

Contract of Service

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1. Section 11 of the *Workers' Compensation and Rehabilitation Act 2003* provides:
11 Who is a worker
 - (1) A **worker** is a person who works under a contract of service.
 - (2) Also, schedule 2, part 1 sets out who is a **worker** in particular circumstances.
 - (3) However, schedule 2, part 2 sets out who is not a **worker** in particular circumstances.
 - (4) Only an individual can be a **worker** for this Act.
2. The phrase 'contract of service' is not defined in the dictionary to the Act.
3. Therefore, it is necessary to look to the common law concept of a worker being an individual who is under a contract of service. Traditionally, the so-called control test, measuring the degree of control which the person engaging the worker was able to exercise over the worker was regarded as important by the Courts: see, for example, *Humberstone v Northern Timber Mills* (1949) 79 CLR 389 and *Zuijs v Wirth Bros Pty Ltd* (1955) 93 CLR 561.
4. Control, although still relevant, is no longer the most significant factor in determining whether a relationship is that of employer and employee. In *Stevens v Brodribb Sawmilling Co. Pty. Ltd.* (1985-86) 160 CLR 16 the High Court moved away from the control test as being the significant determinant towards adopting a more multi-factorial test: see Mason J. at page 24 and Wilson and Dawson JJ. at page 35.
5. The question what is the nature of the relationship is a question of fact to be derived from the circumstances of the case: *Stevens v Brodribb Sawmilling Co. Pty. Ltd.* (1985-86) 160 CLR 16 at 23-24.
6. This is an objective assessment, although the actual construction of the contract embodying the relationship is a matter of law: *Global Plant Ltd v. Secretary of State for Social Services* [1972] 1QB 139.
7. The law governing the determination turns on a number of considerations or factors: *Hollis v. Vabu Pty Ltd* (2001) 207 CLR 21 at 41; *WorkCover Queensland v. J.M. Kelly (Project Builders) Pty Ltd* No. C31 of 2003, 11 June 2003.

First Issue

Do you have a contract at all?

8. It requires an analysis on basic contractual principles. Is there:
- Offer;
 - Acceptance;
 - Consideration;
 - Intention to create legal relations.

Consideration

9. Without consideration, an agreement to work for another does not constitute a contract and does not create enforceable legal obligations:

Dietrich v. Dare (1980) 30 ALR 407 - a disabled and unemployed person given trial employment for a nominal sum.

Eldridge v. Kemblawarra Child and Family Centre [1999] NSWCA 395 - an employee who was originally employed as a casual employee, but after the employer got into financial difficulty continued to work as a volunteer, was found not to be an employee.

Teen Ranch Pty Ltd v. Brown (1995) 87 IR 308 - Brown had volunteered to work for a non-profit organisation in return for accommodation, food and use of camp facilities.

10. At common law an employer's consideration can be constituted by the promise to provide a benefit other than the payment of money: *Hayman v. Betta Brushware Pty Ltd* (1946) 63 WN (NSW) 247. However, note under the IRA payment of remuneration other than by a wage in the form of currency, cheque or electronic transfer is statutorily prohibited: s. 393.
11. At common law, the court does not enquire into the adequacy of the consideration, it merely has to be sufficient at law: *Barba v. Gas & Fuel Corp of Victoria* (1976) 136 CLR 120 (dealing with land).
12. Therefore, even though a person may be being paid a nominal amount in return for the work they are performing, this may still be sufficient to constitute consideration to support an employment contract.
13. A person may be an employee where wages are assessed as a total sum for a task: *Federal Commissioner of Taxation v. J Walter (Aust) Pty Ltd* (1944) 69 CLR 227 (radio play artist contracting for fixed fee per performance).
14. Or by time rates: *Howell v. Noojee Sawmilling and Logging Co* [1974] VR 243.

