

Employer v independent contractor case study



An employer is vicariously liable for the negligent conduct of an employee when it is committed during the course of employment (Broom v Morgan [1953] 1 QB 597). Vicarious liability imposes liability upon the employer, notwithstanding that they may not have been at fault (Adams 2003, 1). In determining vicarious liability, the courts draw an important distinction between employees, in which case there is a contract of services, and the employer has lawful authority or control over the employee, and independent contractors, in which case there is a contract for services, and the employer has no authority or control over how the contractor provides the services required (Balkin & Davis 2004, 784). Courts have ruled that employers are vicariously liable for the negligent actions of their employees, but not of their independent contractors. In determining whether Midas Investments Ltd (“Midas”) is vicariously liable for Barrie Bauer (“Bauer”)’s negligent actions, it is necessary to determine whether Bauer was engaged as an employee or an independent contractor. The courts have devised three legal tests to characterize the relationship between the employer and the worker: the control test, in which the courts will assess the degree of control the employer had over the person; the organisation test, in which the courts will assess the relationship of the work performed by the worker to the overall organisation’s function; and the multi-facet test, in which the courts will assess a broader range of criteria including control (Adams 2003, 1). Whether or not Bauer is found to be an independent contractor or an employee would be assessed by the courts using these tests, and the outcome may vary depending on which legal test is adopted by the courts (Davies & Malkin 2003, 300).

Control Test

The control test is the traditional test adopted by the courts in determining whether or not a worker is an employee (Luntz & Hambly 2002, 921). This test seeks consideration of whether the worker was subject to the control of the employer in relation to the manner in which the work was undertaken (Mersey Docks and Harbour Board v Coggins & Griffith (Liverpool) Ltd [1947] AC 1).

Bauer had a reasonable degree of control over his own work, as he only worked on the concession when the weather is suitable (and Midas simply acquiesced to this), there was no set amount of ore that he was required to deliver, and he used Midas' advice simply as a guide to which part of the open face they should blast. Thus, on the face of it, it would appear that Bauer was in control of his working arrangements, rather than Midas, thus suggesting that he is an independent contractor rather than an employee. However, in *Zuijs v Wirth Brothers* (1955) 93 CLR 561, the High Court stressed that in relation to the control test, the lawful authority to command (in that case, an acrobatic performer) was the significant feature, rather than the actual exercise of control through specific commands. As Mann has visited Bauer on site and became very angry with him and threatened to take back their uniforms and re-allocate their workload to another worker, Mann appears to have a lawful authority to command Bauer, thus implying that Bauer is Mann's employee. If the court was to apply the control test, and adopted the position put forth in *Zuijs v Wirth Brothers*, it is likely that they would find Bauer to be an employee.

Organisation Test

The organisation test was developed as an alternative to the control test (Luntz & Hambly 2002, 925). The organisation test was best summarized by in *Stevenson, Jordan & Harrison Ltd v MacDonald & Evans* [1952] 1 TLR 101 at 111, where it was found that:

“ One feature which seems to run through the instances is that, under a contract of service, a man is employed as part of the business, and this work is done as an integral part of the business; whereas, under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it.”

Midas' core business is to acquire gold mining concessions and to process the ore taken from them, and all of the open cut mining on Midas' main concession is carried out by Bauer and Kapp on behalf of Barmur Ltd. This is clearly an integral part of the business, rather than simply work done that is an accessory to the business. If the courts were to apply the organisation test, it is likely that they would find that Bauer was an employee as the work he performed was integral to the operation of the business.

However, it should be noted that in *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16, Mason J was critical of the organisation test, and held the view that the legal authority to control was more relevant. Perhaps resultantly, the organisation test is not generally applied in Australia (McGlone & Stickley 2006, 349).

Multi-facet Test

The current approach of the courts in determining whether a worker is an employee or an independent contractor involves a consideration of a range of factors: *Stevens v Brodribb Sawmilling Co Pty Ltd*. The courts accept that not every factor will be relevant in every case, each factor may be given a different weight, and that control remains the central element in determining the relationship (Davies & Malkin 2003, 306). In *Stevens v Brodribb Sawmilling Co Pty Ltd*, Mason J found that other factors relevant in determining the type of relationship between an employer and a worker included (but were not limited to): the mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work and provision for holidays, the deduction of income tax and the delegation of work by the putative employee.

