McCallum’s Top Workplace Relations Cases

Labour law and the employment relationship as defined by case law
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McCallum’s Top Workplace Relations Cases

Labour law and the employment relationship as defined by case law

Professor Ron McCallum
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FOREWORD

Ron McCallum AO is well-known — locally and internationally — as Australia’s most eminent labour law scholar. In this book, he shares his decades of experience as a legal academic with a broader audience of working Australians who are curious about the law regulating their employment relationships.

Most Australians spend some, if not all, of their working lives as employees. This book explains the essential principles of employment law through a selection of 35 cases, arranged to follow the life cycle of an employment relationship. It starts with the often-criticised distinction between employment and so-called “independent” work contracts, and progresses through a series of cases explaining how employment contracts are construed and interpreted, what duties and obligations employees are held to owe employers, where the boundary lies between the employee’s work commitments and private life, and what rights employees can assert on termination of an employment relationship.

It goes without saying that the legal analysis in this book is utterly dependable, so it will certainly be a useful volume for students and practitioners of employment law who want a clear and concise understanding of legal principles in this field. All of the ticklish issues are explained here — notably the relationship between common law employment contracts, and awards and other industrial instruments; the interrelationship between federal and state laws and the operation of s 109 of our Constitution (dealing with inconsistency of laws); and the principle in House v King concerning review by appellate courts of discretionary decisions. It is also right up-to-date to the time of publication. Two important decisions from 2007 are included (the Nikolich appeal, and the New South Wales Court of Appeal decision in Del Casale v Artedomus), and the contentious (and somewhat salacious) 2008 decision in Telstra v Streeter.

For law student readers, this is a uniquely useful book. It is more than a textbook of distilled principles because it provides detailed information about the facts and findings in many important cases. It is also more than the typical students’ “cases and materials” book, because instead of extracting court and tribunal decisions and leaving students to decipher them for themselves, it provides illuminating translations, accessible to those unfamiliar with judicial writing styles. Most importantly, the case narratives bring to life, in all their intricacy, the stories of the real people and problems that gave rise to these judgments. As a teacher of law, I frequently remind my own students that one cannot really understand the law unless one takes the trouble to understand the human stories behind the litigation.
Professor McCallum tells these stories in his own highly personal, readable style, and in doing so, he offers the reader his own insightful reflections — drawn from his deep experience as a scholar, legal practitioner and adviser to governments — on the underlying justice (and occasionally injustice) of some of the decisions. In the result, this book certainly achieves its stated purpose of assisting the reader to more easily comprehend not only the 35 decisions explained in these pages, but the essential principles upon which Australian employment law has developed, and how those principles influence the lives of working Australians.

Joellen Riley

10 May 2008
DEDICATION AND ACKNOWLEDGMENTS

I dedicate this book to my family members, friends, students and colleagues who either read cases, articles and law books to me from 1967 to 1992, or who scanned or downloaded this material from the internet from 1990 to the present time. Without this dedicated assistance, it would not have been possible for me to become an academic lawyer, let alone to have written this small volume.

In writing this book about legal cases on the employee and employer relationship in Australia, I thank the following persons. Ms Michelle Wen, who is a law student at the University of New South Wales, assisted me with research and with downloading material from November 2007 to May 2008. Thank you Michelle for your hard work and for your willingness to help me find page references for all of the quotations from the cases.

On Friday afternoon, 2 February 2007, I met with Ms Laini Bennett who is a product director of CCH Australia Publishing, and it was she who suggested that I write this book unpacking significant Australian labour law decisions from the courts and industrial relations tribunals. Thank you Laini for your enthusiasm which has led to the publication of this little book. Ms Nicole Van de Gard, who is the senior IR editor for CCH Australia Publishing, has skilfully edited this volume and I thank you Nicole for so promptly reading all of the chapters.

Much of this book was written in our home, but a good deal of it was researched and written at the Workplace Research Centre, University of Sydney who were kind enough to have me as a visitor from February to June 2008. I thank the Director Associate Professor John Buchanan and the staff for their hospitality and friendship. Thank you to my friend and colleague Professor Joellen Riley of the Faculty of Law, University of New South Wales, who gave up her time to read this book in draft form and to write its foreword.

