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Question 1 (857 words)

1. Identifying the Legal Issue (7 words)

Is Amanda an employee or independent contractor?

2. Stating the Relevant Legal Rule (428 words)

An employee has a contract of service, whereby the employer has control over the employee, and work is unable to be delegated to another (Pagura, 2011). Correspondingly, the employer is legally answerable for the employee's actions.

An independent contractor has a contract for service, whereby the worker performs an agreed task for an agreed remuneration (Utobo, 2017). The employer typically has no control over work hours or the way in which work is carried out otherwise delegated to others. Besides, the employer is unaccountable for the actions of the independent contractor.

The difference between an employee and independent contractor is based on various factors (Mundele, 2015). The common law test used to determine the relationship between Amanda and Monks, is the multi-factor test. This includes identifying and weighing up several features of the relationship to distinguish where the balance lies.

In the case of Stevens v Brodribb Sawmilling Co Pty Ltd (1986) 63 ALR 513, the High Court decided that the two workers were independent contractors and there exists a contract for service. The establishment of relationship is not just based on the

existence of control. Additional factors should be included, such as method of payment, hours of work, tax and many more (Guthrie & Goldacre, 2011).

The above principle of law was well established in Hollis v Vabu (2001) 207 CLR 21, whereby totality of the relationship must be thought-out (McCusker & Vranken, 2010). There was abundant evidence to attest the presence of an employer-employee relationship. The unskilled nature of the courier's work, degree of control the company had over the way the courier finished his work, the existence of a company uniform, as well as the company's control over salary, leave and entitlements did not demonstrate the independence or degree of control associated with that of an independent contractor. The principle in Hollis v Vabu (ibid) was further endorsed in Australian Air Express v Langford (2005) NSWCA 96, whereby the NSW Court of Appeal held that the worker was required to bore the risk of his business and was an independent contractor.

On the contrary, in Damevski V Giudice (2003) FCAFC 252, the Full Court of the Federal Court of Australia used the same test to conclude a cleaner, who was believed to be employed through a labour-hire firm, was instead an employee of the principal (Sutherland & Riley, 2016). Even though the cleaner purported to come through an intermediary, the actuality was that the principal set the terms under which the worker would make available his services, whereas the labour-hire firm only conducted administrative work.

3. Applying the Law to the Facts (341 words)

Amanda worked 50 – 60 hours a week, including evening and weekend call backs to re-shoot scenes. In addition, she signed a contract that says she will fill a central

character in the serial, and must always be ready to work. Henceforth, Amanda had hours of work set by Monks. Linking to Stevens v Brodribb Sawmilling Co Pty Ltd (ibid), as the hours that the worker is required to work for the employer is substantial, this factor weighs more in the direction of an employer-employee relationship (Flynn, 2012). Also, the contract required Amanda to make herself available to the mass media as directed by Monks. Therefore, Monks had the right to control how, when and where Amanda performs her responsibilities. Such that, tasks are done at the request of Monks. Connecting to Damevski v Giudice (ibid), which stresses on the degree of control exercised by the principal, Amanda is more inclined to be an employee (Ping & Hassan, 2013).

Conversely, Monks Pty Ltd remunerated Amanda $10,000 after four weeks, without making any deduction for tax. Hence, Amanda must issue her own tax invoice. Based on Vabu v FCT (1996) 81 IR 150, the NSW Supreme Court of Appeal held that the couriers were independent contractors, as they were making all types of expenditures like self-taxation, maintenance of vehicles, and payment by quantity delivered (Terry & Huan, 2012). In addition, there was no promise of any continued work and Amanda is permitted to receive work from other production companies. So, Amanda can offer services to various clients. Relating to Hollis v Vabu (ibid), where exclusivity is concerned, this factor weighs more to a relationship being of principal and independent contractor (Freedland, Bogg, Cabrelli, Collins, Countouris, Davies, Deakin & Prassl, 2016). Besides, Amanda was unpaid for the period she took to get well from her injury and for her effective dismissal. This specifies that Amanda bore responsibility for injury sustained while carrying out her job. Linking to Australian Air Express v Langford (ibid), which highlights on risk, Amanda is more of an independent contractor.

she is trying to claims for her injury

4. Conclusion (81 words)

Based on the discussion above, Amanda is an independent contractor. The core consideration is the totality of working arrangement, including the performance of work under the control and direction of Monks (Jost, 2011). Nonetheless, indicators such as taxation arrangements, leave, pay rates and compensation arrangements, need to be taken into consideration too. All in all, through there is a moderately high degree of control over Amanda by Monks Pty Ltd, the indicators of an independent contractor outweigh indicators of an employee.