In *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21, the High Court noted that the following factors were relevant in finding that a worker was an employee: there was no negotiation between the worker and the employer as to the rates of remuneration; deductions from the workers' pay for insurance and such could not be negotiated; the employer allocated the work with no bidding for individual jobs by the workers and the workers could not refuse the job; the employer assumed all responsibility as to the direction, training, discipline and attire of its workers; the workers were not providing skilled labour or labour that required special qualifications; the employer provided the workers with items of equipment that remained the property of the employer; and the workers had to wear the employer's uniform.

If the court was to apply the multi-facet test, it would consider and balance a range of factors. Firstly, the fact that Midas pays Bauer on a 'per tonne of ore' basis suggests that Bauer is an independent contractor. Secondly, the fact that Bauer and Kapp had previously leased the truck from Midas (rather than simply used it during the course of their employment), and now own and operate the truck used for their work, is highly suggestive of the fact that they are independent contractors. Thirdly, Bauer only works when the weather is suitable, and there is no set amount of ore that Midas expects him to deliver, thus suggesting that the obligation to work is in line with that of an independent contractor. Fourthly, as Bauer's company has its own tax arrangements (rather than Midas paying tax on Bauer's behalf), it is highly suggestive of the fact that he is an independent contractor. Furthermore, there is nothing to say that Bauer cannot delegate this work to another contractor, which again suggests that he is an independent contractor rather than an employee.

There remain some factors that point towards Bauer being an employee. In accordance with the principles set out in *Hollis v Vabu Pty Ltd*, the court may also consider the fact that Midas had paid for Bauer's safety training, thus asserting a degree of authority and control over him and suggesting that he is an employee. This is similarly the case in respect of the fact that Bauer wears the Midas company uniform and baseball cap, which remain the property of Midas and which Midas has suggested an intention to re-claim.

In determining whether Bauer is an employee or an independent contractor using the multi-facet test, the court will consider the above factors and will essentially balance them out to come to an overall conclusion (Adams 2003, <https://assignbuster.com/employer-v-independent-contractor-case-study/>

1). Given the number and weight of the criteria suggesting that Bauer is an independent contractor, it is likely that the court will find this way.

Conclusion

An important distinction exists between employees and independent contractors in relation to vicarious liability, and this is based upon the premise that employers assert authority and control over employees which they do not assert over independent contractors. Thus, employers are vicariously liable for the negligent acts of their employees, but not of their independent contractors. The tests devised by the courts to distinguish between an employee and an independent contractor are the control test, the organisation test and the multi-facet test. Given that Midas appears to have had the lawful authority to control Bauer (albeit that he did not actually exercise this control), in applying the control test the courts would be likely to find that Bauer is an employee rather than an independent contractor. Similarly, given the integral nature of the works performed by Bauer in Midas' overall organizational functions, an application of the organisation test would suggest again that Bauer is an employee rather than an independent contractor. However, when applying the broader and more comprehensive multi-facet test, which takes into account various other considerations including for example tax and payment arrangements, training, ownership of equipment and obligation to work, it is likely that the courts would find Bauer to be an independent contractor rather than an employee. While these tests produce different results, it is likely that the multi-facet test would be applied as it is the most comprehensive, it considers many of the finer details that are not accounted for in the control

and organisation tests, and it is the legal test that is presently most accepted on the question of whether a worker is an employee or an independent contractor.

Reference List

Journal Articles and Books

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Case Law

6. Broom v Morgan [1953] 1 QB 597
7. Hollis v Vabu Pty Ltd (2001) 207 CLR 21
8. Mersey Docks and Harbour Board v Coggins & Griffith (Liverpool) Ltd [1947] AC 1
9. Stevens v Brodrigg Sawmilling Co Pty Ltd (1986) 160 CLR 16
10. Stevenson, Jordan & Harrison Ltd v MacDonald & Evans [1952] 1 TLR 101 at 111
11. Zuijs v Wirth Brothers (1955) 93 CLR 561