CASE NOTE

Roosters, Ducks and Labour Hire Arrangements: *Damevski v Giudice* (2003) 202 ALR 494 (FCA Full Court)

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Introduction

One of the features of the current Australian labour market is the growth in the number of businesses "contracting out" work that was previously performed by their employees. The "contracting out" is often done through labour hire arrangements: the business engages a labour hire agency to provide it with suitable labour on an "as needs" basis. A common scenario is that the labour hire agency contracts both with the workers who provide the services to the agency's client, and with the client to whom those services are provided. Often the agency pays the workers and bills its client for the labour costs, plus a service fee. Research indicates that during the first half of the 1990s, "the number of agency workers more or less doubled."[1] Analysis of the latest data from the Australian Bureau of Statistics on the number of workers employed through labour hire arrangements has suggested: "290,100 employees were 'on-hired' through agencies in June 2002 and 162,000 workers were paid by labour hire firms in November 2001 (almost doubling from 84,300 some three years earlier)." The value of the employment services industry in 2001-02 was $10.2 billion.[2]

Such arrangements may be cost effective for businesses and at the same time provide flexibility to meet fluctuating labour requirements. However, some workers may be significantly disadvantaged if labour

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1 Stewart A, "Redefining Employment? Meeting the Challenge of Contracting and Agency Labour" (2002) 1 *AJLL* 17.

2 O'Neill S, "Labour Hire: Issues and Responses", Research Paper No 9 2003-04, Parliament of Australia, 8 March 2004, p 2.

hire arrangements result in the worker being classified as an independent contractor, rather than as an employee. This particularly holds true for low-skilled workers who work either exclusively or mainly for one hirer, and who cannot be said to be genuinely in business on their own account. This is because many of the rights and protections accorded to workers by the regulatory labour law system in Australia, such as paid leave, award wages and the right to challenge unfair dismissal, depend on the worker being, at law, an 'employee'.[3] Whilst some workers may receive greater daily remuneration as contractors than they would as employees, "it is important not to underestimate the real value of the statutory and award benefits foregone."[4] In comparison to employees performing the same or similar work, labour hire workers may also be significantly disadvantaged in relation to training, health and safety protections, and access to workers' compensation and rehabilitation programs in the event of injury.

The legal test of employment and some recent case law

The legal test for distinguishing between employees and independent contractors is the "multiple factor test". The test involves considering a range of factors including: the degree of control by the hirer over the worker; who provides and maintains the equipment used by the worker; whether the worker is permitted to delegate the work to another person; and whether the worker can do the work through an interposed entity such as a partnership or corporation.[5] The written contract, the legal effect of which is likely to be better understood by the hirer than the worker, can also be very important, but it will not be determinative. No particular factors are determinative: individual factors may be given differing weight depending on the facts of the

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3 There are exceptions. For example, the protections offered by anti-discrimination legislation and occupational health and safety legislation extend to workers outside the common law definition of 'employee'. Also, non-employees have certain limited statutory rights such as under unfair contracts legislation in NSW and the *Workplace Relations Act 1996* (Cth).

4 Creighton B and Stewart A, *Labour Law: An Introduction*, 3rd ed, Federation Press, Sydney, 2001, pp 212-13.

5 *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16; *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21.

case. As such, the test is easily open to manipulation to achieve a desired result, and it lacks predictive value.[6] In the last decade a substantial body of case law has developed reflecting the growth of labour hire arrangements in the economy, and the concomitant importance of determining the legal character of labour hire arrangements for labour regulation, workers' compensation, taxation and superannuation purposes.[7]

Many cases concerning the legal character of labour hire arrangements have arisen before Federal and State Commissions in the context of unfair dismissal claims: *Damevski v Giudice* was one such case. It is difficult to generalise about the outcomes of these cases, but three previous decisions will serve to illustrate how the weight given to particular factors in the detailed factual matrix will be crucial to the outcome of a case. In *Borg v Troubleshooters Available Pty Ltd*, the Western Australian Industrial Relations Commission dismissed Borg's claim for unfair dismissal, as he was not an employee of the labour hire corporation.[8] Troubleshooters Available Pty Ltd operated a system of labour hire under a licensing agreement. In the earlier and influential case *Building Workers' Industrial Union of Australia v Odco Pty Ltd*[9] (*Odco*), the system of labour hire was held not to give rise to any employment relationships. The Full Federal Court, applying the "multiple factor test", held that the workers were not employees of Odco Pty Ltd, relying among other factors on the

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6 Chin D, "Losing Control: the Difference Between Employees and Independent Contractors after *Vabu v Commissioner of Taxation"* (1996) 52 *Law Society Journal* 52. For a good general discussion of the multiple factor test, see Creighton & Stewart, note 4, ch 7.

