v Vabu**

Stevens v Brodribb Sawmilling Company Pty Ltd (1986)

-Need to look at the totality of factors, not just control

- Brodribb owned and operated a sawmill and was licensed to remove timber from a location near Orbost
- The logging was carried out for Brodribb by Stevens and Gray
- Stevens drove trucks that were loaded with bush and timber, whilst Gray operated a bulldozer to load logs on to Stevens' truck
- Gray was negligent in loading operations and Stevens was injured
- Stevens sued Brodribb as being vicariously liable for Gray

Gray and Stevens:

- Provided and maintained their own equipment;
- Set their own hours;
- Were paid on amount of timber delivered;
- There was no guarantee of work;
- Brodribb did not deduct tax installments from payments made to Stevens and Gray;
- Gray assumed a power to **delegate** the work;
- Stevens and Gray were free to seek other work and employ other people to work for them, with Gray employing his son; and
- They were not directed on how to do a task

-Stevens argued that himself and Gray were employees and was therefore owed a general duty of care

-The High Court agreed with the Supreme Court that they were both independent contractors

-“All of this falls short, in our view, of the type of supervision or right to control which indicates the relationship of master and servant. Rather, it is consistent with the reservation of a right to direct or superintend the performance of the task which does not impair the essential independence of the person performing that task.... Even the most independent of independent contractors is subject to some direction in the performance of his work.... This leads to a consideration of the other factors which are relevant to determine the nature of the relationship”

-Whilst the multiple factor test dictates that it is the totality of factors that should be considered and that no single factor should be determinative there is an exception to this rule

-Namely, where a contract allows a worker to **delegate** their work to others, without any discretion of the organisation, this will be considered a contract for services (independent contractor) as opposed to a contract of services (employee)

Hollis v Vabu [2001]

-Broadened scope of factors

- The question in this case, was whether Vabu was vicariously liable for the negligence of its bicycle courier who injured a pedestrian in the course of his duties
- A determination as to whether the courier was an employee or independent contractor had to be made
- The decision muddled the official boundary between an employee and an independent contractor

-No annual or sick leave was paid by Vabu, superannuation was not contributed by Vabu and the bicycle courier supplied their own bicycle and was responsible for its maintenance

The court relied on seven factors:

1. The couriers were not providing skilled labour;
2. The couriers had little control over the manner of performing their work. They had to be at work by 9am and were not able to refuse work;

3. The couriers had to wear Vabu's uniform and were required to be clean shaven (control);
4. There is a matter of deterrence. Reference has been made to the findings of fact in this case respecting the knowledge of Vabu as to the dangers to pedestrians presented by its bicycle couriers and the failure to adopt effective means for the personal identification of those couriers by the public. This was a policy consideration in that companies should not be able to escape liability so easily;
5. Vabu was responsible for the workers payments;
6. Equipment such as radios and uniforms was provided and maintained (bar the bicycles) by Vabu. The capital outlay for a bicycle was minimal and therefore was not contrary to a relationship of employment; and
7. Vabu exercised actual control over the couriers in that Vabu retained control of the allocation and direction of the various deliveries

-It would therefore be unrealistic to describe the couriers other than as employees

-Thus, control is no longer a sole criterion for defining an employee, and in some cases it may not be very important at all in determining the category to which a worker belongs

-It is the totality that matters

-It should be noted that if a courier was to supply their own vehicle for example, the conventional view is that the courier is not an employee because of significant expenditure

Abdalla v Viewdaze Pty Ltd (2003)

-These factors are not exhaustive, they are just commonly occurring in case law:

-Control

-Performance of work for others

-Separate place of work provision and maintenance 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 parties

Labeling Relationships

-It is not uncommon for parties to expressly agree that their relationship is a contract for services rather than a contract of service

-What is required to overturn such an express term? In what circumstances will courts look behind the stated intentions of parties?

-In **Cam and Sons Pty Ltd v Sargent (1940)**, the High Court overturned such an express term

-Courts must look "at the substance of the transaction and not treat a written agreement, which was designed to disguise its real nature, as succeeding in doing so if it amounted merely to a cloud of words and, without really altering the substantial relations between the parties..."

Structure for Problem Question

1. The problem here is to identify whether employee/independent contractor

2. State the legal principle; multiple factor test which was established in **Stevens v Brodribb; Hollis v Vabu**

3. Apply to the facts of the case (provided own equipment, received annual leave etc) – this is where all the marks are