

## Employee area

### Instant case

The law distinguishes between a contract of service (between employer and employee) and a contract for services (between principal and independent contractor). This distinction affects the terms that will be implied in the absence of an express agreement, the liability of the employer to third parties, the applicability of industrial awards, the applicability of statutes which may affect workers' compensation, occupational health and safety, long-service leave, fringe benefits tax, etc.

The terms “employer” and “worker” are used here to mean “employer” and “employee” (in the case of a contract of service) or “principal” and “independent contractor” (in the case of a contract for services).

In the instant case, the employer did not direct the manner in which the work was to be done; the worker was allowed to use her/his own discretion in doing an aspect of the work that was not specified beforehand; the worker was not an integral part of the employer's business, but was accessory to it; the worker owned the tools or provided the transport with which she/he performed the work; the employer would not make a profit/loss if the work performed by the worker cost less/more than expected; the work was not performed on the employer's premises; the employer neither supervised nor inspected the work; it is not known whether the worker was in business on her/his own account; the worker was not allowed to employ others to assist with her/his work; the worker was not obliged to work only for the employer; the worker was required to work at specified times; it is not known whether the employer paid the worker by time; the money that the employer paid to the worker was not stated to be a “fee”; the money that the employer paid to the worker was not stated to be “wages” or “salary”; the employer did not deduct PAYE tax instalments from the worker's pay; the employer paid the worker neither sick pay nor holiday pay; the employer and the worker did not express any intention that the relationship would be one of employer and employee; and the employer and the worker expressed an intention that the relationship would be one of principal and independent contractor.

In my opinion—following *Humberstone v. Northern Timber Mills*—the worker is an independent contractor.

In *Humberstone v. Northern Timber Mills*,<sup>1</sup> a 1949 decision of three justices of the High Court of Australia, Humberstone carried goods for NTM. He had originally held himself out as a carrier, prepared to carry for anyone, but for over twenty years he had carried goods solely for NTM (although he would, infrequently, carry back-loads for NTM's customers). Humberstone owned the truck, and paid for petrol and repairs. He was paid weekly on a weight-mileage basis. He was a licenced carrier, and had his name printed on the side of his truck with the description “carrier.”

On the way back from a job, he had a puncture. He went home to change the wheel, but exerted himself so strenuously in trying to remove the tyre from the wheel that he became ill and later lapsed into a coma, from which he did not recover. Section 3 of the *Worker's Compensation Act 1928* (Vic) had been amended about a year before Humberstone's death so as to include independent contractors in its definition of a “worker” covered by the Act. However, the High Court held that the amendment applied only to contracts entered into after it came into operation. Further, the Court decided that Humberstone was not an employee of NTM. Hence, he was not a “worker” under the Act, and his widow was not entitled to compensation under the Act.

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<sup>1</sup>(1949) 79 CLR 389.

There are several significant similarities between the instant case and *Humberstone v. NTM*: the employer did not direct the manner in which the work was to be done; the worker was allowed to use her/his own discretion in doing an aspect of the work that was not specified beforehand; the worker was not an integral part of the employer's business, but was accessory to it; the worker owned the tools or provided the transport with which she/he performed the work; the employer would not make a profit/loss if the work performed by the worker cost less/more than expected; the work was not performed on the employer's premises; the employer neither supervised nor inspected the work; the worker was not obliged to work only for the employer; the money that the employer paid to the worker was not stated to be a "fee"; the money that the employer paid to the worker was not stated to be "wages" or "salary"; the employer did not deduct PAYE tax instalments from the worker's pay; the employer paid the worker neither sick pay nor holiday pay; and the employer and the worker did not express any intention that the relationship would be one of employer and employee.

However, the instant case is not on all fours with *Humberstone v. NTM*. In that case the worker was not in business on her/his own account; the worker was allowed to employ others to assist with her/his work; the worker was not required to work at specified times; the employer did not pay the worker by time; and the employer and the worker did not express any intention that the relationship would be one of principal and independent contractor.

Nevertheless, I believe that *Humberstone v. NTM* should be followed.

If *Ferguson v. John Dawson and Partners (Contractors) Ltd* is followed then the worker is an employee.

In *Ferguson v. John Dawson and Partners (Contractors) Ltd*,<sup>2</sup> a 1976 decision of the English Court of Appeal, Ferguson fell off a roof while removing some scaffolding boards. He claimed damages against Dawson (the building contractors) for breach of statutory duty relying on the Construction (Working Places) Regulations 1966 (UK). This duty would only be owed if Ferguson was an employee of Dawson.