7 The case law is extensive. Some examples are *Vabu Pty Ltd v Commissioner of Taxation* (1996) 81 IR 150 (superannuation guarantee payments not payable in respect of couriers); *Drake Personnel Pty Ltd v Commissioner of State Revenue* [2000] 2 VR 635 (payroll tax payable by Drake in respect of agency office workers); *Country Metropolitan Agency Contracting Services Pty Ltd v Slater* (2003) 124 IR 293; *Mason and Cox Pty Ltd Pty Ltd v McCann* (1999) 74 SASR 438 (both cases were concerned with whether the worker was employed by the host business or the labour hire company for the purposes of workers' compensation).

8 *Borg v Troubleshooters Available Pty Ltd* [1995] WAIRComm 129.

9 *Building Workers' Industrial Union of Australia v Odco Pty Ltd* (1991) 99 ALR 735. Odco Pty Ltd, trading as Troubleshooters, kept a register of qualified builders' labourers and sent them to building sites on an "as needs" basis. The builders paid Troubleshooters an all-in fee and the labour hire corporation paid the workers at rates it had determined. The Federal Court held the labourers were not employed by the labour hire corporation or the builders.

absence of Odco Pty Ltd's right to control the workers.[10] In *Borg v Troubleshooters Available Pty Ltd*, Borg's initial contact was with the labour hire corporation, which sent him to work as a crane operator at Fremantle Wharf. Troubleshooters Available Pty Ltd's system of labour hire differed in some respects from the system used in *Odco*. However, the differences were insufficient to affect the finding that the relationship between Borg and Troubleshooters Available Pty Ltd was not an employer/employee relationship. The labour hire corporation reserved no right to control Borg, he was paid by an 'all-in' hourly rate for hours actually worked, had no obligation to accept work, was not entitled to sick leave or annual leave, and was not taxed as an employee.

There was a different result in *Oanh Nguyen and ANT Contract Packers Pty Ltd & Thiess Services Pty Ltd*.[11] Nguyen, a process worker, was initially hired directly by Thiess Services Pty Ltd (Thiess), which usually obtained most of its workers through ANT Contract Packers Pty Ltd (ANT), a labour hire corporation. Shortly after commencing work, Nguyen completed paperwork purporting to make her a casual employee of ANT. She was dismissed after two and a half years' work, allegedly due to her pregnancy. Nguyen claimed against both ANT and Thiess. The NSW Industrial Relations Commission held that Nguyen was an employee of Thiess, because Thiess exercised both legal and practical control over her. Thiess controlled the shifts she worked, decided the work she was permitted to perform, and exercised the right to dismiss her. The fact that Thiess hired Nguyen directly rather than her being referred by ANT strongly favoured the finding of an employer/employee relationship between Thiess and Nguyen. The commission raised the possibility that Thiess and ANT might be "joint employers" of Nguyen, a concept that is common in other jurisdictions such as the USA, but which is only beginning to develop in Australian jurisprudence.[12]

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10 As to the relationship between the builders and the workers, the court held that the absence of consideration (the workers were paid by Odco Pty Ltd and had no enforceable right against the builders if Odco Pty Ltd failed to pay them) meant there was no contract of employment between them.

11 *Oanh Nguyen and ANT Contract Packers Pty Ltd & Thiess Services Pty Ltd* [2003] NSWIRComm 1006.

