



Précis Paper

The Difference between Independent Contractors and Employees

A discussion of the criteria to be considered when determining whether someone is an independent contractor or an employee.

Discussion Includes

- Relevance of *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21
- Development of case law
- Entitlement to work for others
- The right of delegation
- Place of work and supply of tools
- Right to terminate or dismiss
- Integration into the engager's business
- Vicarious liability
- Key takeaways

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The Difference between Independent Contractors and Employees

In this edition of BenchTV, Chris McArdle (Principal Lawyer – McArdle Legal) and Deirdre McEvoy (Senior Associate – McArdle Legal, Sydney) discuss the various factors that must be considered in determining whether someone is an independent contractor or an employee.

Relevance of *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21

1. One of the major issues in this area of law is that people frequently say that someone is an independent contractor when they are in actual fact an employee. This is usually done as they think they can evade their obligations such as to deduct and remit tax, or to avoid paying accumulative entitlements, such as long service leave and annual leave.
2. The case of *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 is a leading case on the difference between independent contractors and employees. This case concerned bike couriers and whether they were independent contractors or employees. Eventually the High Court determined they were employees, and the criteria they used to reach this conclusion was largely based on the control the contractor had over the bicycle couriers.
3. This case was relied upon in the recent decision of *Fair Work Ombudsman v Z Transport Group* [2017] FCCA 2660 which also concerned bike couriers who had been engaged as independent contractors. This was found to be a sham and was in breach of s 357 of the *Fair Work Act 2009* (Cth). In this case, the Respondent had relied on what the Court described as a 'simplistic tool offered by the ATO'. The tool was used to input the characteristics of the arrangement and the ATO calculator had said they were probably independent contractors. The Respondents were criticized by the Court for not applying for declaratory relief.
4. The judge noted that the Respondent was actually aware of the *Hollis v Vabu* decision, leaving the Court perplexed as to why, in light of that knowledge, he had persisted on calling his workers independent contractors. The Respondents were ordered to pay penalties of \$36,000 each: \$20,000 for sham contracting, \$15,000 for underpayment and \$1,000 for payslip offences.

Development of case law

5. The difference between an independent contractor and an employee is all about whether it is a contract of service, that is 'I am at your disposal to exercise my trade, my work, my labour, as reasonably and lawfully directed by you', or 'I am in the business of providing services from time to time', and that is usually transactional in nature.

6. The case of *Stevens v Brodribb Sawmilling Company Pty Ltd* [1986] HCA 1; (1986) 160 CLR 16 concerned a person with a logging truck who went up into the wilderness to extract timber and the person was sadly injured. The determination then was whether the person was a worker or a contractor which was determined primarily in regard to the amount of control exercised by the engager over the individual. The question in this regard is not so much whether the actual control is exercised over the activities and the tasks performed by the worker, but what is important is the right to control, and whether this right, even if it is not exercised, is consistent with an employment relationship.
7. This is very relevant today where you have very highly skilled, technically qualified workers, and you know the employer would not necessarily have the technical knowledge or skills to tell the person what to do, but what is important is whether they have, in a legal sense, the legal right to do so, should they chose to exercise it.
8. Other factors besides control that are important include whether or not the person can be said to be in business on their own account. Do they carry a risk? Do they have a profit element? Are they generating goodwill for their own business? Are they building up something that is, in some shape or form, capable of sale in the future?
9. *Fair Work Ombudsman v Ecosway* [2016] FCA 296 concerned a direct sales outlet and the relevant party was a store manager. This lady opened the store, did the stock, engaged people, and so on, and it was all tightly controlled by the head contractor. However, the Court held that she was not an employee but an independent contractor because she bore some of the risk of the business, i.e. that if the stock did not sell she did not get remunerated.
10. The case of *Rogalski and Anor v PMP Print Pty Ltd* [2016] FCCA 281 involved document distributors who worked from home some of the time, but occasionally had premises leased for them by the head contractor as well. Essentially they collected pamphlets and then organized walkers in the area to drop them into letterboxes. They were paid per number of pamphlets distributed and were held to have been independent contractors rather than employees due to the nature of the work.

Entitlement to work for others

11. If you are an independent contractor it is highly unlikely that you would work for one person and one person alone. Whether you have the legal entitlement to work for other people during the course of your agreement with your engager may be an indication of whether you are an independent contractor or an employee, but it will depend upon the circumstances of each case.

12. In reality a lot of the time it is just not practical to do work for somebody else even if they nominally have that right. When you are discussing the various tests for determining who is an independent contractor or an employee, you must look at the totality of the relationship, then you must do some sort of synthesis to decide which of the factors you have looked at including things such as the exclusivity, whether they could provide their own tools and equipment, the right to control, the profit element, etc.
13. The case of *Fair Work Ombudsman v Grouped Property Services Pty Ltd (No 2)* [2017] FCA 557 concerned contract cleaners, and another issue was who was the true employer as the engager had set up his own sort of captive labour hire business and tried to say the workers were engaged by that labour hire business. The Court saw through this argument and held the engager to be the employer, and that the people were employees' not independent contractors.
14. The weight of authority when you consider the modern case law is that it seems more likely than not that someone would be found to be an employee rather than an independent contractor.

The right of delegation

15. In every written independent contracting agreement that you look at, there will be a right for the worker to delegate his services to other people, most often with the approval of the engager. In a lot of cases in practice it is not exercised and sometimes it can tend to be a fairly neutral factor when considering the relationship overall.
16. It could also be part of a sham contract if it is included in the contract but no reasonable person would think it is going to happen. For example, if you are working as a nurse or a carer, it is incomprehensible that in those sort of positions where there has to be some sort of trust and personal relationship, that you're just going to be able to send a delegate in your place. This can be contrasted against the situation of a plumber – most do not really care if the plumber that was promised does not arrive and another plumber arrives in their place, it is the getting the job done that is important, not the identity of the person.

