

## Hierarchy

<i>c</i>	<i>Court</i>
1	five justices of the High Court of Australia
2	four justices of the High Court of Australia
3	three justices of the High Court of Australia
4	a single justice of the High Court of Australia
5	three judges of the Federal Court of Australia
6	the Judicial Committee of the Privy Council
7	the English Court of Appeal
8	the King's Bench Division of the English High Court the Queen's Bench Division of the English High Court

## Employee area

<i>Case</i>	<i>Attributes</i>																		<i>c</i>	<i>Result</i>
	<i>A</i> <sub>1</sub>	<i>A</i> <sub>2</sub>	<i>A</i> <sub>3</sub>	<i>A</i> <sub>4</sub>	<i>A</i> <sub>5</sub>	<i>A</i> <sub>6</sub>	<i>A</i> <sub>7</sub>	<i>A</i> <sub>8</sub>	<i>A</i> <sub>9</sub>	<i>A</i> <sub>10</sub>	<i>A</i> <sub>11</sub>	<i>A</i> <sub>12</sub>	<i>A</i> <sub>13</sub>	<i>A</i> <sub>14</sub>	<i>A</i> <sub>15</sub>	<i>A</i> <sub>16</sub>	<i>A</i> <sub>17</sub>	<i>A</i> <sub>18</sub>		
<i>C</i> <sub>1</sub>	×	•	•	×	•	•	•	×	×	×	•	•	×	×	•	×	×	×	1	Employee
<i>C</i> <sub>2</sub>	•	•	•	×	•	×	×	×	•	×	×	×	×	×	×	×	×	×	2	
<i>C</i> <sub>3</sub>	•	×	•	×	•	•	•		×	×	•	×	•	×	×	×	×	×	4	
<i>C</i> <sub>4</sub>	•	×	•	•	×	•	•	×		×	×	×	×	×	×	×	×	×	5	
<i>C</i> <sub>5</sub>	•	×	•	×	•	×	•	×	×	×	•	•	×	×	×	×	×	•	7	
<i>C</i> <sub>6</sub>	×	•	•	×	•	×		×	×	×	•							×	7	
<i>C</i> <sub>7</sub>	•	•	•	•	×	•	•	×	×	•	•	•	×	•	×	×	×	×	8	
<i>I</i> <sub>Employee</sub>	•	×	•	×	•	•	•	×	×	•	•	•	×	•	•	•	•			
<i>C</i> <sub>8</sub>	×	•	×	•	×	×	×	×	•	×	×	×	×	×	×	×	×	×	3	Contractor
<i>C</i> <sub>9</sub>	×	•	×	•	×	×	•	•	•	×	×	×	×	×	×	×	•	×	3	
<i>C</i> <sub>10</sub>	×	•	•	•	×	×	×	×	•	×	×	×	×	×	•	×	×	×	5	
<i>C</i> <sub>11</sub>	×	•	•	•	×	×	×	•	•	•	×	×	×	×	×	×	×	•	6	
<i>C</i> <sub>12</sub>	•	•	•	×	•	•	×	•	•	×	•	•	×	×	×	•	×	•	7	
<i>C</i> <sub>13</sub>	×	•	×	×	•	×		×	×	×	•						•	×	7	
<i>C</i> <sub>14</sub>	×	•	•	•	×	×	×	×	•	•	×	×	×	×	×	×	×	•	8	
<i>I</i> <sub>Contractor</sub>	×	•	×	•	×		×	•	•	×	×	×	•	×	×	×		•		

## Opening

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).

## Results

Employee: the worker is an employee.

Contractor: the worker is an independent contractor.

## Attributes

$A_1$ : Did the employer direct not only what work was to be done, but also the manner in which it was to be done?

YES: the employer directed the manner in which the work was to be done.

⇒ Employee

NO: the employer did not direct the manner in which the work was to be done.

⇒ Contractor

UNKNOWN: it is not known whether the employer directed the manner in which the work was to be done.

If the employer had a right of control over how the worker did the work then the employer had the power to direct not only what work was to be done, but also the manner in which it was to be done.

$A_2$ : Was the worker allowed to use her/his own discretion in doing an aspect of the work that was not specified beforehand?

YES: the worker was allowed to use her/his own discretion in doing an aspect of the work that was not specified beforehand.

⇒ Contractor

NO: the worker was not allowed to use her/his own discretion in doing an aspect of the work that was not specified beforehand.

⇒ Employee

UNKNOWN: it is not known whether the worker was allowed to use her/his own discretion in doing an aspect of the work that was not specified beforehand.

$A_3$ : Was the worker an integral part of the employer's business?

YES: the worker was an integral part of the employer's business.