Finally, I thank my wife Professor Mary Crock who has kept me close during marriage, children and the changes wrought by computer-based adaptive technology and synthetic speech.

Professor Ron McCallum AO

May 2008
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## CONTENTS

<table>
<thead>
<tr>
<th>Chapter One: Australian Labour Law and its Case Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction ........................................................................... 1</td>
</tr>
<tr>
<td>Labour law’s case law ................................................................. 1</td>
</tr>
<tr>
<td>Labour law decisions as narratives ........................................... 3</td>
</tr>
<tr>
<td>The cases in this volume ............................................................. 4</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Chapter Two: The Employee and the Employer</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction ........................................................................... 5</td>
</tr>
<tr>
<td>Employees and independent contractors .......................... 6</td>
</tr>
<tr>
<td>Case 1: Injured acrobat seeks compensation — Zuijs v Wirth Brothers Pty Ltd ................................................................. 7</td>
</tr>
<tr>
<td>Case 2: The reckless bicycle courier — Hollis v Vabu Pty Ltd ................................................................. 9</td>
</tr>
<tr>
<td>Case 3: The plight of the office cleaner — Dameoski v Giudice ................................................................. 13</td>
</tr>
<tr>
<td>Employers ........................................................................... 16</td>
</tr>
<tr>
<td>Case 4: Family day carers working from their own homes — Family Day Carers Case ................................................................. 17</td>
</tr>
<tr>
<td>Case 5: The plight of the Canadian temporary employee — Pointe-Claire (City) v Quebec (Labour Court) ................................................................. 19</td>
</tr>
<tr>
<td>Conclusion ........................................................................... 22</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Chapter Three: The Architecture of the Employment Relationship</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction ........................................................................... 23</td>
</tr>
<tr>
<td>Entering the contract of employment .......................... 24</td>
</tr>
<tr>
<td>Case 6: An archbishop and the contract of employment — Ermogenous v Greek Orthodox Community of SA Inc ................................................................. 26</td>
</tr>
<tr>
<td>Awards, collective agreements and contracts of employment .......................... 29</td>
</tr>
<tr>
<td>Case 7: A newspaper journalist relies on his contract of employment — Kilminster v Sun Newspapers Ltd ................................................................. 30</td>
</tr>
<tr>
<td>Case 8: Test case in coalmining industry to recover piece-work payments under verbal contracts of employment — Amalgamated Collieries of WA Ltd v True (High Court of Australia); True v Amalgamated Collieries of WA Ltd (Privy Council) ................................................................. 31</td>
</tr>
</tbody>
</table>
Enforcing awards under private law
Case 9: Baggage handling scandal at Sydney Airport — Byrne and Frew v Australian Airlines Ltd ........................................ 36

The operation of statute law
Case 10: Airline pilots and gender — Ansett Transport Industries (Operations) Pty Ltd v Wardley ........................................ 41

The role of employer policies and codes of conduct
Case 11: Employee obtains redundancy through the incorporation of employer policy — Riverwood International (Australia) Pty Ltd v McCormick ........................................ 45
Case 12: Employee obtains damages for psychiatric distress — Goldman Sachs JBWere Services Pty Limited v Nikolich ........ 48
Conclusion ........................................................................................................... 52

Chapter Four: Working in the Employment Relationship, Commenced
Introduction ........................................................................................................... 53

Working under the contract of employment
Case 13: Telex messages and trouble — North v Television Corporation Ltd ........................................................................ 55
Case 14: Teachers refuse to take classes for absent colleagues — Sim v Rotherham Metropolitan Borough Council . 57

Controlling employee dress and grooming
Case 15: The Union Badge case — Australian Tramway Employees Association v Prahran and Malvern Tramway Trust and Ors ........................................................................ 61
Case 16: Man wears caftan to work — Australian Telecommunications Commission v Hart ............................................. 63

Good faith and fidelity
Case 17: An ill-fated attempt at anticipatory termination — Blyth Chemicals Ltd v Bushnell .............................................. 66
Case 18: Husband and wife work on weekends for opposition company — Hivac Ltd v Park Royal Scientific Instruments Ltd and Ors ........................................................................ 69