Megaw and Browne LJ held that, despite the fact that both parties labelled Ferguson a "self-employed labour only subcontractor", the reality of the relationship between them was that of employer and employee.<sup>3</sup>

There are several similarities between the instant case and *Ferguson v. Dawson*: the work was not performed on the employer's premises; the worker was not allowed to employ others to assist with her/his work; the worker was not obliged to work only for the employer; the worker was required to work at specified times; the money that the employer paid to the worker was not stated to be a "fee"; the money that the employer paid to the worker was not stated to be "wages" or "salary"; the employer did not deduct PAYE tax instalments from the worker's pay; the employer paid the worker neither sick pay nor holiday pay; the employer and the worker did not express any intention that the relationship would be one of employer and employee; and the employer and the worker expressed an intention that the relationship would be one of principal and independent contractor.

However, there are several significant differences between the instant case and *Ferguson v. Dawson*. In that case the employer directed the manner in which the work was to be done; the worker was not allowed to use her/his own discretion in doing an aspect of the work that was not specified beforehand; the worker was an integral part of the employer's business; the worker neither owned the tools nor provided the transport with which she/he performed the work; the employer would make a profit/loss if the work performed by the worker cost less/more than

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<sup>2</sup>[1976] 1 WLR 1213.

<sup>3</sup>ibid. at 1219 per Megaw LJ, at 1228-9 per Browne LJ.

expected; the employer supervised or inspected the work; the worker was not in business on her/his own account; and the employer paid the worker by time. Note also that *Ferguson v. Dawson* is only a decision of the English Court of Appeal and not as good authority as a case decided by three justices of the High Court of Australia—like *Humberstone v. NTM*.

Consequently, there is nothing in *Ferguson v. Dawson* to warrant any change in my conclusion.

## Hypothetical 1

Consider the instant case changed so that the following is true: the worker was allowed to employ others to assist with her/his work; and the employer and the worker did not express any intention that the relationship would be one of principal and independent contractor.

If that were so then I would be more strongly of the opinion that—following *Humberstone v. Northern Timber Mills*—the worker is an independent contractor.

Details of *Humberstone v. NTM* are summarized above. There are several significant similarities between the hypothetical case and *Humberstone v. NTM*: the employer did not direct the manner in which the work was to be done; the worker was allowed to use her/his own discretion in doing an aspect of the work that was not specified beforehand; the worker was not an integral part of the employer's business, but was accessory to it; the worker owned the tools or provided the transport with which she/he performed the work; the employer would not make a profit/loss if the work performed by the worker cost less/more than expected; the work was not performed on the employer's premises; the employer neither supervised nor inspected the work; the worker was allowed to employ others to assist with her/his work; the worker was not obliged to work only for the employer; the money that the employer paid to the worker was not stated to be a "fee"; the money that the employer paid to the worker was not stated to be "wages" or "salary"; the employer did not deduct PAYE tax instalments from the worker's pay; the employer paid the worker neither sick pay nor holiday pay; the employer and the worker did not express any intention that the relationship would be one of employer and employee; and the employer and the worker did not express any intention that the relationship would be one of principal and independent contractor.

However, the hypothetical case is not on all fours with *Humberstone v. NTM*. In that case the worker was not in business on her/his own account; the worker was not required to work at specified times; and the employer did not pay the worker by time.

Nevertheless, I believe that *Humberstone v. NTM* should be followed.

If *Cam and Sons Pty Ltd v. Sargent* is followed then the worker is an employee.

In *Cam and Sons Pty Ltd v. Sargent*,<sup>4</sup> a 1940 decision of four justices of the High Court of Australia, Sargent was the master of a ship. He entered into an agreement with Cam and Sons that claimed that the ship was hired by Cam and Sons to Sargent and his fellow contractors (called "the partnership"). However, it was doubtful whether that agreement actually deprived Cam and Sons of any control over the ship. The partnership was to use the ship only to carry coal from Swansea to Sydney. Cam and Sons were sole agents of the partnership for securing cargoes for the ship, and for collecting money due to the partnership. The partnership paid nothing for the "hire" of the ship, but received a specified sum for each return trip of a certain tonnage plus (in certain circumstances) 5% of the earnings, the balance of which was retained by Cam and Sons. Cam and Sons had to approve people employed by the partnership.

