EMPLOYEE OR CONTRACTOR?— AN ONGOING QUESTION IN INDUSTRIAL AND OTHER CONTEXTS

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The distinction between employee and independent contractor has long troubled workers and employers alike. The question arises often: in the particular circumstances of engagement, is the worker to be regarded as an employee or a contractor?

The categorisation as employee or contractor has many implications—for employer liability for negligent acts, for payment of benefits, such as holiday pay or sick leave, or for superannuation obligations, to name some of them.

The issue has again been faced—by the New South Wales Court of Appeal in the context of negligence claims in two cases (April 2005) and by the Full Bench of the Australian Industrial Relations Commission in an industrial context, an application to register an association of employees under the Workplace Relations Act 1996 (Cth) (14 June 2005).

BOYLAN NOMINEES PTY LTD TRADING AS QUIRKS REFRIGERATION V SWEENEY [2005] NSWCA 8

At a convenience store of a BP service station, a refrigerator door recently serviced by a serviceman engaged by Boylan fell on the plaintiff and injured her. She sued for negligence. At first instance the judge found that the servicing of the refrigerator was negligent and that Boylan was vicariously liable for that negligence. The defendant appealed to the New South Wales Court of Appeal.

One of the main issues which the court considered was whether the refrigerator serviceman was an employee or independent contractor of Boylan. Relevant aspects of the relationship were:

- there was 'a close working relationship to say the least' between Boylan and the serviceman;
- the serviceman was engaged as a 'contractor' by Boylan but did not work in the Boylan plant where there was a service department which was staffed by six employees who worked within that plant;
- between Boylan and the serviceman there was no formal or general contract. The serviceman would undertake work for a customer upon Boylan's request;
- the serviceman supplied his own equipment or tools;
- the serviceman was not paid superannuation;
- the serviceman was responsible for his own workers compensation insurance and public liability insurance;
- the serviceman had his own 'corporate identity'— a company called Cool Runnings Refrigeration and Air Conditioning Pty Ltd—of which the serviceman was a director;
- the serviceman invoiced Boylan for hours worked and he was not paid a salary;
- whenever spare parts were required he purchased them from a manufacturer of refrigerator equipment and not from Boylan;
- the work which was carried out by the serviceman was not undertaken at the premises of Boylan as he was not based at those premises;
- there was no exercise of control by Boylan over the work that the serviceman performed. Rather 'it was left to his judgment as to what work should be done at a customer's premises and how it should be done';
- 'there was no evidence that [the serviceman] did not undertake work for others';
- Boylan treated its field service employees and its 'contractors' differently.

APPLYING PRINCIPLES DISTINGUISHING AN EMPLOYEE FROM AN INDEPENDENT CONTRACTOR

The court stated that 'the control test remains important and it is appropriate, in the first instance, to have regard to it (although that is by no means conclusive)'.

The court regarded it as 'highly significant' that there was no control at all exercised by Boylan over the serviceman's work. The court stated:

... the absence of control (neither entitlement in law nor in fact) is a very strong sign that he was not an employee. The absence of control means that the very essence of the employer/employee relationship is missing. It would be a very strange kind of employee over whom the supposed employer can exercise no authority.

Further, the court viewed the absence of an obligation to provide work for a particular period and an absence of an obligation on the worker to work for that period as important. This 'mutuality of obligation is a usual ingredient of the employer/employee relationship'.

There were other indicia of the serviceman's independence—working in his own business under its name; provision by him of equipment and tools; buying spare parts from other suppliers; being paid on a piecework basis; providing his own workers compensation, public liability insurance and superannuation.

The court concluded that essentially the serviceman carried on his own trade or business and was an independent contractor.

VICARIOUS LIABILITY?

Having established that the serviceman was not an employee, the court proceeded to determine whether Boylan was vicariously liable for the acts of its agent. At this point, the court looked at comments by Justice McHugh in the High Court decision of Hollis v Vabu Pty Ltd (2001) 207 CLR 21, particularly his comments on vicarious liability. McHugh J had held that the courier, regardless of whether he was an employee or an independent contractor, was performing acts for which the principal could be liable largely because the acts in the name of, or representing, the principal. The New South Wales Court of Appeal respectfully rejected the broad proposition as put forward by Justice McHugh stating that it 'does not presently represent the law in Australia'.

IMPLICATIONS OF THE DECISION

In conclusion, the court ruled that, as the serviceman was a 'true independent contractor and a principal in the transaction', Boylan would not be vicariously liable for his conduct.

While this case does not state any new law in relation to the distinction between employee and independent contractor, it does highlight the different legal consequences flowing where the one workplace has workers on different arrangements and distinguishes between them in aspects of the relationship, as in the case of Boylan's staff working on the premises and the contractor.

The case also did not support the broader view of Justice McHugh about vicarious liability of the worker, whether employee or contractor, in the Hollis case.

AUSTRALIAN AIR EXPRESS PTY LTD V LANGFORD [2005] NSWCA 96

Australian Air Express Pty Limited operates a delivery business in Australia. Under an owner-driver agreement it engaged the owner-

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driver, the respondent in the case. Under the agreement and the operation of the arrangement between Australian Air and the owner-driver, the owner-driver:

• provided his own truck for deliveries;

• maintained the vehicle himself;

• bore the vehicle's operating expenses;

• had tax deducted from his earnings;

• reported for work regularly at the premises each day;

• drove his own truck but it bore Australian Air's name

• wore Australian Air uniform

• carried ID supplied by Australian Air; and

• attended safety lectures and functions organised by Australian Air Express.