Intention to Create Legal Relations

15. This factor will be relevant in circumstances involving family businesses, smaller operations, businesses where friends assist.
16. The promise to pay a worker an extremely small sum is likely to prompt the court to conclude that there was no intention to create legal relations, and that the sum provided was to be provided in the context of charity or social, religious or family relations: *Dietrich v. Dare* (1980) 30 ALR 407.
17. It should be remembered that employment contracts may be, and frequently are, entered into as the result of very informal negotiations: see for example *Brimacombe v. Emtex Chemicals (SA) Pty Ltd* (1986) 28 ALR 489.
18. It should be also remembered when undertaking this first step, that a contract of employment can be constituted:-
 - In writing;
 - Orally;
 - Or implied by conduct.
19. There is no requirement that an employment contract must be in writing.

Implied by Conduct

20. Not only the terms of the contract but the existence of the contract itself may be implied by conduct, the most reasonable explanation of which is that the parties have entered into a contract of employment: *Hamlyn & Co. v. Wood & Co.* [1891] 2 QB 488.
21. The conduct of one party commencing to perform for another work of a type normally performed by employees can give rise to an inference of the intention to create legal relations, the offer of work and the acceptance of the work offered: cf *Dietrich v. Dare* (1980) 30 ALR 407.
22. It will then be implied by operation of law that the work was to be performed, at a reasonable rate, the going rate for the work, or the award rate: *Monks v. Poynice Pty Ltd* (1987) 8 NSWLR 662

Case Study A

- Claimant had been a casual employee of the alleged employer for approximately 17 years.
- The alleged employer operated a cane farm and also operated a transport business transporting chemicals.
- The Claimant's duties involved loading and unloading trucks on the farm, and working as a bin-out

operator during harvest.

- The Claimant also accompanied the employer on local trips to Brisbane to pick up or deliver fertiliser and was paid as part of his casual duties.
- On longer trips to cart chemicals, the employer would take an employee with him, but not as an employee, but as a 'mate'.
- It was not compulsory, and it was the person's choice whether they went or not.
- The Claimant had accompanied the employer on a dozen trips on that basis over the years and was not paid on these occasions.
- On a trip to Ayr with the employer, the Claimant suffered a leg injury when stepping off the truck.
- The Claimant performed some work on the trip which included taking the gates off the side of the truck, helping to tie ropes on and assisting in unloading the chemicals.
- During the trip the employer paid for meals and drinks.

Finding

- WorkCover had found that the Claimant was not a worker.
- The Review Unit reversed this decision, finding that he was a worker.
- Industrial Magistrate found that the Claimant was not a worker.
- Magistrate found that the issue to be determined was whether the person was employed at all at the time of the injury.
- Magistrate was not satisfied that the Claimant was within the definition of a 'worker' in the Act;
- There was no obligation for him to go on the trip. He had gone on a number of trips in the past without any agreement for services and for his own recreation.
- There was no relationship between the fact that food and drinks were purchased by the employer, at the whim of the employer, and the fact that the Claimant may have rendered some assistance to the employer during the trip.
- There was no agreement between the Claimant and the alleged employer for the Claimant to perform any services during the trip.

Walden v. Q-Comp and Atherton (Unreported, MM5000 of 2002, Maroochydore Magistrates Court, 31 July, 2003)

Case Study B

- The Claimant was an older gentleman, 61 at the time of the accident who has been on an invalid pension since 1990, and unemployed since that date.
- The alleged employer was a small company operating a hardware store.
- The Claimant lived by himself and began frequenting the hardware store as a customer.
- Over time he struck up a friendship with the owner, one of the directors of the company.
- He would attend the store virtually every day, by his own choice, and stayed for many hours, once again by his own choice just chatting to the owner and customers.