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<sup>4</sup>(1940) 14 ALJ 162.

Sargent claimed that he (and others in the partnership) were employed by Cam and Sons, and therefore came within the terms of an industrial award. Cam and Sons claimed that members of the partnership were independent contractors.

The High Court unanimously agreed with Sargent. Rich J came to the conclusion that the agreement was an attempt to evade the terms of the industrial award.<sup>5</sup>

There are several similarities between the hypothetical case and *Cam v. Sargent*: the worker was allowed to use her/his own discretion in doing an aspect of the work that was not specified beforehand; the work was not performed on the employer's premises; the employer neither supervised nor inspected the work; the worker was allowed to employ others to assist with her/his work; the worker was not obliged to work only for the employer; the money that the employer paid to the worker was not stated to be a "fee"; the money that the employer paid to the worker was not stated to be "wages" or "salary"; the employer did not deduct PAYE tax instalments from the worker's pay; the employer paid the worker neither sick pay nor holiday pay; the employer and the worker did not express any intention that the relationship would be one of employer and employee; and the employer and the worker did not express any intention that the relationship would be one of principal and independent contractor.

However, there are several significant differences between the hypothetical case and *Cam v. Sargent*. In that case the employer directed the manner in which the work was to be done; the worker was an integral part of the employer's business; the worker neither owned the tools nor provided the transport with which she/he performed the work; the employer would make a profit/loss if the work performed by the worker cost less/more than expected; the worker was not in business on her/his own account; the worker was not required to work at specified times; and the employer did not pay the worker by time.

Despite the fact that *Cam v. Sargent* is a decision of four justices of the High Court of Australia (and better authority than a case decided by three justices of the High Court of Australia—like *Humberstone v. NTM*), there is nothing in *Cam v. Sargent* to warrant any change in my conclusion.

## Hypothetical 2

Consider the instant case changed so that the following is true: the worker was not allowed to use her/his own discretion in doing an aspect of the work that was not specified beforehand; and the worker was an integral part of the employer's business.

If that were so then my opinion would be that—following *Ferguson v. John Dawson and Partners (Contractors) Ltd*—the worker is an employee.

Details of *Ferguson v. Dawson* are summarized above. There are several significant similarities between the hypothetical case and *Ferguson v. Dawson*: the worker was not allowed to use her/his own discretion in doing an aspect of the work that was not specified beforehand; the worker was an integral part of the employer's business; the work was not performed on the employer's premises; the worker was not allowed to employ others to assist with her/his work; the worker was not obliged to work only for the employer; the worker was required to work at specified times; the money that the employer paid to the worker was not stated to be a "fee"; the money that the employer paid to the worker was not stated to be "wages" or "salary"; the employer did not deduct PAYE tax instalments from the worker's pay; the employer paid the worker neither sick pay nor holiday pay; the employer and the worker did not express any intention that the relationship would be one of employer and employee; and the employer

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<sup>5</sup>ibid. at 163.

and the worker expressed an intention that the relationship would be one of principal and independent contractor.

However, the hypothetical case is not on all fours with *Ferguson v. Dawson*. In that case the employer directed the manner in which the work was to be done; the worker neither owned the tools nor provided the transport with which she/he performed the work; the employer would make a profit/loss if the work performed by the worker cost less/more than expected; the employer supervised or inspected the work; the worker was not in business on her/his own account; and the employer paid the worker by time.

Nevertheless, I believe that *Ferguson v. Dawson* should be followed.

If *Australian Mutual Provident Society v. Chaplin* or *Ready Mixed Concrete (South East) Ltd v. Minister of Pensions and National Insurance* are followed then the worker is an independent contractor.

In *Australian Mutual Provident Society v. Chaplin*,<sup>6</sup> a 1978 decision of the Judicial Committee of the Privy Council, Chaplin was a representative of AMP. A clause of the agreement between them stated that the relationship was one of “principal and agent” and not one of “master and servant.” Chaplin claimed that he was employed under a contract of service, and was therefore a “worker” under the *Long Service Leave Act, 1967* (SA) and entitled to certain benefits.