⇒ Employee

NO: the worker was not an integral part of the employer's business, but was accessory to it.

⇒ Contractor

UNKNOWN: it is not known whether the worker was an integral part of the employer's business or was merely accessory to it.

If the worker was "part and parcel" of the employer's business then she/he was an integral part of the business, not merely accessory to it.

$A_4$ : Did the worker own the tools or provide the transport with which she/he performed the work?

YES: the worker owned the tools or provided the transport with which she/he performed the work.

⇒ Contractor

NO: the worker neither owned the tools nor provided the transport with which she/he performed the work.

⇒ Employee

UNKNOWN: it is not known whether the worker owned the tools or provided the transport with which she/he performed the work.

A<sub>5</sub>: Would the employer make a profit/loss if the work performed by the worker cost less/more than expected?

YES: the employer would make a profit/loss if the work performed by the worker cost less/more than expected.

NO: the employer would not make a profit/loss if the work performed by the worker cost less/more than expected.

UNKNOWN: it is not known whether the employer would make a profit/loss if the work performed by the worker cost less/more than expected.

A<sub>6</sub>: Was the work performed on the employer's premises?

YES: the work was performed on the employer's premises.

NO: the work was not performed on the employer's premises.

⇒ Contractor

UNKNOWN: it is not known whether the work was performed on the employer's premises.

A<sub>7</sub>: Did the employer supervise or inspect the work?

YES: the employer supervised or inspected the work.

⇒ Employee

NO: the employer neither supervised nor inspected the work.

⇒ Contractor

UNKNOWN: it is not known whether the employer supervised or inspected the work.

A<sub>8</sub>: Was the worker in business on her/his own account?

YES: the worker was in business on her/his own account.

⇒ Contractor

NO: the worker was not in business on her/his own account.

⇒ Employee

UNKNOWN: it is not known whether the worker was in business on her/his own account.

A<sub>9</sub>: Was the worker allowed to employ others to assist with her/his work?

YES: the worker was allowed to employ others to assist with her/his work.

⇒ Contractor

NO: the worker was not allowed to employ others to assist with her/his work.

⇒ Employee

UNKNOWN: it is not known whether the worker was allowed to employ others to assist with her/his work.

A<sub>10</sub>: Was the worker obliged to work only for the employer?

YES: the worker was obliged to work only for the employer.

⇒ Employee

NO: the worker was not obliged to work only for the employer.

⇒ Contractor

UNKNOWN: it is not known whether the worker was obliged to work only for the employer.

A<sub>11</sub>: Was the worker required to work at specified times?

YES: the worker was required to work at specified times.

⇒ Employee

NO: the worker was not required to work at specified times.

⇒ Contractor

UNKNOWN: it is not known whether the worker was required to work at specified times.

A<sub>12</sub>: Did the employer pay the worker by time?

YES: the employer paid the worker by time.

⇒ Employee

NO: the employer did not pay the worker by time.

⇒ Contractor

UNKNOWN: it is not known whether the employer paid the worker by time.

The employer could pay the worker by time (e.g. by the hour, or by the week) or by results.

A<sub>13</sub>: Was the money that the employer paid to the worker stated to be a “fee”?

YES: the money that the employer paid to the worker was stated to be a “fee”.

⇒ Contractor

NO: the money that the employer paid to the worker was not stated to be a “fee”.

⇒ Employee

UNKNOWN: it is not known whether the money that the employer paid to the worker was stated to be a “fee”.

A<sub>14</sub>: Was the money that the employer paid to the worker stated to be “wages” or “salary”?

YES: the money that the employer paid to the worker was stated to be “wages” or “salary”.

⇒ Employee

NO: the money that the employer paid to the worker was not stated to be “wages” or “salary”.

⇒ Contractor

UNKNOWN: it is not known whether the money that the employer paid to the worker was stated to be “wages” or “salary”.

A<sub>15</sub>: Did the employer deduct PAYE tax instalments from the worker’s pay?

YES: the employer deducted PAYE tax instalments from the worker’s pay.

⇒ Employee

NO: the employer did not deduct PAYE tax instalments from the worker’s pay.

⇒ Contractor

UNKNOWN: it is not known whether the employer deducted PAYE tax instalments from the worker’s pay.

A<sub>16</sub>: Did the employer pay the worker sick pay or holiday pay?

YES: the employer paid the worker sick pay or holiday pay.

⇒ Employee

NO: the employer paid the worker neither sick pay nor holiday pay.

⇒ Contractor

UNKNOWN: it is not known whether the employer paid the worker sick pay or holiday pay.

A<sub>17</sub>: Did the employer and the worker express an intention that the relationship would be one of employer and employee?

YES: the employer and the worker expressed an intention that the relationship would be one of employer and employee.