The owner-driver was injured by another driver and sued Australian Air for negligence. One of the issues before the court was whether he was an employee—if so, his claim would be regulated by the Comcare Act.

COURT OF APPEAL—OWNER-DRIVER WAS A CONTRACTOR

The NSW Court of Appeal upheld the primary judge's ruling that the owner-driver was an independent contractor.

Truck ownership

Justice McColl, with whom Justices Ipp and Tobias agreed, analysed the matter of truck ownership, a factor which was important in the view of the primary judge as indicating the owner-driver was a contractor. The High Court precedent in Hollis v Vabu Pty Ltd, which held that a bicycle courier who supplied his own bicycle was an employee, not contractor, was viewed as being confined to its facts—it concerned a bicycle courier, not couriers using motor vehicles or motorbikes.

Further, it was noted that 'significant investment in capital equipment might lead to a different conclusion'. Justice McColl observed that there were authorities in the High Court which consistently supported the view that workers who provided expensive equipment were independent contractors. The investment in this case was significant—the truck cost over $67,000, and expenses in 1998 and 1999 of $26,000 and $32,000 respectively were incurred to run the truck.

Tax position

It was significant that the owner-driver was treated by Australian Air, a Commonwealth authority, as an independent contractor for tax purposes.

Right to delegate

The issue of delegation was important: 'A contract of employment carries an obligation of personal service. Accordingly a power to delegate the performance of a contract tells against these being an employment relationship.'

Even though the right delegate might have been limited to a right to delegate during a period of leave, the court regarded this delegation right as a significant factor. Particularly, this right was consistent with the need to maintain income from the operation of the truck, and pointed to the owner-driver running his own business, and showing independence in the utilization of the truck. It was also significant that the owner-driver engaged and paid for the delegate himself and these transactions appeared in his tax returns.

Description as contractor

The express description of the owner-driver as 'the contractor' also was taken into account. It was contained in a 'serious document entered into by a Commonwealth authority' and should be given some weight.

CONCLUDING COMMENTS

The NSW Court of Appeal ruled that other factors, such as the owner-drivers having union representation, receiving a minimum weekly sum and insurance premiums being paid by Australian Air to Comcare, were not inconsistent with the owner-driver being an independent contractor, and concluded that the owner-driver was an independent contractor. The degree of control exercised over the owner-driver did not turn the contractor into an employee—the court viewed this control as essential for the efficient running of a business.

In essence, the court viewed the owner-driver as operating his own business, but subject to a necessary degree of control in order to ensure the efficient operation of the business.

The parties must always look at the essential facts in each particular case. The provision of the truck and its maintenance by the owner-driver differentiated this case from that of the bicycle courier in Hollis and led to a different legal conclusion.

APPLICATION FOR REGISTRATION BY AN ASSOCIATION OF EMPLOYEES ACT VISITING MEDICAL OFFICERS ASSOCIATION PR958666

The key question before the Australian Industrial Relations Commission was whether visiting medical officers who were engaged by public hospitals were employees or independent contractors. If they were not employees, they were not eligible to apply for registration as an association of employees under the Workplace Relations Act 1996 (Cth).

BACKGROUND FACTS

Senior Deputy President Williams of the Commission found that four doctors, who were regarded by the parties as being representative of the membership of the ACT Visiting Medical Officers Association, were employees of the public hospitals. The main reasons were the degree of control exercised by the hospitals over the doctors, the method and mode of payment and leave entitlements.

The Australian Capital Territory and the Australian Capital Territory Health Care Service appealed against this decision to a full bench of the Commission.

DECISION OF FULL BENCH OF THE COMMISSION

The Full Bench decided that the doctors each conducted a business of her or his own as a specialist, and that part of that business included the work of the visiting medical officer at the public hospitals.

The Full Bench identified factors showing that the doctors were independent contractors, including:

• the highly skilled nature of the work of the medical professionals;

• performance of work for others—there was a right of private practice in the public hospitals;

• the ability to delegate work;

• payments to doctors were not subject to PAYG tax deductions; and

• there was no provision of paid sick or holiday leave.

The main factor favouring the employment relationship, on the other hand, was the issue of control. The Full Bench considered that the legal authorities showed that control was a relevant and important factor in determining the relationship, but it is not the determinative factor. The Full Bench ruled: 'There were significant ways in which the hospitals did not exercise control where there was scope for it and in circumstances where one would expect the hospitals to exercise control if the doctors were employees'.

Further, the control test was not whether there was actual exercise of control, but whether there is lawful authority for control, as far as there is scope for such control. The Full Bench decided that the result on the question of control in this case was ambiguous. That being so, the parties, in characterising the relationship as not that of employer and employee, had made clear the nature of the relationship.

CONCLUDING COMMENTS

The decision of the Australian Industrial Relations Commission, together with the two NSW Court of Appeal decisions, reinforce the significance of the notion of the worker being in business on his or her own account in determining whether the worker is an employee or contractor.

Where this is the case, even a level of reasonable control by the principal will not change the characterisation of the relationship into that of employer and employee. The cases acknowledge that controls over independent contractors may be necessary for the efficient operation of businesses, and that is an acceptable level of control by the principals which will not render the relationship that of employer and employee.

Having said that, it is often very difficult to classify with certainty the true nature of the relationship and various factors and indicators should be balanced. Employers should carefully consider the nature of the work arrangements if they are uncertain as to whether the type of relationship is that of employer and employee or principal and contractor and legal advice should be sought.

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