12 See, for example, *Morgan v Kittochside Nominees Pty Ltd* (2002) 117 IR 152.

Damevski v Giudice: the facts of the case

Endoxos Pty Ltd (Endoxos) was a corporation conducting a cleaning business in the ACT. In 2001, it decided to operate its business more cost effectively by using labour hire arrangements. For that purpose, Endoxos engaged MLC Workplace Solutions Pty Ltd (MLC), a labour hire corporation. MLC, acting on behalf of Endoxos, purported to make contractual arrangements that interposed MLC between Endoxos and its workers. The intention of these contractual arrangements was to put in place *Odco*-type labour hire arrangements.[13] The workers had the 'choice' of resigning their employment with Endoxos and being rehired immediately as contractors through the 'agency' of MLC, or not being given any further work. Endoxos paid MLC an all-in fee, and MLC paid the contract cleaners, after deducting amounts for insurance and superannuation.

Endoxos had employed Riste Damevski as a cleaner in August 1998. Pursuant to the above labour hire arrangement, Damevski 'resigned' his employment on 19 August 2001 and was immediately engaged as a contractor by Endoxos. Damevski did the same work as before, used equipment supplied by Endoxos, wore an Endoxos uniform, and worked under the direction of Endoxos. The only differences were he had to submit his timesheets to MLC instead of to Endoxos, and he received his remuneration from MLC. On instruction from MLC, Damevski registered a business name in January 2002. On 8 February 2002, without notifying MLC, Endoxos removed Damevski from his current job, required him to return all the equipment, and thereafter gave him no further work.

The ensuing legal action

Damevski applied to the Australian Industrial Relations Commission (AIRC) for a remedy for unfair termination of employment under the *Workplace Relations Act 1996* (Cth). Section 170CE(1) permits certain workers to seek an order of reinstatement or compensation from the AIRC if their employment was terminated "at the initiative of the employer" and the termination was "harsh, unjust or

13 *Building Workers' Industrial Union of Australia v Odco Pty Ltd*, note 9.

unreasonable". In order to make an application under the section, it is essential that the worker be in an employer/employee relationship.[14]

A worker in a labour hire arrangement whose job is terminated by the business for whom he/she works must prove: (1) that he/she has a contractual relationship with the business, and (2) that, in law, the nature of the contractual relationship is that of employer/employee. This may be particularly difficult to prove in circumstances where a business has put in place a labour hire arrangement with the express purpose of avoiding some of the obligations attaching to an employer/employee relationship. In general, the courts have held that the interposition of a labour hiring agency between the agency's clients and the workers the agency hires out to them results in there being no employer/employee relationship between the agency's clients and the workers.[15]

The AIRC decision

At first instance, Grainger C dismissed Damevski's application for relief on the ground that after 19 August 2001 there was no contract of employment between Damevski and Endoxos: the only contract Damevski had was with MLC. Among other matters, the commissioner relied on Damevski's resignation from Endoxos, his acceptance of payment of his accrued entitlements, the signing of documents that created contractual relations with MLC, and the fact that Damevski submitted his timesheets to MLC and was paid by MLC. On appeal, the Full Bench of the AIRC affirmed that Damevski was an independent contractor whose only contractual relationship was with MLC. Under that contract, he performed work for Endoxos pursuant to an agreement between Endoxos and MLC. As there was no employer/employee relationship between Endoxos and Damevski, the AIRC had no jurisdiction to hear a claim for unfair termination of employment under the *Workplace Relations Act 1996* (Cth).[16]

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14 *Pawel v Australian Industrial Relations Commission* (1991) 94 FCR 231 at 235.

15 *Damevski v Giudice* (2003) 202 ALR 494 at 533. See *Mason & Cox Pty Ltd v McCann* (1999) 74 SASR 438; *Drake Personnel v Commissioner of State Revenue* (2000) 2 VR 635, and other cases cited by Merkel J.

16 *Damevski v Endoxos Pty Ltd*, AIRC, Full Bench, Print PR922380 at [22]-[27].

Damevski sought prerogative writs against the AIRC, which were remitted by the High Court to the Federal Court pursuant to s 44 of the *Judiciary Act 1903* (Cth). The Full Court of the Federal Court quashed the decision of the Full Bench of the AIRC, and issued a writ of mandamus to the AIRC directing it to hear and determine the matter according to law.

The findings of the FCA Full Court

In separate judgments, Wilcox, Marshall and Merkel JJ unanimously concluded that the AIRC had erred: (1) in its determination of the legal effect of the tripartite arrangements, and (2) by finding that there was no contractual relationship between Endoxos and Damevski after 19 August 2001. They further decided that the contractual relationship between Endoxos and Damevski was that of employer/employee. The judges' conclusions were based on slightly different reasoning: their judgments will therefore be analysed separately.