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Question 2 (643 words)

1. Identifying the Legal Issue (24 words)

Can the 'last on / first off' rule form part of Ken's contract, and that he should therefore not be made redundant before Bob?

2. Stating the Relevant Legal Rule (355 words)

Redundancy is typically considered to be a state where an employee's position is surplus to an employer's viable needs. That goes to say, a genuine redundancy cannot be an unfair dismissal (Moy & Herbert, 2013).

The 'last on / first off' rule, lays down that the last employed will be the first to leave, as they have assisted the organization for the slightest period. It is commonly seen as a fair measure, if its utility does not neglect discrimination laws (Schreier-Joffe & Dias-Abey, 2009).

Every employee has a contract of employment, which is an agreement with their boss about working conditions. A contract of employment does not have to be written. It can be partially oral, written, custom and practice, or implied by law. A contract of employment, whether written or oral, will encompass many express and implied terms (Middlemiss, 2011).

In the case of Public Service Association v Zoological Parks Board of New South Wales (2007) NSWIRComm 1080, it was held that a long-lasting practice of consenting employees to take a flexi-day each month, in return for working extra hours,

had turned out to be a customary term of their employment contracts. As it was a deep-rooted practice, it had been implied as a term (Gaber, Al Jarwan, Sharif & El Beheiry, 2010).

On the contrary, in Qantas Airways Ltd v Fetz (1998) 84 IR 52, the Full Bench of the Australian Industrial Relations Commission held that existence of the custom could not stop Qantas from carrying out a specific term in the contract which opposed the custom. The custom could not be implied into a contract that expressly provided a fixed period of employment which was to conclude at the end of the apprenticeship.

The above principle of law was well established in Tibaldi Smallgoods (Australasia) Pty Ltd v Rinaldi (2008) 172 IR 86. Conclusion accentuates that there must be a right basis for implying a term providing redundancy (Walsh, 2008). Other employees of a company being eligible to redundancy compensation under a collective agreement, will not be a basis for implying a redundancy payment in an employment contract that is not covered.

3. Applying the Law to the Facts (208 words)

Ken expected the customary 'last on / first off' rule to be applied as it has been by the company, and indeed across the mining industry more commonly in previous recessions. Relating to Public Service Association v Zoological Parks Board of New South Wales (ibid), the NSWIRC decided that the pattern of hours which employees at Tooronga Park Zoo had been working for more than 15 years had turned out to be part of the employees' contracts of employment. Custom and practice is recurrently counted on as a basis for employees or employers underscoring a right or an obligation (Wynn & Leighton, 2009). As opposed to Tibaldi Smallgoods (Australasia) Pty Ltd v

Rinaldi (ibid), the 'last on / first off' custom is not only well-known to one group of employees at Ore Ltd, but across the industry.

As a counter argument, there was no indication of the 'last on / first off' rule in Ken's contract, which said only that the employer can determine redundancies by reference to the level of employee qualification. Relating to Qantas Airways Ltd v Fetz (ibid), a term will not be implied into a contract based on custom where it is contradictory to the express terms of the agreement (Latimer & Maume, 2015).

what abt this ?

4. Conclusion (56 words)

Based on the discussion above, the 'last on / first off' rule can form part of Ken's contract with Ore Ltd, and that he should therefore not be made redundant before Bob. All in all, industry practices can play a vital part in implying terms into an employment contract (Finkelstein, Kain, Spurn, O'Neill & Nasseri, 2015).

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