Good faith and fidelity and professional employees
Case 19: A solicitor and a firm’s client — Sanders v Parry ...... 71
Chapter Five: Working in the Employment Relationship, Concluded

Introduction ........................................................................................................... 75

Confidential information and trade secrets ......................................................... 75

Case 20: Animosity in the retail chicken trade — Faccenda Chicken Ltd v Fowler and Ors ........................................................ 77

Case 21: Former employee uses confidential information in the building industry — Co-ordinated Industries Pty Ltd v Elliott .............................................................. 79

Case 22: Imported stone from an undisclosed source — Del Casale and Ors v Artedonus (Aust) Pty Ltd ........................................ 81

Intellectual property and the employment relationship ...................................... 83

Case 23: A teenage computer programmer seeks his fortune in the IT industry — Redrock Holdings Pty Ltd and Hotline Communications Ltd v Hinkley ......................................................... 84

Case 24: Gifted employee invents an improved process for retreading tyres — Spencer Industries Pty Ltd v Collins .............. 85

The implied term of mutual trust and confidence .............................................. 88

Case 25: Two innocent employees seek redress from corrupt employer — Mahmud v Bank of Credit and Commerce International SA .......................................................... 88

Case 26: Reinstated choir master seeks further redress — Russell v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney ................................................ 91

Conclusion ............................................................................................................. 95

Chapter Six: Beyond the Boundaries of the Employment Relationship

Introduction ........................................................................................................... 97

Is there a right to do work from home? ................................................................. 97

Case 27: A subeditor of Hansard seeks to do more of her work from home — State of Victoria v Schou ........................................ 98

Working time and private time .......................................................................... 102

Case 28: An employee makes after-hours telephone contact with women co-workers — McManus v Scott-Charlton ........ 102

Case 29: An employee engages in out-of-hours sexual conduct with fellow employees — Telstra Corporation Ltd v Streeter ........................................................................ 105
### Chapter Seven: Ending the Employment Relationship and General Conclusion

#### Introduction

Notice and reasonable notice

- Case 32: A manager of a construction project seeks reasonable notice on termination — *Quinn v Jack Chia (Australia) Ltd* ................................................................. 122

Resignation from employment

- Case 33: An employee unsuccessfully seeks to withdraw his resignation — *Re Rodney Birrell v Australian National Airlines* .............................................................. 124

Misconduct and summary termination

- Case 34: An employee unsuccessfully challenges his summary termination — *Concut Pty Ltd v Worrell* .......................... 128

Reinstatement in employment

- Case 35: An employer unsuccessfully seeks to neutralise an order of reinstatement — *Blackadder v Ramsey Butchering Services Pty Ltd* .................................................. 134

General conclusion ................................................................. 139

### Indexes

- Topical index ................................................................. 141
- Case table ................................................................. 147
Chapter 1

AUSTRALIAN LABOUR LAW AND ITS CASE LAW

Introduction

When describing Australian labour law, it is more easily comprehended if it is appreciated that in the main it flows from two streams. First, there are the decisions of the courts and industrial relations tribunals, and second, there are the statutes enacted by the Commonwealth, state and territory parliaments. In other words, the two primary sources for the legal rules which govern our day-to-day conduct when performing remunerated work are case law and statute law. Put simply, Australian labour law comprises the legal rules governing the performance of remunerated work, and its primary sources are the cluster of statutes with their regulations emanating from Australia’s nine parliaments and the decisions of the common law courts, of industrial courts and from industrial relations tribunals.

This book is an exploration of the case law of Australian labour law which, together with statute law, governs the performance of work within and around the employment relationship. In other words, 35 of the key labour and employment law decisions of courts and tribunals which impact upon the operations of the employment relationship will be unpacked and dissected.

(a) Labour law’s case law

In writing this book, I have selected 35 decisions from the common law courts, from the Australian Industrial Court and from what is now called the Australian Industrial Relations Commission. While most of the cases are from Australia, there are several from the courts of the United Kingdom, and I have also included one decision from the Supreme Court of Canada. The cases which I have chosen explore the contours of the employment relationship, that is, the relationship between employees and their employer — which is often a legal entity such as a company. Most Australian adults are employees because it is only through the performance of work for their employers that they are able to use their wages to support themselves and their families, and employees usually, although not always, find social fulfilment through their work. After all, performing remunerated work is a public act and a necessary component of being an adult member of our society.