⇒ Employee

NO: the employer and the worker did not express any intention that the relationship would be one of employer and employee.

UNKNOWN: it is not known whether the employer and the worker expressed an intention that the relationship would be one of employer and employee.

For example, if the employer and the worker characterized their agreement as being a “contract of service,” that would be an expression of an intention that the relationship would be one of employer and employee.

A<sub>18</sub>: Did the employer and the worker express an intention that the relationship would be one of principal and independent contractor?

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

⇒ Contractor

NO: the employer and the worker did not express any intention that the relationship would be one of principal and independent contractor.

UNKNOWN: it is not known whether the employer and the worker expressed an intention that the relationship would be one of principal and independent contractor.

For example, if the employer and the worker characterized their agreement as being a “contract for services,” that would be an expression of an intention that the relationship would be one of principal and independent contractor.

### Cases in which the worker is an employee

*C*<sub>1</sub>: *Zuijs v. Wirth Brothers Pty Ltd* (1955) 93 CLR 561 (“*Zuijs v. Wirth*”)

*A*<sub>1</sub>: the employer did not direct the manner in which the work was to be done.

*A*<sub>2</sub>: the worker was allowed to use her/his own discretion in doing an aspect of the work that was not specified beforehand.

*A*<sub>3</sub>: the worker was an integral part of the employer’s business.

*A*<sub>4</sub>: the worker neither owned the tools nor provided the transport with which she/he performed the work.

*A*<sub>5</sub>: the employer would make a profit/loss if the work performed by the worker cost less/more than expected.

*A*<sub>6</sub>: the work was performed on the employer’s premises.

*A*<sub>7</sub>: the employer supervised or inspected the work.

*A*<sub>8</sub>: the worker was not in business on her/his own account.

*A*<sub>9</sub>: the worker was not allowed to employ others to assist with her/his work.

*A*<sub>10</sub>: the worker was not obliged to work only for the employer.

*A*<sub>11</sub>: the worker was required to work at specified times.

*A*<sub>12</sub>: the employer paid the worker by time.

*A*<sub>13</sub>: the money that the employer paid to the worker was not stated to be a “fee”.

*A*<sub>14</sub>: the money that the employer paid to the worker was not stated to be “wages” or “salary”.

*A*<sub>15</sub>: the employer deducted PAYE tax instalments from the worker’s pay.

*A*<sub>16</sub>: the employer paid the worker neither sick pay nor holiday pay.

*A*<sub>17</sub>: the employer and the worker did not express any intention that the relationship would be one of employer and employee.

*A*<sub>18</sub>: the employer and the worker did not express any intention that the relationship would be one of principal and independent contractor.

In *Zuijs v. Wirth Brothers Pty Ltd*,<sup>1</sup> a 1955 decision of five justices of the High Court of Australia, Zuijs was an acrobat who fell during a trapeze act at one of Wirth Brothers’ circuses. He sought compensation under the Worker’s Compensation Act 1926 (NSW), claiming to be an employee of Wirth Brothers. Wirth Brothers claimed that, because of

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<sup>1</sup>(1955) 93 CLR 561.

the high degree of skill and personal judgment that he had to exercise in his work, Zuijs was an independent contractor and therefore not entitled to compensation.

The High Court unanimously agreed with Zuijs. “Even if [one of the circus managers] could not interfere in the actual technique of the acrobats and in the character of the act, no reason appears why [Zuijs] should not be subject to his directions in all other respects . . . There are countless examples of highly specialized 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.”<sup>2</sup>

*C*<sub>2</sub>: *Cam and Sons Pty Ltd v. Sargent* (1940) 14 ALJ 162 (“*Cam v. Sargent*”)

- A*<sub>1</sub>: the employer directed the manner in which the work was to be done.
- A*<sub>2</sub>: the worker was allowed to use her/his own discretion in doing an aspect of the work that was not specified beforehand.
- A*<sub>3</sub>: the worker was an integral part of the employer’s business.
- A*<sub>4</sub>: the worker neither owned the tools nor provided the transport with which she/he performed the work.
- A*<sub>5</sub>: the employer would make a profit/loss if the work performed by the worker cost less/more than expected.
- A*<sub>6</sub>: the work was not performed on the employer’s premises.
- A*<sub>7</sub>: the employer neither supervised nor inspected the work.
- A*<sub>8</sub>: the worker was not in business on her/his own account.
- A*<sub>9</sub>: the worker was allowed to employ others to assist with her/his work.
- A*<sub>10</sub>: the worker was not obliged to work only for the employer.
- A*<sub>11</sub>: the worker was not required to work at specified times.
- A*<sub>12</sub>: the employer did not pay the worker by time.
- A*<sub>13</sub>: the money that the employer paid to the worker was not stated to be a “fee”.
- A*<sub>14</sub>: the money that the employer paid to the worker was not stated to be “wages” or “salary”.
- A*<sub>15</sub>: the employer did not deduct PAYE tax instalments from the worker’s pay.
- A*<sub>16</sub>: the employer paid the worker neither sick pay nor holiday pay.
- A*<sub>17</sub>: the employer and the worker did not express any intention that the relationship would be one of employer and employee.
- A*<sub>18</sub>: the employer and the worker did not express any intention that the relationship would be one of principal and independent contractor.

