

Episode 8: Summary



Episode name: 9 to 5, Redefined

Guest(s): Nicola Martin

What area(s) of law does this episode consider?

Employment law, specifically (1) the legal difference between an employee and contractor; and (2) considerations for employers when implementing flexible working arrangements such as working from home practices.

Why is this topic relevant?

The main source of income for most Australians is their employment. But the nature of work is changing – and the growth of the gig economy is an example of this trend. So too is the growing practice of working from home, which has been adopted by (or been forced upon) more and more businesses, in Australia and around the world in light of the COVID-19 pandemic.

What legislation is considered in this episode?

Both Commonwealth and State legislation governs employment law, including:

1. *Fair Work Act 2009* (Cth)
2. *Fair Work Regulations*
3. *NSW Industrial Relations Act 1996* (NSW)
4. any applicable awards (such as the Restaurant Award, Hospitality Award or Legal Services Award).

What cases are considered in this episode?

Hollis v Vabu (2001) HCA 44: this case focused on the nature of the employment relationship. Vabu traded under the business name of 'Crisis Couriers', which had 20-30 bicycle and motorcycle couriers. In December 1994, Mr Hollis was leaving a building where he had picked up a parcel. He was knocked over by a cyclist, wearing a Crisis Couriers jacket, after stepping onto the footpath and suffered injuries as a result.

While previously control was the sole criterion in determining the true nature of a relationship of employment, the High Court held instead that the totality of the relationship between the parties must be considered, including factors such as remuneration (including whether there are invoices, whether the contractor is registered for GST, whether tax is being withheld), who determines the hours the contractor will work, who provides the equipment etc. As Nicola explains, the determination is a balancing exercise between these indicia.

Ultimately the High Court held that the bicycle courier was an employee of Vabu thus finding Vabu vicariously liable for the act of the courier who knocked down Mr Hollis.

Amrita Gupta v Portier Pacific Pty Ltd; Uber Australia Pty Ltd [2019] FWC 5008: Mrs Gupta was an Uber Eats driver. In early 2019, her account was deactivated by Uber. Mrs Gupta argued that the decision by Uber to suspend, then permanently block her access to the app constituted unfair dismissal. In April 2020, the full bench of the Fair Work Commission decided that Mrs Gupta, and Uber drivers in general, were not employees as they lacked some of the "essential hallmarks of an employment relationship". While some indicia pointed to an employment relationship, Uber did not have significant control over the drivers, who could choose if and when to pick up jobs.

What are the main points?

- The distinction between an employee and independent contractor is crucial, for both employees/contractors and employers/service providing platforms. For an employee or contractor, this distinction will impact the scope of their employment rights. While for an employer or service providing platform, it helps to define their obligations both to that employee or contractor and also third parties (as was the case in *Hollis*).
- Nicola also discusses the shift to flexible working. The COVID-19 pandemic forced many employers and workplaces to transition to working from home fairly quickly; even for those who had already embraced flexible working, this was a challenge.
- Working from home is just one of many flexible working arrangements. When working from home, your work area will be considered the “workplace” from a workplace health and safety, as well as workers compensation perspective.

What are the practical takeaways?

- If a business wishes to engage personnel as contractors, it must turn its mind to the structural and other substantive steps it will take to distinguish the contracting relationship from a standard employment relationship (such as engaging contractors through their own interposed proprietary company). Getting this wrong can have consequences for both parties, including in relation to compulsory superannuation contributions, income tax and GST withholding.
- The prevalence of working from home is likely to increase, especially after the COVID-19 recovery period. Employers should implement a flexible work policy (which includes working from home) and consider workplace injury, health and safety in a working from home context. This can include requiring employees to complete a ‘working from home’ checklist to ensure that they are working in a safe and conducive working environment that complies with workplace health and safety requirements, a practice advocated by Safe Work NSW.
- The key ingredients to a successful working from home arrangement is trust and communication. A written working from home policy establishes expectations for both parties, even if the circumstances do not allow a fulsome analysis of all of the risks present in the home office environment. Nevertheless, work health and safety laws continue to apply at home and injuries sustained while working at home present a material risk to employers.
- It is recommended that employers support and assist employees to work from home by creating working from home guidelines, as well as being accommodating with the transition and if necessary assisting employees to set up workstations at home.

Show notes

[Safe Work NSW – Working from home workplace health and safety checklist](#)