It is a truism that over the last three decades the outpouring of statutes from our nine parliaments has markedly increased the importance of statute law. In the field of labour law, for example, the Workplace Relations Act 1996 (Cth) is more than 1,200 closely printed pages in length. It is also the case that over the last 30 years, Commonwealth and state and territory Acts of parliament have gone beyond the traditional subjects of industrial relations and workers
compensation, and now the parliaments prescribe rules governing occupational health and safety and discrimination in employment.

Yet, if one reads these statutes from cover to cover, although one is inundated by a plethora of rules and penalties for their transgression, it is not possible, I contend, to gain any real understanding of how our labour law operates in the real world on flesh and blood people, whether they be employees, managers or employers. What breathes life into the legal rules which make up Australian labour law are the experiences of people in their day-to-day employment. These experiences, with their hopes, fears and satisfactions, are recorded in the many labour and employment law decisions which have been handed down by the common law courts, industrial courts and industrial relations tribunals. When carefully read and unpacked, they give us clues to how the labour laws, including statutes and their regulations, impact upon Australian working men and women.

Therefore, the idea behind the writing of this little book is to examine in some detail the facts, the reasoning and the holdings in 35 decisions which graphically illustrate how labour law and especially the employment relationship really works in Australia. I seek to unpack these cases and by carefully examining them, try to show why employers and employees have taken their grievances to a court or to an industrial tribunal. It must never be forgotten that the persons who appear in these cases are flesh and blood people who are living or who have lived their lives in our nation.

This small volume is neither a textbook on labour law, nor is it a standard casebook in this field. Textbooks on labour law are global in nature and they explain and expound upon the law. However, with only a few exceptions, these volumes do not have the space to unpack curial or tribunal decisions in great detail. In the main, these decisions serve as markers for the legal rules there expounded. Neither should this book be thought of as a casebook because it does not contain lengthy extracts from decisions. Rather, by synthesising the cases, it opens them up to a broad readership.

I believe this volume can be thought of best as a type of partner book to accompany one or more of the excellent labour law text books such as Breen Creighton and Andrew Stewart, *Australian Labour Law*, 4th edn, the Federation Press, Sydney, 2005, or Rosemary Owens and Joellen Riley, *The Law of Work*, Oxford University Press, Melbourne, 2007.

Never before have the decisions of the courts and industrial relations tribunals been so available to anyone wishing to read them. Not only is there a proliferation of published law reports, but almost all of the cases are readily available on websites. However, in my recent experience, many students, human resources practitioners and even lawyers are time-starved in our hectic world, and many of these persons do not have the time to read these decisions in full. Hence, the modest task of this book is to unpack and explain these decisions to this audience of students, human resources practitioners, trade union officials, lawyers and interested employees and employers. If the unpacking of these cases better enables students and others to more easily read the complete judgments in these cases, then it will have served a useful
purpose. In these days of computers and sound bites, reading lengthy
decisions is perhaps less palatable than in years gone by. Yet, there is no
substitute for reading these cases in full to glean a complete understanding of
Australian labour law. If this book whets the reader’s appetite, so much the
better.

(b) Labour law decisions as narratives

The strength of our common law system is that the decisions which specify the
legal outcomes arising from disputes between flesh and blood litigants are
regarded as precedents which shape the present law. In other words, the
common law possesses a practical foundation because its decisions, in the
main, craft practical outcomes for litigants. We lawyers read labour law
decisions in order to extract principles and rules from them, and we are
especially guided by the judgments from the decisions of the superior courts.
Yet, as well as reading cases to extract the reasonings of the judges, I have
always found myself spellbound by their facts. This may also be the case for
other lawyers, but I can’t help wondering whether the fact that I grew up in
the law listening to decisions being read to me has bestowed upon me this
heightened interest in the stories surrounding labour law litigation.