In *Cam and Sons Pty Ltd v. Sargent*,<sup>3</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

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<sup>2</sup>ibid. at 571–2 per Dixon CJ, Williams, Webb and Taylor JJ.

<sup>3</sup>(1940) 14 ALJ 162.

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.

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>4</sup>

*C<sub>3</sub>: Federal Commissioner of Taxation v. J. Walter Thompson (Australia) Pty Ltd (1944) 69 CLR 227 (“FCT v. Thompson”)*

*A<sub>1</sub>*: the employer directed the manner in which the work was to be done.

*A<sub>2</sub>*: the worker was not allowed to use her/his own discretion in doing an aspect of the work that was not specified beforehand.

*A<sub>3</sub>*: the worker was an integral part of the employer’s business.

*A<sub>4</sub>*: the worker neither owned the tools nor provided the transport with which she/he performed the work.

*A<sub>5</sub>*: the employer would make a profit/loss if the work performed by the worker cost less/more than expected.

*A<sub>6</sub>*: the work was performed on the employer’s premises.

*A<sub>7</sub>*: the employer supervised or inspected the work.

*A<sub>8</sub>*: it is not known whether the worker was in business on her/his own account.

*A<sub>9</sub>*: the worker was not allowed to employ others to assist with her/his work.

*A<sub>10</sub>*: the worker was not obliged to work only for the employer.

*A<sub>11</sub>*: the worker was required to work at specified times.

*A<sub>12</sub>*: the employer did not pay the worker by time.

*A<sub>13</sub>*: the money that the employer paid to the worker was stated to be a “fee”.

*A<sub>14</sub>*: the money that the employer paid to the worker was not stated to be “wages” or “salary”.

*A<sub>15</sub>*: the employer did not deduct PAYE tax instalments from the worker’s pay.

*A<sub>16</sub>*: the employer paid the worker neither sick pay nor holiday pay.

*A<sub>17</sub>*: the employer and the worker did not express any intention that the relationship would be one of employer and employee.

*A<sub>18</sub>*: the employer and the worker did not express any intention that the relationship would be one of principal and independent contractor.

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<sup>4</sup>ibid. at 163.

In *Federal Commissioner of Taxation v. J. Walter Thompson (Australia) Pty Ltd*,<sup>5</sup> a 1944 decision of a single justice of the High Court of Australia, the FCT claimed that payments made to radio artists by Thompson were “wages” within the meaning of the *Pay-roll Tax Assessment Act 1941* (Cth) and therefore taxable. The artists were selected by a producer and paid to appear in radio plays. They were paid a “fee” for each performance, but were paid nothing for attending (compulsory) rehearsals. Thompson claimed that the artists were presumed to know their work and “to render services in the same manner as a professional man, such as a surgeon or an architect, not being subject . . . to detailed control as to the manner in which those services are to be performed.”<sup>6</sup> Hence, Thompson claimed, they were independent contractors.

Latham CJ held that the radio actors were employed “to co-operate with others in a team under the control of the producer to bring about a result, the details of which must in great measure be determined by the producer.”<sup>7</sup> Hence the artists were employed by Thompson; the fee they were paid was subject to payroll tax.

*C*<sub>4</sub>: *Australian Timber Workers Union v. Monaro Sawmills Pty Ltd* (1980) 29 ALR 322 (“*ATWU v. Monaro*”)

*A*<sub>1</sub>: the employer directed the manner in which the work was to be done.

*A*<sub>2</sub>: the worker was not allowed to use her/his own discretion in doing an aspect of the work that was not specified beforehand.

*A*<sub>3</sub>: the worker was an integral part of the employer’s business.

*A*<sub>4</sub>: the worker owned the tools or provided the transport with which she/he performed the work.

*A*<sub>5</sub>: the employer would not make a profit/loss if the work performed by the worker cost less/more than expected.

*A*<sub>6</sub>: the work was performed on the employer’s premises.

*A*<sub>7</sub>: the employer supervised or inspected the work.

*A*<sub>8</sub>: the worker was not in business on her/his own account.