- Over time, the Claimant began to perform small tasks around the store, and helping out.
- There was a suggestion that the company should employ the Claimant, however, the director responded that he could not afford to.
- The Claimant around this time was attending the store six days a week, from approximately 8.30 am to 5.30 pm, and sometimes later.
- The store moved premises, and during this time and the initial set-up, the Claimant along with a number of other friends assisted the owner of the store.
- The owner of the store would on occasions buy the Claimant's petrol for his vehicle, and would buy him meals.
- There was no employment agreement, no taxation or other financial records indicating an employment relationship.
- There was no requirement that the Claimant attend the store, or when there, that he stay at the store, it was all his personal choice to do so.
- In October 2000, in the course of trying to install a spotlight at the store (by his own choice), a ladder collapsed underneath the Claimant and he suffered injury.

Finding

- At first instance WorkCover found the Claimant was not a worker under s.12 of the old Act.
- The Review Unit upheld this decision also finding that the Claimant was not a worker.
- The Industrial Magistrates Court found that the Claimant was a worker.
- On a finding of credit the Court preferred the evidence of the Claimant over the director of the company, and found that it was satisfied that an informal oral employment contract had been entered into.
- The Court was also satisfied that an employment contract could be implied from the conduct of the Claimant in attending regularly for weeks on end and performing work, and the acceptance of the benefit of that work by the employer.
- The Court noted that the employer felt a moral obligation to pay for the Claimant's petrol and meals.
- The Court noted that not only the Claimant, but other friends of the director fell into the category of unpaid workers.

Burton v. Q-Comp (Unreported, Innisfail Magistrates Court, 00139962/04, 22 April, 2005).

Case Study C

- The Claimant was a carpenter working around the Cairns area.
- The Claimant conducted his own business, often in tandem with another tradesman and usually supplied all of his own tools and equipment, including a utility and trailer, power tools, hand tools, compressor, limited scaffolding.
- For a number of years the Claimant had undertaken construction of sheds on behalf of the alleged employer Chappell Development Group.

- The Claimant estimated that approximately 40% of his work was done on behalf of CDG.
- The Claimant would provide a tax invoice which included GST to CDG, and was usually paid on a lump sum basis, unless the nature of the job did not allow this.
- The Claimant was contracted by CDG to undertake the construction of a large warehouse in East Timor on behalf of CDG.
- Because of quarantine restrictions, the only equipment that the Claimant provided was a tool belt and some hand tools.
- The Claimant was paid on an hourly basis for this work and was provided with accommodation and meals by CDG. The Claimant invoiced CDG on this basis, but the invoices did not include a GST component.
- The Claimant provided his own skilled workmanship and acted as foreman for approximately a dozen unskilled local labourers.
- The Claimant was injured when he fell from a scaffolding whilst working in East Timor.

Finding

- Both WorkCover and Q-Comp found that the Claimant was not a worker within the meaning of the Act both finding that the Claimant was not employed under a contract of service but as an independent contractor.
- The Industrial Magistrate noted a distinction between the contractual arrangements between the Claimant and CDG for the work undertaken in Cairns and that undertaken in Dili.
- The Industrial Magistrate noted from the decision of President Hall in *WorkCover Queensland v. J M Kelly Pty Ltd* [2003] QIC noted from the decision of President Hall that it was possible for a person to change their mode of work from independent contractor to employee and back again.
- The Industrial Magistrate found that the Claimant at the time of the accident was engaged on a specific contract in terms of an oral agreement to provide his services personally to be paid substantially for labour only. Therefore, he was a worker.

Raappana v. Q-Comp (Unreported, Cairns Magistrates Court, 1 September 2005).