Let me explain what I mean in the following sentences. I have been totally
blind since my birth in 1948 and began studying law at Melbourne’s Monash
University in 1967. Not until December 1989 was it possible for me to scan
legal decisions and have them read to me in synthetic speech. Now, of course,
most legal decisions are downloaded from internet websites and my special
adaptive technology reads them to me via an electronic voice. However, from
1967 right up to the close of 1989, all of the legal decisions (which I had to read
as a student and then as a tertiary teacher) had to be read to me by family,
friends and students. Usually they were read directly to me, but on other
occasions, friends read the cases onto tape and I played back the recordings
using various tape recorders.

The above has been written to explain that I learned about Australian labour
law case law as a listener, and not as a reader using my eyes. As a listener, I
was fascinated by the stories in each decision, by the motivations and the
aspirations of the real people in these real life cases from the courts and
industrial relations tribunals. Perhaps it is because of the way in which I first
listened to these decisions that I became very interested in the facts of each
and every case.

It is my firm view that facts are critically important when seeking to
comprehend the legal rules emanating from the case law, and when I was in
legal practice the facts of every matter with which I dealt were of enormous
importance. In this little book, when analysing the cases, I have consciously
unpacked their facts in detail. It is this approach, I contend, that will give
readers a true appreciation of how Australian labour law impacts upon the
lives of employees, managers and employers and directors of incorporated
employers.
In recounting these cases, I have included the names of the persons who have either initiated, defended or have become caught up in the litigation because they are real people and they should be portrayed in this manner. In the descriptions of these 35 legal decisions, all of the material has been taken from the judgments of the courts and the industrial relations tribunals, and all of this material is in the public domain. All of the decisions in this book are available either in volumes of law reports or are published on the internet.

(c) The cases in this volume

These 35 labour law decisions concerning the employment relationship have been chosen by me after a lifetime of reading labour law cases. I have no doubt that some scholars and legal practitioners would not have included all of the decisions recounted here, and that they would have chosen some other cases which I have not used. Of course, reasonable minds will differ in this type of selection.

My choices have been guided by the following factors: First and foremost, there is the precedent value of the decision, that is, whether it is one of the leading cases which has either formulated or reformulated a particular legal rule or principle. Decisions of this nature have a strong claim for inclusion in a volume such as this, one of whose aims is to explain the legal rules governing the employment relationship.

Second, there are the facts and circumstances of a decision. In other words, the facts of a case may be a useful illustration of a common occurrence or of a recurring issue in labour law. Again, such cases warrant inclusion in this book.

The third factor is the actual judgment embodying the decision of the judge or of the tribunal member because it is of critical importance. Cogent and clear judgments that expound a legal rule are useful to lawyers and students alike, and deserve inclusion in this collection.

Fourth, the very humanity of the judge or tribunal member shines through in some cases. It is this humanity which, I contend, is one of the strengths of our legal system. In part, this humanity emanates from the independence which is granted to the judges and which should always be bestowed upon members of the significant tribunals. Decisions of great humanity need to have a place in this type of book.

Finally, in all honesty, some decisions have been included because they are old favourites of mine, and like familiar stories in an anthology they nourish the reader. It is my hope that you will enjoy the decisions encapsulated in the following six chapters.
Chapter 2

THE EMPLOYEE AND THE EMPLOYER

Introduction

Most adults spend the majority of their waking hours at work, that is, most of us spend more time undertaking paid work than any other activity including sleeping. We work to earn money to support ourselves and our families. However, work also defines us as persons in society. In any social gathering, one of the first questions which we ask one another is, “What do you do?” This is because our vocations and occupations define us as persons within the economic and social realms of Australia. Put another way, the doing of paid work is a cooperative and public activity which enables us as citizens to build the economic and social foundations of our nation.

The building blocks of labour law are employees and their employers because even today most paid work is undertaken by employees for employers. This is why the legal rules governing work still focus upon the relationship between the employee and the employer. Of course other persons perform paid work; for example, a growing number of persons undertake work on their own account, and the largest category are independent contractors. In recent years, I have observed a growing number of consultants of all shapes and sizes working on their own account as independent contractors.