Justices Wilcox and Marshall

Justices Wilcox and Marshall first considered the legal relationship between Damevski and MLC before analysing the relationship between Damevski and Endoxos. In the view of Wilcox J, there was "a total absence of material that would be necessary to enable either Mr Damevski or MLC to prove the existence of a contract between them."[17] A less adamant Marshall J found there was "no clear and unambiguous contract" between MLC and Damevski. The only document Damevski signed was a letter on the Endoxos letterhead that effected his resignation, and which also purported to be an acceptance by him of an offer from MLC to act as a "contractor management agency [to] bona fide self-employed contractors" not wanting to be bound by the "constraints" of the wages system.[18] The offer was made in documents in an information pack provided to Damevski. The information pack contained an "agreement to contract", but there was no evidence that either Damevski or MLC had signed that document.

17 *Damevski v Giudice*, note 15, at 496.

18 *Damevski v Giudice*, note 15, at 499-500.

Even if the letter constituted a contract between Damevski and MLC, Marshall J held that it was never fulfilled by either party as the arrangement detailed in the information pack bore little resemblance to the actual events. Damevski was not an independent contractor, as was envisaged in the MLC documentation. He worked only for Endoxos. He was not able to delegate his shifts to other persons. If he refused work he faced the likelihood of receiving no further work. The equipment he used was owned by Endoxos. Furthermore, MLC did not provide Damevski with any services, nor did it put him in touch with other businesses requiring cleaning services. MLC did not control his work: Endoxos did. MLC merely acted as an agent for Endoxos in paying Damevski, and Damevski submitted timesheets to MLC for that purpose.[19]

The ambiguity of any contract between MLC and Damevski, and the inconsistency between the information pack and the reality of the situation, required an examination of the entire factual matrix to establish what legal relationships, if any, actually existed between the three parties.[20] Viewed objectively, Endoxos and Damevski informally re-entered a contract on the same terms and conditions as Damevski's previous employment. A contract may be implied from the conduct of the parties. The question is whether the conduct of the parties, viewed in the light of the surrounding circumstances, shows a tacit understanding or agreement between them, and is capable of proving all the essential elements of an express contract.[21] The relationship between Damevski and Endoxos was one of mutual dependence. Damevski provided Endoxos with cleaning services. Endoxos determined Damevski's rate of pay and where and when he worked, did not permit him to delegate the performance of the work to others, expected him to use its equipment and livery, and ultimately retained the right to dismiss him.[22] While Endoxos may have set about making arrangements for the provision of labour through a third party (MLC), it ultimately acted in a way that showed an intention to create legal relations with Damevski, and the nature of that legal relationship was that of employer/employee.

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19 *Damevski v Giudice*, note 15, at 503-04.

20 *Damevski v Giudice*, note 15, at 507.

21 *Brambles Holdings Ltd v Bathurst City Council* (2001) 53 NSWLR 153 at 163-64 per Heydon JA.

22 *Damevski v Giudice*, note 15, at 510-11.

Justice Wilcox agreed with Marshall J's analysis that the new contract had been formed directly between Endoxos and Damevski, rather than through the agency of MLC, and acknowledged that the difference in their analyses was of no real significance.

Justice Merkel

For Merkel J, the legal question raised by the tripartite arrangements was whether MLC, acting as an agent for both Damevski and Endoxos, created privity of contract between them from 19 August 2001, and whether the ensuing contract created an employer/employee relationship or a principal/independent contractor relationship.[23] While the clear intent of the parties, based on the evidence and the documentation, was to create a principal/independent contractor rather than an employer/employee relationship, the real substance of the new arrangements was that Damevski was an employee rather than an independent contractor. The arrangements made for Endoxos were different from the *Odco*-style arrangements envisaged in the MLC documentation. Justice Merkel cited as relevant factors the level of control by Endoxos, the supply of equipment, the right to dismiss, and the other factors identified by Marshall J. These factors indicated not only that the relationship was one of employer/employee, but also that Endoxos was a principal, with MLC acting as agent for the parties as well as providing some administrative services to Endoxos. The fact that Endoxos was a principal was further supported by the likelihood that the workers could seek payment from Endoxos in the event that MLC did not pay them.[24]

Conclusions

Damevski v Diugice illustrates the technical difficulties that can arise in interpreting the legal effect of the triangular relationships created by labour hire arrangements. The ultimate outcome indicates that businesses lack the legal capacity to determine the nature of their contractual relationships simply by making use of labels that do not

23 *Damevski v Giudice*, note 15, at 531.