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*A*<sub>16</sub>: the employer paid the worker neither sick pay nor holiday pay.

*A*<sub>17</sub>: the employer and the worker did not express any intention that the relationship would be one of employer and employee.

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<sup>5</sup>(1944) 69 CLR 227.

<sup>6</sup>*ibid.* at 231.

<sup>7</sup>*ibid.* at 232.

A<sub>18</sub>: the employer and the worker did not express any intention that the relationship would be one of principal and independent contractor.

In *Australian Timber Workers Union v. Monaro Sawmills Pty Ltd*,<sup>8</sup> a 1980 decision of three judges of the Federal Court of Australia, Wales was a tree feller who cut timber exclusively for Monaro Sawmills. He performed his work in an area allotted to him by Monaro Sawmills. He, and other fellers, were paid by the amount of millable wood they cut. Wales provided his own tools and transport, but was (with the other fellers) covered by Monaro Sawmill's workers' compensation policy.

The union sought an order that a penalty be imposed on Monaro Sawmills for breaching the Timber Industries Consolidated Award 1974 by failing to pay Wales money in lieu of annual leave. Monaro Sawmills claimed that Wales was an independent contractor, and so was not subject to the award.

Sweeney and Evatt JJ examined the circumstances of Wales's employment and held that those circumstances clearly pointed to the existence of a relationship of employer and employee. They could not see "any sense in which it could be said that Wales was conducting some sort of business of his own."<sup>9</sup>

C<sub>5</sub>: *Ferguson v. John Dawson and Partners (Contractors) Ltd* [1976] 1 WLR 1213 ("*Ferguson v. Dawson*")

A<sub>1</sub>: the employer directed the manner in which the work was to be done.

A<sub>2</sub>: the worker was not allowed to use her/his own discretion in doing an aspect of the work that was not specified beforehand.

A<sub>3</sub>: the worker was an integral part of the employer's business.

A<sub>4</sub>: the worker neither owned the tools nor provided the transport with which she/he performed the work.

A<sub>5</sub>: the employer would make a profit/loss if the work performed by the worker cost less/more than expected.

A<sub>6</sub>: the work was not performed on the employer's premises.

A<sub>7</sub>: the employer supervised or inspected the work.

A<sub>8</sub>: the worker was not in business on her/his own account.

A<sub>9</sub>: the worker was not allowed to employ others to assist with her/his work.

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A<sub>15</sub>: the employer did not deduct PAYE tax instalments from the worker's pay.

A<sub>16</sub>: the employer paid the worker neither sick pay nor holiday pay.

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<sup>8</sup>(1980) 29 ALR 322.

<sup>9</sup>ibid. at 329.

A<sub>17</sub>: the employer and the worker did not express any intention that the relationship would be one of employer and employee.

A<sub>18</sub>: the employer and the worker expressed an intention that the relationship would be one of principal and independent contractor.

In *Ferguson v. John Dawson and Partners (Contractors) Ltd*,<sup>10</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>11</sup>

C<sub>6</sub>: *Stevenson Jordan and Harrison Ltd v. Macdonald and Evans (2)* [1952] 1 TLR 101 (“*Stevenson v. Macdonald (2)*”)

A<sub>1</sub>: the employer did not direct the manner in which the work was to be done.

A<sub>2</sub>: the worker was allowed to use her/his own discretion in doing an aspect of the work that was not specified beforehand.

A<sub>3</sub>: the worker was an integral part of the employer’s business.

A<sub>4</sub>: the worker neither owned the tools nor provided the transport with which she/he performed the work.

A<sub>5</sub>: the employer would make a profit/loss if the work performed by the worker cost less/more than expected.

A<sub>6</sub>: the work was not performed on the employer’s premises.

A<sub>7</sub>: it is not known whether the employer supervised or inspected the work.

A<sub>8</sub>: the worker was not in business on her/his own account.

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A<sub>15</sub>: it is not known whether the employer deducted PAYE tax instalments from the worker’s pay.

A<sub>16</sub>: it is not known whether the employer paid the worker sick pay or holiday pay.

A<sub>17</sub>: it is not known whether the employer and the worker expressed an intention that the relationship would be one of employer and employee.

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<sup>10</sup>[1976] 1 WLR 1213.

<sup>11</sup>ibid. at 1219 per Megaw LJ, at 1228–9 per Browne LJ.

*A*<sub>18</sub>: the employer and the worker did not express any intention that the relationship would be one of principal and independent contractor.