In this era which may be described as a time when the competitive pressures of economic globalisation have penetrated national labour markets, there have been significant changes in the performance of work. The notion of an employee spending all or most of his or her working life with one employer is fast disappearing. More and more persons work precariously, that is, they undertake part-time jobs or they do casual work. By casual employment, I mean that there is no expectation of continuity in their work because casual employees perform tasks only so long as their employer requires their performance. Many casual jobs are part-time in nature because the hours of casual work are less than the standard 38-hour week. Approximately one-third of the Australian workforce undertakes part-time or casual employment, and most women with dependent children undertake part-time jobs. On the other hand, approximately one-third of employees work for more than 38 hours each week, with many, especially professionals and their support staff, working for 50 or more hours each week.

An increasing number of employees work more than one job each week. In other words, these employees undertake work for two or more employers. For example, a worker may undertake hospitality work of an evening as a waiter, but may also be a cleaner in the morning. An increasing number of employees do all or at least some of their work at home. For example, most of this book has been written in my home. It is important for labour law to keep up with these changes in the manner in which paid work is undertaken.
I shall begin this chapter by examining several key decisions which explain when, and under what circumstances, a worker is an employee. I shall turn my attention to the employer in the second part. One question which will be asked when examining the decisions in that section is, can an employee have more than one employer?

(a) Employees and independent contractors

Since ancient times, there has been a distinction which operates in law right up to our present day, between servants and craftsmen. Even in Roman times, it was clear that servants — whom I shall call employees — performed paid work under the control of their masters — whom I shall call employers. By “under the control of employers”, I mean that employees are required to obey all reasonable and lawful orders of their employer.

On the other hand, craftsmen — whom I shall call craftspersons — were in business on their own account, and they produced goods like silver vessels or jewellery. These days, craftspersons are a little out of vogue given the mass production of goods, but we are all familiar with repair persons and consultants of all shapes and sizes who work on their own account. We call these persons independent contractors because they contract with others for their services.

This distinction between employees and independent contractors is of crucial importance because most of the protections which labour law gives to workers are bestowed only upon employees and not independent contractors. As I shall show, it is possible for clever lawyers to manipulate these legal rules and to turn persons performing employee functions into independent contractors. Once their status has been legally altered, these workers will have largely fallen out of labour law’s basket of protective rules and into the fire of the free market.

Most people easily comprehend the differences between employees who work for employers and independent contractors who work on their own account. Difficulties arise when the lines become blurred, which is occurring more often these days given the changing nature of the performance of work.

The difference between employees and independent contractors is often easy to spot when examples are given. However, like defining a vehicle or a dog, it is often difficult to enunciate exactly where the legal line is to be drawn. For example, a person mows our lawns every few weeks. He mows many lawns in our suburb, and I am sure he is an independent contractor because he is in business on his own account. On the other hand, when our three children were small, a nanny looked after them in our home after the school day was over and when my wife and I were working. Although my wife and I were usually not in the house for most of the time when our nanny was doing the caring, I am sure that our nanny was an employee who was under our control.

However, it is possible to give an example of the performance of work where it is far more difficult to determine whether the worker is an employee or an independent contractor. Some years ago when we were living in Melbourne, my wife and I purchased some built-in wardrobes from a manufacturer. A
person whom I shall call “the worker” came to our home to install the wardrobes in our bedroom. The name of the manufacturer was painted on the truck which the worker drove. However, he did not receive a weekly wage but instead was paid a sum every time he assembled built-in wardrobes in a house. The worker did not receive annual leave or other vacation benefits. On this evidence, I suggest that it is difficult to conclude whether the assembler is an employee or an independent contractor.

Case 1
Injured acrobat seeks compensation

*Zuijs v Wirth Brothers Pty Ltd*

High Court of Australia

(1955) 93 CLR 561

This is the first of the 35 cases which I shall discuss in this book. Though it was decided more than 50 years ago, it clearly enunciates the legal differences between employees and independent contractors, and it shows the central role of the employer’s control over the employment relationship.

The facts in the *Zuijs Case* are easily set out in the following sentences. They recount a workplace accident, and sadly, workplace accidents of all sorts are still a common occurrence in our community.