24 In Merkel J's view an important factor in *Odco* was that the workers' right to be paid existed against the labour hire agency only: they could not claim payment from the builders if Troubleshooters Available failed to pay them.

accord with the real substance of a relationship.[25] As Gray J said in the case of *Re Porter*: "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."[26]

Nevertheless, *Damevski v Giudice* and other similar cases illustrate, by implication, that canny, well-advised employers can exploit the common law distinction between independent contractors and employees to the detriment of their workers: even to the point of delivering an ultimatum to existing employees to choose between becoming independent contractors or losing their jobs. In most cases, it is a simple matter of hiring the labour through a properly established agency supplying to a range of businesses, as in *Odco*.[27] The features of the hiring can be manipulated so that workers contracting to provide their personal labour are defined legally as contractors, although they in no real sense operate a business of their own, and lack the flexibility, discretion and business profits that self-employment usually implies. The workers are defined as contractors whilst operating under disguised employment arrangements, but without the safety net protections available to most employees.[28] Such matters have been the concern of the union movement, and have been raised in a number of State Government inquiries into the labour hire industry in recent years.[29]

In the face of this business freedom, it has been cogently argued that a new approach to protecting workers who fall outside the traditional common law definition of 'employee' is needed if labour law is to properly fulfil one of its fundamental goals, namely, the protection of vulnerable workers with inferior bargaining power from the loss of safety net labour conditions like minimum wages, paid leave and termination rights and benefits.[30] In his article "Redefining Employment? Meeting the Challenge of Contract and Agency

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25 *Damevski v Giudice*, note 15, at 532.

26 *Re Porter; ex parte Transport Workers Union of Australia* (1989) 34 IR 179 at 184.

27 However, in other labour hire cases the worker has been held to be the employee of the labour hire agency, and thus entitled to protections as a result of that relationship.

28 Stewart, note 1, pp 8-13. Such workers are often called 'dependent contractors'.

29 For an overview of these inquiries, see O'Neill, note 2, pp 11-14. O'Neill notes in this context that Australia's employment protections in the agency/labour hire area are relatively lax by OECD standards.

30 Stewart, note 1, pp 25-6.

Labour", Professor Stewart has presented a range of options to better protect workers in disguised employment arrangements. In particular, he argues the need to replace the common law definition of employment with a legislative definition that "provides a more realistic basis than the common law has done for distinguishing between an employee and an entrepreneur."[31] Under his proposed definition, a worker who contracts to supply her/his labour to another is presumed to do so as an employee, unless it can be shown that the other party is a client or customer of a business genuinely carried on by the worker.[32] In the case of labour hire arrangements, Professor Stewart proposes that the employment agency that contracts to supply the labour of a worker to another party (the client) is to be deemed to be the worker's employer, except where the result of the arrangements is a direct contract between the worker and the client. This would make it far more difficult to exploit the reasoning in cases like *Odco* in order to establish arrangements for the provision of labour without providing workers with the protections accorded to employees.

It is encouraging to see that Professor Stewart's recommendations have been adopted in one Australian jurisdiction.[33] In a general economic and political environment where business flexibility is highly valued, it seems unlikely that there will be wholesale reforms aimed at protecting those workers who, although labelled 'independent' contractors, in fact operate under disguised employment arrangements. Good legal and commercial advice can go a long way to ensuring that cost effective arrangements for the supply of labour can be put in place without businesses having to incur the 'burden' of entering into contracts of employment with their workers. As a result, many 'dependent' contractors will continue to be disadvantaged.

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31 Stewart, note 1, p 41.

32 Stewart, note 1, p 36.

33 Professor Stewart's redefinition of employment has been adopted in a review of South Australian industrial legislation commissioned by the Rann Government: Stewart, note 1, p 42.