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Question 1(A)

The Legal Issue

Is Donald still an ABC employee?

The Relevant Law

The current Common law test which is also known as the Multi-Factor test is mainly used in Australia primarily to determine whether the relationship of a worker to a company is of an employee or an independent contractor, as applied in **Stevens V. Brodribb Sawmilling Co. Pty Ltd (1985)**. The High Court rule that the control test which was also a test to determine the employee or contractor relationship was not decisive enough as it does not take reference to the control elements that the Multi-Factor does.

Factors under Multi-Factors test that weigh in favour of a relationship being one of employee and employer;

- The provision of equipment and cleaning materials by the principal(Hollis V Vabu)

- The place and hours of work not at the discretion of worker (Hollis V Vabu)

- Worker being managed in the same manner as other employees (Stevens V. Brodribb Sawmilling Co.)

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- Uniform and company van were issued to worker as an identification of employee (Hollis V Vabu)

- Worker is required to work set days and hours (Hollis V Vabu)

Factors under Multi-Factors test that weigh in favour of the relationship being of principal and independent contractor;

- Worker is being engaged for completion of a specific task

Application of the Law to the Facts

Factors weighing in favour of employer/employee relationship

Donald worked for ABC till Nov 2016 when he was informed of the change of employment from ABC to DEF. Donald was promised that nothing will change and ABC will still assign him jobs. With reference to the Multi-Factor test, these factors indicates that Donald is an employee because Donald is being managed in the same manner as other employees where he is required to attend company meetings. It also appears that Donald has to adhere to the ABC's work allocation for the place and hour of work. In addition, ABC provided Donald with his cleaning materials and equipment for his work and also a uniform for him to wear, which clearly indicates that ABC has some control over Donald. In addition, Donald still drive ABC's van for work and uses the mobile phone which ABC provided is a clear acceptance of control and representation of ABC which was held by the High Court of Australia in **Hollis v Vabu (2001)207 CLR 21**.

Factors that indicate that Donald is an independent contractor

However, there are also some factors under the Multi-Factor test where Donald could be seen as an independent contractor. Such as, Donald was issued with ABC's uniform, however, he is not obliged to wear but rather only if he wished to wear while working. Donald has also been working at the same site he always had which is a clear indication he has been engaged for completion of a specific task only. Both factors clearly point Donald towards an independent contractor as noted in **Vabu v FC of T (1996) 81 IR 150; (35 ATR 537)** whereby worker are independent contractor when they perform their specific assigned work using their own tools and they are not obliged to wear uniform which represent the company.

Factors that do not assist either way

There are also neutral factors that do not assist. Such as Donald was employed as a cleaner on full time basis until Nov 2008 does not help to determine whether Donald is still an employee of ABC as Donald has since resigned and contracted himself to DEF.

Conclusion

In conclusion, Donald is still an employee of ABC due to the high level of control that ABC has over Donald. A clear and deciding factor is the equipment and cleaning material that are all provided by ABC. Without those tools, Donald is impossible to start work. Although Donald can choose to wear or not to wear his uniform which represent ABC and he was engaged for a

specific task only, this two factors does not outweigh those factors which constitute Donald as an employee of ABC.

1(B)

The Legal Issue

Whether did ABC breach any federal legislation in relation to requiring him to contract to DEF?

The Relevant Law

There are 3 legislation that can be considered under the Fair Work Act that protect employees and ensure they received their entitlement and fairness at workplace.

The current legislation which are used to determine whether an employee has breached legislation when requiring a worker to sign a contract is the **Fair Work Act 2009 –Sect358**. Under this legislation, it is illegal for an employer to use unlawful pressure and threatening to dismiss or force employee to resign in order hire them as an independent contractor against their will.

Another legislation that is often used in conjunction with FWA Sect 358 is the **Fair Work Act 2009 - Sect 359** which is used to determine whether is there any misrepresentation to engage worker as independent contractor. Under this legislation, the employer must not in any circumstances make a statement or promise that the employer him or herself knows its false in an attempt to

influence the worker to contract his/her service as an independent contractor to the company.

Another legislation can be considered is the **Fair Work Act 2009 - Section 357** that is used to determine whether is there any misrepresenting employment as independent contracting arrangement. This legislation protects worker from being misrepresented by employer who knowingly employ workers as an independent contractor but perform the same task as an employee; this allow the employer to save on employee's benefits.

L What about caselaw Centennial finance & Heppy Cabby

Application of the Law to the Facts

Under Donald's situation, he was employed full time by ABC until Nov 2016 when he was requested to contract his service to DEF. We can observe that a significant amount of pressure was present when ABC issued Donald an ultimatum to contract to DEF. By failing to do so, he will not be provided with any jobs in the future. This clearly breached FWS Section 358 as ABC threatened and pressured Donald to resign and contract to DEF.