Mr Zuijs had emigrated to Australia from Latvia several years earlier shortly after the end of World War II. His life in Europe had been fraught with difficulties and dangers, and given that Latvia had been taken over by the Soviet Union, he may well have been a refugee. At that time, migrants were contracted to undertake defined employment and Mr Zuijs worked in a glass factory. Mr Zuijs had been an acrobat in Latvia, and he met up with a fellow Latvian and acrobat named Mr Labans. They began working for Wirth’s circus where they performed acrobatics on the trapeze.

In March 1951, Mr Labans told Mr Zuijs that he was going to retire from circus life because he was getting married. Another Latvian acrobat replaced Mr Labans, and on 18 April 1951, Mr Zuijs was holding onto the legs of the replacement acrobat who was hanging on to the trapeze. The replacement acrobat slipped, both men fell, and Mr Zuijs was seriously injured.

Mr Zuijs applied for workers compensation payments under the Workers Compensation Act of New South Wales. However, when the matter came before the Workers Compensation Commission, the judge held that Mr Zuijs could not seek compensation because he was not an employee of Wirth Brothers Pty Ltd — instead, he was an independent contractor. Under the law as it then stood, if Mr Zuijs was not regarded as an employee he could not claim any compensation whatsoever. The New South Wales Supreme Court agreed with the holding of the compensation judge. The acrobats were an “act” who contracted their services to the circus.

In order to obtain compensation, Mr Zuijs had to appeal to the High Court of Australia which is the highest court in our land. The High Court unanimously
held that Mr Zuijs was an employee. He and his partner received a weekly salary, they undertook their performances and were also required to take their places in the grand parade. Did the fact that the circus owners could not really direct the acrobats on how to perform their acrobatics take them out of the employee category? The High Court said “no” and held them to be employees. Chief Justice Dixon, together with Justices Williams, Webb and Taylor said:

“Assuming that the terms of the engagement fixed the character of the act and that from its very nature an acrobatic performance must be executed upon the unhampered responsibility of the performers, that does not remove the relationship from the category of master and servant. There are countless examples of highly specialised functions in modern life that must as a matter of practical necessity and sometimes even as a matter of law be performed on the responsibility of persons who possess particular knowledge and skill and who are accordingly qualified. But those engaged to perform the functions may nevertheless work under a contract of service. In the present case what has been proved in evidence all points to the conclusion that the relation between the parties was that of master and servant. If the power of selecting the person engaged must exist in the master in order that the contract may be one of service, that element was certainly present. If the fact that the remuneration takes the form of wages is a mark of the relationship, that was the case here. If a right in the master to suspend or dismiss for misconduct is something to be looked for, then again there could be little doubt that the appellant was subject to that discipline. If a right to superintend and control the manner in which the servant fulfils his obligation must exist in some degree, a little consideration will show that the daily relations of a performer playing a regular part in the work of such an organisation as a travelling circus would demand a large measure of control and superintendence.” ((1955) 93 CLR 561, 571)

In other words, while control by the employer is central to the employment relationship, in essence, control in modern times really comes down to the right to control the employee. No doubt the judges were aware that if they held Mr Zuijs to be an independent contractor, this poor immigrant would not receive compensation, and this may have caused them to broaden the control test to ensure he recovered compensation.

Fifty years ago when this case was decided, it was probably more clearly arguable that Mr Zuijs could be an independent contractor, for at that time actual control was the hallmark of the employee and employer relationship. However, in the early years of the 21st century, it is less arguable that persons like Mr Zuijs are independent contractors because of the increased number of employees who possess skills whom the employer can never replicate. Thus, it is now the right to control which is at the centre of this relationship. Nevertheless, it must not be forgotten that in this relationship, it is the employer who exercises real control over the working life of the employee.
In more recent times, the courts have held that as well as the right to control, other factors may be important in determining whether a worker is an employee. These factors include payment of a salary, taxation matters, ownership of tools or equipment, the power to delegate performance of the work, and the express terms of the contract to perform work. Justice Mason summed up these principles in 1986 when deciding *Stevens v Brodribb Sawmilling Co Pty Ltd* in the High Court of Australia ((1986) 160 CLR 16, 24 references omitted). He said:

“A prominent factor in determining the nature of the relationship between a person who engages another to perform work and the person so engaged is the degree of control which the former can exercise over the latter. It has been held, however, that the importance of control lies not so much in its actual exercise, although clearly that is relevant, as in the right of the employer to exercise it ... But the existence of control, whilst significant, is not the sole criterion by which to gauge whether a relationship is one of employment. The approach of this Court has been to regard it merely as one of a number of indicia which must be considered in the determination of that question ... Other relevant matters include, but are 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.”