In *Stevenson Jordan and Harrison Ltd v. Macdonald and Evans (2)*,<sup>12</sup> a 1951 decision of the English Court of Appeal, Evans-Hemming was an accountant who had been employed (first as a servant, then as an executive officer) by Macdonald and Evans. Shortly after he left them, he wrote a textbook on business management and submitted the manuscript to Stevenson Jordan and Harrison (a firm of publishers). He died before the book was published. Macdonald and Evans claimed that the book was written while Evans-Hemming was their employee, and so they owned the copyright in the work under s. 5(1)(b) of the Copyright Act 1911 (UK).

The book was divided into five sections. The second section was written in its final form while Evans-Hemming was employed by Macdonald and Evans. The Court of Appeal held that he wrote the second section as an employee, and hence the copyright in the second section was in Macdonald and Evans.

*C*<sub>7</sub>: *Performing Right Society Ltd v. Mitchell and Booker (Palais de Danse) Ltd* [1924] 1 KB 762 (“*PRS v. Palais de Danse*”)

*A*<sub>1</sub>: the employer directed the manner in which the work was to be done.

*A*<sub>2</sub>: the worker was allowed to use her/his own discretion in doing an aspect of the work that was not specified beforehand.

*A*<sub>3</sub>: the worker was an integral part of the employer’s business.

*A*<sub>4</sub>: the worker owned the tools or provided the transport with which she/he performed the work.

*A*<sub>5</sub>: the employer would not make a profit/loss if the work performed by the worker cost less/more than expected.

*A*<sub>6</sub>: the work was performed on the employer’s premises.

*A*<sub>7</sub>: the employer supervised or inspected the work.

*A*<sub>8</sub>: the worker was not in business on her/his own account.

*A*<sub>9</sub>: the worker was not allowed to employ others to assist with her/his work.

*A*<sub>10</sub>: the worker was obliged to work only for the employer.

*A*<sub>11</sub>: the worker was required to work at specified times.

*A*<sub>12</sub>: the employer paid the worker by time.

*A*<sub>13</sub>: the money that the employer paid to the worker was not stated to be a “fee”.

*A*<sub>14</sub>: the money that the employer paid to the worker was stated to be “wages” or “salary”.

*A*<sub>15</sub>: the employer did not deduct PAYE tax instalments from the worker’s pay.

*A*<sub>16</sub>: the employer paid the worker neither sick pay nor holiday pay.

*A*<sub>17</sub>: the employer and the worker did not express any intention that the relationship would be one of employer and employee.

*A*<sub>18</sub>: the employer and the worker did not express any intention that the relationship would be one of principal and independent contractor.

In *Performing Right Society Ltd v. Mitchell and Booker (Palais de Danse) Ltd*,<sup>13</sup> a 1924

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<sup>12</sup>[1952] 1 TLR 101.

<sup>13</sup>[1924] 1 KB 762.

decision of the King's Bench Division of the English High Court, the defendant was the occupier of a dance hall. It engaged a band to provide music in the hall. The agreement provided that the band should not infringe copyright, and that the band would be liable for damages and costs caused by any such infringement. There was also a notice displayed in the hall stating that "[o]nly such music as may be played without fee or licence is allowed to be played in this Hall."<sup>14</sup>

The band performed several pieces of music, the copyright in which was held by the Performing Right Society, without its permission. The defendant did not know, and had no reasonable grounds for suspecting, that the infringement was to take place.

The PRS abandoned its earlier claim that the defendant had "permitted" the infringement under s. 2(3) of the Copyright Act 1911 (UK). However, it claimed that the band members were the defendant's employees, and so the defendant was vicariously liable for the infringement.

McCardie J examined the agreement and found that it gave to the defendant "the right of continuous, dominant, and detailed control on every point, including the nature of the music to be played".<sup>15</sup> Hence the band members were employees of the defendant, which was liable for the infringement.

$I_{\text{Employee}}$  (the ideal case in which the worker is an employee):

$A_1$ : the employer directed the manner in which the work was to be done.

$A_2$ : the worker was not allowed to use her/his own discretion in doing an aspect of the work that was not specified beforehand.

$A_3$ : the worker was an integral part of the employer's business.

$A_4$ : the worker neither owned the tools nor provided the transport with which she/he performed the work.

$A_5$ : the employer would make a profit/loss if the work performed by the worker cost less/more than expected.

$A_6$ : the work was performed on the employer's premises.

$A_7$ : the employer supervised or inspected the work.

$A_8$ : the worker was not in business on her/his own account.

$A_9$ : the worker was not allowed to employ others to assist with her/his work.

$A_{10}$ : the worker was obliged to work only for the employer.

$A_{11}$ : the worker was required to work at specified times.

$A_{12}$ : the employer paid the worker by time.

$A_{13}$ : the money that the employer paid to the worker was not stated to be a "fee".

$A_{14}$ : the money that the employer paid to the worker was stated to be "wages" or "salary".