Furthermore, ABC promised Donald that nothing will change even though he was contracted to DEF and ABC will still assign him job. But that promise didn't last as Donald was informed by ABC that he was not required anymore and was dismissed on the spot with no notice and payment. From the instant dismissal, we can deduce that when ABC promised that nothing will change for Donald when he contract to DEF is just a statement which ABC never intended to honor so as to get Donald to contract to DEF as an independent contractor. This breaches the FWA Section 359 on misrepresentation to

on case by case basis when a contract has come to an end legally. However, exception to the common law with justifiable ground for dismissal allow employer to instantly or summary dismiss the employee with no notice on termination is required or implied; ***Byrne v Australian Airlines*** **(1995) 185 CLR 410**. Such reason must be misconduct by employee that disregarded the terms of the employment contract.

Application of the Law to the Fact

In applying the above laws to Donald's situation, Donald has been contracted to ABC since 2008 until 2016 where he was made redundant with no notice and no payments. From Legislation perspective, Donald must be given a notice of termination before he can be terminated from his employment. If notice of termination wasn't give, ABC should instead be paying Donald his full salary in lieu to the end of the reasonable notice period.

From common law jurisdiction, Donald's contract with ABC did not explicitly state the notice of termination period, hence, it should be implied that a reasonable period of notice should be given to Donald. However the exception where immediate dismissal due to serious misconduct should not be the case for Donald as well since his performance is not a factor; **North v Television Corporation Ltd (1976) 11 ALR 599**.

what is the period of notice?
what is minimum period

Conclusion

All in all, ABC breached both the legislation and common law by instantly terminating Donald without a reasonable notice on termination and with no payments made to him. (1596 words)

Law cases reference list

Stevens V. Brodribb Sawmilling Co. Pty Ltd (1985)

Fact: The plaintiff, Stevens suffered injuries while working as a truck driver delivering felled tree to defendant's sawmill. The sawmill had a general supervisor over the operation but has no control on how the snigger (one who move felled logs to loading bay) carry out their job. This resulted in an accident cause by the negligence of the snigger while moving the log and injuring the plaintiff.

Held: The judge held that both the snigger and tracker are not the employee of the defendant, hence the defendant is not liable for the snigger's negligence.

Hollis V Vabu Pty Ltd(2001)207 CLR 21

Fact: The plaintiff, Hollis was stuck down by a courier cyclist that was working for Vabu Pty Ltd. Hollis sued Vabu claiming that Vabu was viciously liable for the injuries he sustained due to the cyclist's negligence.

Held: The high court held that Vabu is viciously liable as the relationship between Vabu and the courier is of employer/employee due to several indicator such as the cyclist's uniform and equipments were all provided by Vabu.

Vabu Pty Ltd v FC of T (1996) 81 IR 150; (35 ATR 537)

Fact: Case was brought up due to taxation issue rises from Vabu's courier.

Held: The judge held that the couriers were independent contractors contracted to perform a specific task, e.g deliver parcel, rather than engage for labour. Also, courier maintained their own transport for delivery and does their own self-taxation.

Byrne v Australian Airlines (1995) 185 CLR 410

Fact: The plaintiff, Byrne was a baggage handler in Sydney Airport. He was filmed acting suspiciously during one of the baggage loading. The video footage was submitted to Airline's Headquarter for investigation and he was eventually confronted with allegation of theft and his employment was instant termination. Byrne claimed that his dismissal violated clause 11(a) of the Transport Workers' Airline Award 1988 which state that the termination of a worker must not be "harsh, unjust or unreasonable" and it should be implied in his employment contract.

Held: The judge rejected the claim because the award was already a statutory force which by legal terms operates independently and so there is no need to be implied into the contract.

North v Television Corporation Ltd (1976) 11 ALR 599

Fact: The plaintiff, Pemberton was a deputy news director under Television Corp. He was caught sending a telex message with offensive contain to a government official and was summarily dismissed for alleged misconduct. Official of the Australian Journalist Associate sued Television Corp for breaching of the clause 10 of the Journalist Television Award 1971 which state that journalist can only be terminated from work with notice of pay in lieu of notice. However, Television Corp argued that they did not breach the Award as Pemberton action in sending the telex sufficiently amounted to misconduct.

Held: The Australian Industrial court held that Pemberton's action does not amount to misconduct and thus he did not breach his contract of employment. As discussed by the court, misconduct is a single action executed by intentionally ignoring the contract of employment. What Pemberton did will potentially damage the reputation of the company but he wasn't intentionally

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