Place of work and supply of tools

17. Another test to consider is whether or not you have a separate place of work. This test does have relevance in determining who is an independent contractor or an employee, but it is probably not one of the more decisive factors because it just shows how the parties thought

they should have conducted themselves, it does not mean they actually have the right label on the nature of their relationship.

18. The supply of your own tools is not an exclusive test but it is important. The mere fact that you do supply some of your own tools and equipment does tip the scales slightly in favour of being in an independent contracting relationship but it is not determinative. You must still consider all of the factors that are present. This test is relevant, but there is no rule that states that if you provide some of your own tools and equipment that you are automatically an independent contractor rather than an employee, it will depend upon the specifics of each case.

Right to terminate or dismiss

19. There is the idea of ongoing payment and the right to terminate or dismiss, but if it is transactional we assume the dismissal is at the end of the transaction, and it is renewed at the time of the next transaction.
20. The right to terminate or suspend is equally consistent with an employment relationship or an independent contracting relationship, because even though it is an independent contracting relationship, the person engaging in the service does have the right to expect that it will be delivered with a certain amount of quality and skill, and they have a right to ensure that that is the case. One factor cannot be the be all and end all of applying the characterization.

Integration into the engager's business

21. Another test to consider is whether they are wearing the livery of the business that engaged them, and the degree to which they are integrated into that business. For example, do they have business cards that bear the logo of their independent contracting business, or does it bear the logo of the business that is engaging them?
22. The degree of integration into the engager's business is an important test. This test will consider things such as whether they wear the livery or the uniform of the business, their business cards, and so on. It asks the question of how they represent themselves to the world at large. Do they represent as being in business on their own account, or are they represented as some sort of emanation or agent of the engaging business?
23. There are sometimes examples of where the relationship is so carefully constructed that people's email sign off, even though it may come from @business.com.au, will specify that the person is not actually an employee, but that they are an independent contractor.

24. As per the *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue* [2001] HCA 49, you must consider the totality of the relationship. This includes the concept of goodwill. Good will is important because if you are a genuine independent contractor then you are genuinely in business on your own account and presumably the work you do is going to be generating goodwill, creating value and capital asset for you. Whereas if all you are doing is working on someone else's business, rather than your own, that is going to tell in favour of an employment relationship.

Vicarious Liability

25. Another telling factor may be through vicarious liability. For example, the remedy against the plumber who works for you and makes an error is to terminate the plumber's services and claim on the relevant insurance.
26. Typically someone is only vicariously liable if the worker is an employee and they are doing the act that was named, or whatever was committed, was committed during the course of employment. Another thing to consider on this note is how the parties have managed that risk and who has taken out the insurance in the case of negligent acts by the worker.
27. If it is a true independent contracting relationship, one would expect the worker to have his or her own professional indemnity and public liability insurance, whereas the person who is an employee would not – they would be relying on their employer to have that type of insurance in place.

Key Takeaways

28. If individuals are contracting through a proprietary company, this does not automatically mean they cannot be considered employees. This point is illustrated by the case of *ACE Insurance Limited v Trifunovski* [2013] FCAFC 3.
29. In this case the workers were insurance brokers and most of them were contracted as sole traders, but at least one of them occasionally used a proprietary limited company along the way for several renewals of the contract. The Court did not address this point in detail, but was willing to find that the relationship was one of employer and employee, despite the presence sometimes of this proprietary limited company. This displays that there probably is a willingness to pierce the corporate veil to look behind the structure to see what is actually happening.

30. It is the case that one might be an independent contractor but if it is a contract for personal services for the labour of that person then, notwithstanding that you might not meet the test for being an employee, superannuation is still payable on the amounts that are paid to the independent contractor.
31. Under the Workers Compensation Act 1987 (NSW) there is in some instances an obligation to make sure that deemed workers, which can include some independent contractors, are covered by workers compensation. It is a mistake to think that even if you have a legitimate contracting relationship that that absolves you of all other duties under superannuation and workers compensation. Not paying superannuation and leave entitlements on the grounds that someone is an independent contractor when they may truly be an employee is a significant commercial risk.
32. The significant thing about all of the criteria that has been discussed is that there are exceptions, case by case, to every single one of them. In modern times there are so many consequences for mislabeling and misrepresenting a relationship that it is important to think from the outset about setting the relationship up correctly. The consequences of not doing this can be more catastrophic than simply having to pay leave entitlements on an ongoing basis.

BIOGRAPHY

Chris McArdle

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Chris commenced legal practice in 1998 after serving as a Commissioner of the Industrial Relations Commissions of NSW. Chris is accredited by the Law Society of NSW as a specialist in Employment and Industrial Law and has achieved a number of breakthroughs in the anti-discrimination, unfair contracts and Australian Workplace Agreements Jurisdictions. Chris acts for corporate and individual clients with a philosophy of preventing problems and increasing corporate efficiency.

Deirdre McEvoy

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Prior to settling in Australia in 2004, Deirdre practiced in Ireland and is one of the few Australian Employment Lawyers who are also admitted and had practical training and experience in the European Union. Deirdre practices exclusively in employment law and has published articles in journals domestically and internationally, including in the Law Society Journal. Deirdre is accredited by the Law Society of NSW as a specialist in Employment and Industrial law and is also a member of Chartered Secretaries Australia.

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Legislation

Fair Work Act 2009 (Cth) s 357

Workers Compensation Act 1987 (NSW)