$A_{15}$ : the employer deducted PAYE tax instalments from the worker's pay.

$A_{16}$ : the employer paid the worker sick pay or holiday pay.

$A_{17}$ : the employer and the worker expressed an intention that the relationship would be one of employer and employee.

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<sup>14</sup>ibid. at 764.

<sup>15</sup>ibid. at 771.

*A*<sub>18</sub>: it is not known whether the employer and the worker expressed an intention that the relationship would be one of principal and independent contractor.

### Cases in which the worker is an independent contractor

*C*<sub>8</sub>: *Humberstone v. Northern Timber Mills* (1949) 79 CLR 389 (“*Humberstone v. NTM*”)

*A*<sub>1</sub>: the employer did not direct the manner in which the work was to be done.

*A*<sub>2</sub>: the worker was allowed to use her/his own discretion in doing an aspect of the work that was not specified beforehand.

*A*<sub>3</sub>: the worker was not an integral part of the employer’s business, but was accessory to it.

*A*<sub>4</sub>: the worker owned the tools or provided the transport with which she/he performed the work.

*A*<sub>5</sub>: the employer would not make a profit/loss if the work performed by the worker cost less/more than expected.

*A*<sub>6</sub>: the work was not performed on the employer’s premises.

*A*<sub>7</sub>: the employer neither supervised nor inspected the work.

*A*<sub>8</sub>: the worker was not in business on her/his own account.

*A*<sub>9</sub>: the worker was allowed to employ others to assist with her/his work.

*A*<sub>10</sub>: the worker was not obliged to work only for the employer.

*A*<sub>11</sub>: the worker was not required to work at specified times.

*A*<sub>12</sub>: the employer did not pay the worker by time.

*A*<sub>13</sub>: the money that the employer paid to the worker was not stated to be a “fee”.

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*A*<sub>15</sub>: the employer did not deduct PAYE tax instalments from the worker’s pay.

*A*<sub>16</sub>: the employer paid the worker neither sick pay nor holiday pay.

*A*<sub>17</sub>: the employer and the worker did not express any intention that the relationship would be one of employer and employee.

*A*<sub>18</sub>: the employer and the worker did not express any intention that the relationship would be one of principal and independent contractor.

In *Humberstone v. Northern Timber Mills*,<sup>16</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

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<sup>16</sup>(1949) 79 CLR 389.

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.

*C*<sub>9</sub>: *Queensland Stations Pty Ltd v. Federal Commissioner of Taxation* (1945) 70 CLR 539 ("Queensland Stations v. FCT")

- A*<sub>1</sub>: the employer did not direct the manner in which the work was to be done.
- A*<sub>2</sub>: the worker was allowed to use her/his own discretion in doing an aspect of the work that was not specified beforehand.
- A*<sub>3</sub>: the worker was not an integral part of the employer's business, but was accessory to it.
- A*<sub>4</sub>: the worker owned the tools or provided the transport with which she/he performed the work.
- A*<sub>5</sub>: the employer would not make a profit/loss if the work performed by the worker cost less/more than expected.
- A*<sub>6</sub>: the work was not performed on the employer's premises.
- A*<sub>7</sub>: the employer supervised or inspected the work.
- A*<sub>8</sub>: the worker was in business on her/his own account.
- A*<sub>9</sub>: the worker was allowed to employ others to assist with her/his work.
- A*<sub>10</sub>: the worker was not obliged to work only for the employer.
- A*<sub>11</sub>: the worker was not required to work at specified times.
- A*<sub>12</sub>: the employer did not pay the worker by time.
- A*<sub>13</sub>: the money that the employer paid to the worker was not stated to be a "fee".
- A*<sub>14</sub>: the money that the employer paid to the worker was not stated to be "wages" or "salary".
- A*<sub>15</sub>: the employer did not deduct PAYE tax instalments from the worker's pay.
- A*<sub>16</sub>: the employer paid the worker neither sick pay nor holiday pay.
- A*<sub>17</sub>: the employer and the worker expressed an intention that the relationship would be one of employer and employee.
- A*<sub>18</sub>: the employer and the worker did not express any intention that the relationship would be one of principal and independent contractor.

In *Queensland Stations Pty Ltd v. Federal Commissioner of Taxation*,<sup>17</sup> a 1945 decision of three justices of the High Court of Australia, agreements were entered into between Queensland Stations and some drovers. The agreements stated that the drovers would "serve" Queensland Stations and take charge of a specified number of cattle, and deliver them to a specified place. The drovers were paid a specified rate per head of cattle

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<sup>17</sup>(1945) 70 CLR 539.

successfully delivered. Each drover was responsible for hiring help, and paying for feed for the cattle. The drovers were to “obey and carry out all lawful instructions and to use the whole of [their] time, energy and ability in the careful droving of the stock.”<sup>18</sup> The FCT claimed that payments made to drovers were “wages” within the meaning of the *Pay-roll Tax Assessment Act 1941* (Cth), and that Queensland Stations was liable to payroll tax.