The following decision is a useful illustration of this approach.

**Case 2**

**The reckless bicycle courier**

*Hollis v Vabu Pty Ltd*

High Court of Australia

(2001) 207 CLR 21

On 22 December 1994, Mr Gary Hollis, who was a courier, was leaving a building in Ultimo, Sydney when he was knocked over by another bicycle courier who was riding along the footpath. The reckless courier said “Sorry mate” and then rode away. The courier did not identify himself but he was wearing a green jacket with gold lettering depicting “Crisis Couriers”. Crisis Couriers is the trading name of the defendant, Vabu Pty Ltd, which conducts this courier business. Mr Hollis suffered serious injury to his knee, and he brought proceedings against the defendant’s courier business. His primary assertion was that Vabu was responsible for the negligence of its couriers.

This decision is not a labour law case. Rather, it is a proceeding in tort — that is for a civil wrong — seeking compensation for the economic and non-economic costs of the injury. However, in law, an employer is vicariously liable for — that is responsible for — the acts of his or her employees, when the acts complained of occur in the ordinary course of employment.
It is important to appreciate that there was a 1996 decision of the New South Wales Court of Appeal which also related to the status of motor vehicle couriers of Vabu. In *Vabu Pty Ltd v Federal Commissioner of Taxation* (1996) 33 ATR 537, Vabu obtained a declaration that their motor vehicle couriers were not employees. Accordingly, Vabu was neither required to make superannuation payments to these couriers nor did it have to pay a superannuation tax to the Australian Government.

At the trial, counsel for Mr Hollis conceded that the courier who had collided with Mr Hollis was an independent contractor, no doubt because of the holding in the earlier *Vabu Case*. The judge held that Vabu was not vicariously liable for the acts of one of its couriers because, in part, they were not employees. However, the judge assessed the compensation to Mr Hollis as being more than $176,000. On appeal, the New South Wales Court of Appeal accepted the decision of the trial judge on the status of the couriers, and after examining a number of subsidiary arguments, by majority, dismissed the appeal.

Mr Hollis appealed to the High Court of Australia who, despite the concession at the trial, examined the legal status of the bicycle couriers. Though the couriers owned their bicycles, their uniforms and radios were supplied by Vabu. They were also required to be neat and tidy at all times, to be in uniform and clean-shaven unless bearded. The couriers were paid for the delivery of documents and parcels in accordance with a schedule of rates determined by Vabu, and they were also required to pay for public liability insurance. When couriers reported in each morning by radio, Vabu’s fleet controller directed the couriers with respect to the pick-up and delivery of documents, and couriers were not permitted to refuse jobs assigned to them.

In a joint judgment delivered by Chief Justice Gleeson and Justices Gaudron, Gummow, Kirby and Hayne, it was held that the bicycle couriers were employees of Vabu. They were under the control of Vabu and they were not in business on their own account. In other words, the ownership of their bicycles, which was not a significant outlay of their capital, did not turn them into small business persons. Gleeson CJ and Gaudron, Gummow, Kirby and Hayne JJ said:

“In classifying the bicycle couriers as independent contractors, the Court of Appeal fell into error in making too much of the circumstances that the bicycle couriers owned their own bicycles, bore the expenses of running them and supplied many of their own accessories. Viewed as a practical matter, the bicycle couriers were not running their own business or enterprise, nor did they have independence in the conduct of their operations. A different conclusion might, for example, be appropriate where the investment in capital equipment was more significant, and greater skill and training were required to operate it. The case does not deal with situations of that character. The concern here is with the bicycle couriers engaged on Vabu’s business. A consideration of the nature of their engagement, as evidenced by the documents to which reference has been made and by the work practices imposed by Vabu,”