

## **WEEK TWO: THE CHANGING BOUNDARIES OF THE LEGAL TESTS FOR THE CONTRACT OF EMPLOYMENT**

### **i. The legal tests**

#### ***Bradley v Bradley***

- Lack of mutual intention to have legal consequences
- Not every type of work will attract jurisdiction of s88 F of the Industrial Arbitration Act
- Intention by both parties to make a legally enforceable bargain
- Things may appear to fall within s88F but they don't; for example- a son cleaning the family car for remuneration
- The evidence in this case shows that there was no intention on the parties or mutual obligation to create a legally binding contract or to have an legal consequences from their arrangement

#### ***Dietrich v Dare***

- Contract for services vs contract of services
- Look at the nature of work and the fact that all materials were supplied by the respondent. There is evidence of control by the respondent of the manner in which the work was to be done and the hours during which it was meant to be done.
- The payment of \$2.00 per hour sealed its proper categorization as a contract of services.
- Argument was whether these were act of benevolence or whether it was for work
- Argument that there was no intention to create legal obligation
- Lacked the element of mutual obligation
- The majority rejected that it was neither a contract for services; due to his physical characteristics, the fact that he was not a professional painter and that he was paid an hourly rate of \$2.00- all contribute to deny him the character of an independent contractor.
- They also rejected that he was hired for contract of services- the arrangement lacked the element of mutual obligation
- Murphy J (left wing) dissenting- intention to create legal obligation was evident through the mere fact of the payment that was agreed upon for work. The benevolence was for work and not for charity. Found that the work was to be done under a contract of service and that he was an employee. Found that a right to control to some extent is sufficient to fulfil the requirement of contract of service. If there is no control then the contract is not one of employment.
- Appeal dismissed and the appellant was NOT an employee

#### ***Ready Mixed Concrete (South East) Ltd***

- Courier
- He was ruled by the company and they had total control over him – wear the company uniform, comply with the rules and regulations , further the good name of the company, maintain the company truck- all at his expense.
- They are paid piece rates
- Independent contractor?

- Contract of service:
  - The servant agrees, that in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master.
  - He agrees expressly or impliedly, that in the performance of that skill he will be subject to the others control in a sufficient degree
  - The other provisions of the contract are consistent with its being of a contract of service
- The payment of a wage = consideration and without consideration then there is no contract of any kind
- Opportunities of profit and control
- Whether the men were employees as a matter of economic reality (closest to a modern capitalist economy)
- Control test is outdated and not the conclusive test of employment
- Court found that it was a contract for services therefore NOT an employee

### ***Market Investigations Ltd***

- Contract for services vs contract of service s
- Cites *Ready Mixed Concrete Case* for the conditions that need to be met for a “contract of service” – remuneration, extent and degree of control ( what ought to be done and how)
- Control test can be debated
- Absence of control and direction in that sense can be of little, if any, use as a test.
- Control is not a decisive test, contract of service can exist w/out control
- Need to look at the contract as a whole- the nature and provisions of the contract of service
- They are moving away from the idea of control but they still respect it
- It was found that the part time interviewer (Mrs Irving) was employed by the company under a contracts of service

### ***Stevens v Brodribb Sawmilling Co Pty Ltd***

- Stevens was injured by Gray so he sued Gray and the Company
- Were Gray and Stevens employees of the company or individual contractors?
- Ultimate authority over the man in the performance of his work resided in the employer
- Existence of control, whilst important, is not the sole criterion
- Other relevant matters need to be included; mode of remuneration, provision and maintenance of equipment, obligation to work, hours of work, provisions for holidays, deduction of income tax, delegation of work by the putative employee.
- Agreed with the majority in the Full Court of the Supreme Court that neither Stephens nor Gray was an employee of Brodribb.
- They provided and maintained their own equipment, set their own hours of work, and received payments not in the form of wages
- The power to delegate is an important factor in deciding whether a worker is a servant or an independent contractor – *Australian Mutual Provident Society v Chaplin*
- ‘Organisation test’ An important question is whose business is it ? asking whether the party is carrying on the business in the sense of carrying it on for himself or on his own behalf and not merely for a superior

- Organisation is relevant to the issue of control
- Element of organisation is another factor to be weighed
- Conclusion that it is a contract for services and therefore not an employee.

#### ***Vabu Pty Ltd v FC of T***

- Bicycle Courier
- The Couriers provided their own bikes, directories, and were taxed as independent contractors
- Meagher JA – concluded that at common law the couriers must be classified as independent contractors.

#### ***Hollis v Vabu Pty Ltd***

- They say that the control test didn't exist in the current society and that it was outdated
- Shift from the exercise of control to the actual right to exercise it
- Totality of the r/ship b/w the parties needs to be considered
- Stated that the COA fell into error by claiming that the bicycle couriers were independent contractors and placed too much importance on the fact that they owned their own bicycles, bore the expenses of running them, supplied their own accessories. In actual matter they weren't running their own business nor did they have independence in the conduct of their operations.
- Finances were controlled
- They had limited scope for pursuit of any real business enterprise
- Finding that the bicycle couriers were employees

#### **ii. The validity of the Tests**

#### ***Re Porter; Re Transport Workers Union of Aus***

- Gray J looks at Economic Reality
- A court will always look at the terms of the contract
- Will not be bound by the express choice of the parties
- The parties cannot create something which has every feature of a rooster but call it a duck and insist that everybody else recognise it as a duck
- Wage workers have more freedom
- "The level of economic dependence of one party upon another"