



RANKIN ELLISON CASE NOTES

President Reinforces role of Indicia to determine “Worker”

Digby v Hyspec Construction & Roofing Pty Ltd [2018] NSWCCPD 39

An issue to be determined in respect of every workers compensation claims is whether the injured person is a ‘worker’ or ‘deemed worker’ in the context of the *Workplace Injury Management and Workers Compensation Act 1998* (NSW). The Workers Compensation Commission recently decided an Appeal pertaining to that issue and in doing so advanced important legal principles as to the application of the relevant common law test for distinguishing between an employee and an independent contractor.

Material Facts

The Appellant, Jaime-Lee Digby, is the former de facto partner and sole dependant of the Deceased. In February 2017, the Deceased approached the Respondent Company, Hyspec Construction & Roofing, seeking work as a carpenter. He was given work but the exact nature of his engagement with the Respondent was not clear. Whilst performing work for the Respondent the Deceased came into contact with exposed electrical wiring and was fatally electrocuted.

The Appellant made a claim for lump sum death benefits pursuant to Section 25 of the *Workers Compensation Act 1987* (NSW) (“1987 Act”). At Arbitration it was found that the Deceased was neither a ‘worker’ employed by the Respondent nor a ‘deemed worker’ for the purposes of the workers compensation scheme. That finding was made in accordance with the indicia for distinguishing between an employee and an independent contractor as set out in *Stevens v Brodribb Sawmilling Co Pty Ltd* [1986] HCA 1. The Arbitrator therefore determined that the Respondent was

not liable for the Deceased’s death under the 1987 Act and entered an Award for the Respondent.

The Appellant appealed. The important grounds of the Appellant’s Appeal were:

- Arbitrator erred by giving insufficient weight to certain “prominent indicia”.
- Arbitrator erred in considering the indicia of employment by adopting a numerical for-and-against approach rather than a weighted approach.
- Arbitrator erred in exercising her discretion by taking into consideration irrelevant factors.
- Arbitrator erred in her finding that the Deceased’s working relationship with ‘Boers Construction’ had not ceased prior to his work with the Respondent.

Presidential Decision

President Keating gave an important preamble to his decision noting that despite the laws’ former preoccupation with the degree of *control* exercised by a putative employer, the modern approach to determining the status of a worker is multi-factorial. That is to say that the totality of the work relationship must be considered.

The Appellant contended that the degree of control exercised by a putative employer over a worker is a “prominent indicia” for determination of his/her status. As such, the Appellant submitted that the Arbitrator erred by failing to give additional weight to that factor when contemplating the totality of the indicia. President Keating

Our experience.
Your results.

RANKIN ELLISON
lawyers

Sydney: 02 8297 5900
Newcastle: 02 4929 9333

www.rankinellison.com.au

RANKIN ELLISON
lawyers



rejected that submission on the basis it was inconsistent with the Common law. The indicia of control and its significance varies based upon the specific facts of a dispute. In this case, the Respondent was contracted to perform the works and so it was inevitable that it would exercise some degree of control over the Deceased regardless of whether he was a worker or deemed worker or otherwise. Accordingly, President Keating confirmed that the Respondent's control over the site did not necessarily lead to the conclusion that the Deceased was a worker.

Arbitrator found that there were "few" indicia in favour of the Deceased being a worker and "many" that mitigated against it. On the balance of those indicia, Arbitrator was satisfied that the Deceased was not a worker employed by the Respondent at the date of his death. The Appellant submitted that the word "many" suggested that the Arbitrator approached the task as being one which involved a numerical analysis. She considered that certain indicia attracted greater weight than others and are therefore more influential in determining the status of one's engagement. President Judge Keating rejected that submission. It was found that Arbitrator had clearly taken into account a range of factors and the use of the words 'few' in comparison to 'many' was a statement of fact and not indicative of a numerical analysis. Notwithstanding, the President considered that the Appellant's submission was based on a fundamental error that the indicia of control was the paramount factor and carries more weight than other indicia.

The Appellant also contended that Arbitrator took into consideration factors that were not relevant to his worker/deemed worker status; namely his practice of issuing invoices for work performed. It was standard practice for the Deceased to issue tax invoices (including a business name and associated ABN) to Organisations for which he carried out work. President Keating stated that whilst that in and of itself was not determinative of a contract for

services it was open to the Arbitrator to conclude that they were factors supporting that the Deceased was an independent contractor.

Finally, the Appellant contended that the Deceased ceased working as an independent contractor with Boers Construction in favour of taking up full-time paid work as an employee of the Respondent. President Keating found that the evidence did not support that the Deceased had stopped trading in his business name or as a sub-contractor as the Appellant sought to suggest. Rather, the evidence supported an inference that the Deceased elected to contract with parties other than Boers Construction as an independent contractor. That was not sufficient proof of an employment relationship of the nature of a "worker" with the Respondent.

Implications

There is no doubt that the indicia set out in *Stevens v Brodribb Sawmilling* have endured as the preferred test for distinguishing between an employee and an independent contractor. It is also clear that the application of that test is not always straight forward. However, in light of this decision it can be said with certainty that no one indicia necessarily bears more weight than another.

Should you have any questions about a particular workers compensation matter please contact us on 02 4929 9333 (Newcastle) or 02 8297 5900 (Sydney).

Our experience.
Your results.

RANKIN ELLISON
lawyers