The Privy Council found that there was no reason to think that the clause was not a genuine statement of the parties’ intentions. Examining the agreement, their Lordships concluded that it provided for a contract of agency. The fact that Chaplin was given the power of unlimited delegation of the whole performance of his work was “almost conclusive against the contract being a contract of service.”<sup>7</sup>

There are several similarities between the hypothetical case and *AMP v. Chaplin*: the employer did not direct the manner in which the work was to be done; the worker was an integral part of the employer’s business; the worker owned the tools or provided the transport with which she/he performed the work; the employer would not make a profit/loss if the work performed by the worker cost less/more than expected; the work was not performed on the employer’s premises; the employer neither supervised nor inspected the work; the money that the employer paid to the worker was not stated to be a “fee”; the money that the employer paid to the worker was not stated to be “wages” or “salary”; the employer did not deduct PAYE tax instalments from the worker’s pay; the employer paid the worker neither sick pay nor holiday pay; the employer and the worker did not express any intention that the relationship would be one of employer and employee; and the employer and the worker expressed an intention that the relationship would be one of principal and independent contractor.

However, there are several significant differences between the hypothetical case and *AMP v. Chaplin*. In that case the worker was allowed to use her/his own discretion in doing an aspect of the work that was not specified beforehand; the worker was in business on her/his own account; the worker was allowed to employ others to assist with her/his work; the worker was obliged to work only for the employer; the worker was not required to work at specified times; and the employer did not pay the worker by time.

Despite the fact that *AMP v. Chaplin* is a decision of the Judicial Committee of the Privy Council (and better authority than a case decided by the English Court of Appeal—like *Ferguson v. Dawson*), there is nothing in *AMP v. Chaplin* to warrant any change in my conclusion.

In 1967, *Ready Mixed Concrete (South East) Ltd v. Minister of Pensions and National Insur-*

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<sup>6</sup>(1978) 18 ALR 385.

<sup>7</sup>ibid. at 391.

*ance*<sup>8</sup> was decided by the Queen’s Bench Division of the English High Court. (A case decided by the Queen’s Bench Division of the English High Court is not as good authority as a case decided by the Judicial Committee of the Privy Council—like *AMP v. Chaplin*; furthermore *Ready Mixed v. Minister* is 11 years older than *AMP v. Chaplin*.)

In *Ready Mixed v. Minister*, Latimer worked for Ready Mixed as an “owner-driver.” He was paid at mileage rates, and was obliged to buy the truck through a financial organization associated with Ready Mixed. The truck was painted in the company’s colours, and he had to wear a Ready Mixed uniform. Latimer was obliged to meet the costs of maintenance, repair and insurance of the truck (and the attached mixing unit, which belonged to Ready Mixed). The Minister determined that Latimer was employed under a contract of service, and was therefore an “employed person” under s. 1(2) of the National Insurance Act 1965 (UK), making Ready Mixed liable to make weekly contributions.

MacKenna J examined the contract and held that the rights it conferred, and the duties it imposed, between Latimer and Ready Mixed were not such as to make it a contract of service.

There are several similarities between the hypothetical case and *Ready Mixed v. Minister*: the employer did not direct the manner in which the work was to be done; the worker was an integral part of the employer’s business; the worker owned the tools or provided the transport with which she/he performed the work; the employer would not make a profit/loss if the work performed by the worker cost less/more than expected; the work was not performed on the employer’s premises; the employer neither supervised nor inspected the work; the money that the employer paid to the worker was not stated to be a “fee”; the money that the employer paid to the worker was not stated to be “wages” or “salary”; the employer did not deduct PAYE tax instalments from the worker’s pay; the employer paid the worker neither sick pay nor holiday pay; the employer and the worker did not express any intention that the relationship would be one of employer and employee; and the employer and the worker expressed an intention that the relationship would be one of principal and independent contractor.

However, there are several significant differences between the hypothetical case and *Ready Mixed v. Minister*. In that case the worker was allowed to use her/his own discretion in doing an aspect of the work that was not specified beforehand; the worker was not in business on her/his own account; the worker was allowed to employ others to assist with her/his work; the worker was obliged to work only for the employer; the worker was not required to work at specified times; and the employer did not pay the worker by time. Note also that *Ready Mixed v. Minister* is only a decision of the Queen’s Bench Division of the English High Court and not as good authority as a case decided by the English Court of Appeal—like *Ferguson v. Dawson*.

Consequently, there is nothing in *Ready Mixed v. Minister* to warrant any change in my conclusion.

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<sup>8</sup>[1968] 2 QB 497.