Employee vs. Independent Contractor

23. The decision of the Australian Industrial Relations Commission in *Abdulla v. Viewdaze Pty Ltd trading as Malta Travel* [2003] AIRC FB, PR 927971, 14 May 2003 provides a useful summary of the relevant indicia to be used in determining whether a person is an employee or an independent contractor. These included:-

Whether the putative employer exercises, or has the right to exercise, control over the manner in which the work is performed, place of work, hours of work and the like

- Control of this sort is indicative of a relationship of employment. The absence of such control or the

- right to exercise control is indicative of an independent contract.¹
- Whilst control of this sort is a significant factor it is not by itself determinative.²
 - In particular, the absence of control over the way in which the work is performed is not a strong indicator that a worker is an independent contractor where their work involves a high degree of skill and expertise.³
 - On the other hand, where there is a high level of control over the way in which work is performed and the worker is presented to the world at large as a representative of the business then this weighs significantly in favour of the worker being an employee.⁴

Whether the worker performs work for others (or has a genuine and practical entitlement to do so)

- The right to the exclusive services of the person engaged is characteristic of the employment relationship. On the other hand, if the individual also works for others (or has a genuine and practical entitlement to do so) then this suggests independent contract.

Whether the worker has a separate place of work⁵ and or advertises his or her services to the world at large.

Whether the worker provides and maintains significant tools or equipment.⁶

- Where the worker's investment in capital equipment is substantial the worker will be an independent contractor in the absence of overwhelming indications to the contrary: see *Green v. Q-Comp Review Unit* [2005] QIC 4 where the courier supplied the motor vehicle used for transporting items, this was held by President Hall as a significant factor pointing to Ms Green not being an employee.

Whether the work can be delegated or subcontracted.⁷

- If the worker is contractually entitled to delegate the work to others (without reference to the putative employer) then this is a strong indicator that the worker is an independent contractor.⁸ This is because a contract of service is personal in nature, unlike a contract for services.

* Note however - *Brett Holt Plumbing Pty Ltd v. Q-Comp C87 of 2004*

President Hall found that the claimant was a worker under Schedule 2, Part 1 of the Act.

This was despite the fact that the evidence in that case was that the claimant:-

- (a) was paid to produce a result (not to labour); and
- (b) had the ability to delegate the entirety of the work carried out.

Whether the putative employer has the right to suspend or dismiss the person engaged.⁹

1. *Stevens v. Brodribb Sawmilling Co. Pty. Ltd.*, supra, see Mason J. at p.24.

2. *Ibid.*

3. *Zuijs v. Wirth Bros. Pty. Ltd.* (1955) 93 CLR 561 at p.571.

4. *Hollis v. Vabu* (2001) 207 CLR 21.

5. *Brodribb* supra per Wilson and Dawson JJ. at p.37.

6. *Brodribb* supra per Mason J. at p. 24; see also *Daykin v. Neba International Couriers & Anor* [2002] WASCA 213 per Mathews AJ at paragraph 43; *Hollis v. Vabu* (2001) per Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ. at paras 22 and 47 and *McHugh J.* at para 71, pp. 49-50; and *Margaret Green and Q-Comp Review Unit No. C49 of 2004* per President Hall at pp.3-4.

7. *Brodribb* supra per Mason J. at p. 24.

8. *Queensland Stations Pty Ltd v. Federal Commissioner of Taxation* (1945) 70 CLR 539; *AMP v. Chaplin* (1978) 18 ALR 385 at p.389.

9. *Brodribb* supra per Wilson and Dawson JJ. at p.36.

*Whether the putative employer presents the worker to the world at large as an emanation of the business.*¹⁰

- Typically this will arise because the worker is required to wear the livery of the putative employer.

*Whether income tax is deducted from remuneration paid to the worker.*¹¹

*Whether the worker is remunerated by periodic wage or salary or by reference to completion of tasks.*¹²

- Employees tend to be paid a periodic wage or salary. Independent contractors tend to be paid by reference to completion of tasks.

*Whether the worker is provided with paid holidays or sick leave.*¹³

Whether the work involves a profession, trade or distinct calling on the part of the person engaged.

Whether the worker creates goodwill or saleable assets in the course of his or her work.

10. Hollis v.Vabu supra at paragraph [50] p. 42.

11. Brodribb supra per Mason J. at p. 24, Wilson and Dawson JJ. at p. 37.

12. Cf Brodribb per Mason J. at p. 24.

13. As to paid holidays see Brodribb supra per Mason J. at p.24.