The High Court held that the drovers were independent contractors, so the payments were not “wages.” Rich J pointed out that drovers were traditionally free from the control of owners of cattle. “The obligation imposed on the drover to obey and carry out all lawful instructions is not a reservation of detailed control and possession having regard to the terms of the agreement as a whole.”<sup>19</sup>

*C*<sub>10</sub>: *Price v. Grant Industries Pty Ltd* (1978) 21 ALR 388 (“*Price v. Grant*”)

*A*<sub>1</sub>: the employer did not direct the manner in which the work was to be done.

*A*<sub>2</sub>: the worker was allowed to use her/his own discretion in doing an aspect of the work that was not specified beforehand.

*A*<sub>3</sub>: the worker was an integral part of the employer’s business.

*A*<sub>4</sub>: the worker owned the tools or provided the transport with which she/he performed the work.

*A*<sub>5</sub>: the employer would not make a profit/loss if the work performed by the worker cost less/more than expected.

*A*<sub>6</sub>: the work was not performed on the employer’s premises.

*A*<sub>7</sub>: the employer neither supervised nor inspected the work.

*A*<sub>8</sub>: the worker was not in business on her/his own account.

*A*<sub>9</sub>: the worker was allowed to employ others to assist with her/his work.

*A*<sub>10</sub>: the worker was not obliged to work only for the employer.

*A*<sub>11</sub>: the worker was not required to work at specified times.

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*A*<sub>13</sub>: the money that the employer paid to the worker was not stated to be a “fee”.

*A*<sub>14</sub>: the money that the employer paid to the worker was not stated to be “wages” or “salary”.

*A*<sub>15</sub>: the employer deducted PAYE tax instalments from the worker’s pay.

*A*<sub>16</sub>: the employer paid the worker neither sick pay nor holiday pay.

*A*<sub>17</sub>: the employer and the worker did not express any intention that the relationship would be one of employer and employee.

*A*<sub>18</sub>: the employer and the worker did not express any intention that the relationship would be one of principal and independent contractor.

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<sup>18</sup>ibid. at 540.

<sup>19</sup>ibid. at 549.

In *Price v. Grant Industries Pty Ltd*,<sup>20</sup> a 1978 decision of three judges of the Federal Court of Australia, Grant Industries manufactured and sold wardrobes, which Price (and others) delivered and installed. Price and each of the other “contractors” (as Grant Industries called them) had to provide and maintain a suitable truck to deliver the wardrobes, and provide the tools required to install them. Price sought an order that a penalty be imposed on Grant Industries for breaching the Furnishing Trades (Consolidated) Award 1975 by not paying him the appropriate rate of wages, and not giving him annual leave. The award only applied to “employees” of specified employers.

The Federal Court examined the facts, and the provisions of the agreement, and held that Price was an independent contractor and, therefore, not subject to the award.

*C*<sub>11</sub>: *Australian Mutual Provident Society v. Chaplin* (1978) 18 ALR 385 (“AMP v. Chaplin”)

*A*<sub>1</sub>: the employer did not direct the manner in which the work was to be done.

*A*<sub>2</sub>: the worker was allowed to use her/his own discretion in doing an aspect of the work that was not specified beforehand.

*A*<sub>3</sub>: the worker was an integral part of the employer’s business.

*A*<sub>4</sub>: the worker owned the tools or provided the transport with which she/he performed the work.

*A*<sub>5</sub>: the employer would not make a profit/loss if the work performed by the worker cost less/more than expected.

*A*<sub>6</sub>: the work was not performed on the employer’s premises.

*A*<sub>7</sub>: the employer neither supervised nor inspected the work.

*A*<sub>8</sub>: the worker was in business on her/his own account.

*A*<sub>9</sub>: the worker was allowed to employ others to assist with her/his work.

*A*<sub>10</sub>: the worker was obliged to work only for the employer.

*A*<sub>11</sub>: the worker was not required to work at specified times.

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*A*<sub>14</sub>: the money that the employer paid to the worker was not stated to be “wages” or “salary”.

*A*<sub>15</sub>: the employer did not deduct PAYE tax instalments from the worker’s pay.

*A*<sub>16</sub>: the employer paid the worker neither sick pay nor holiday pay.

*A*<sub>17</sub>: the employer and the worker did not express any intention that the relationship would be one of employer and employee.

*A*<sub>18</sub>: the employer and the worker expressed an intention that the relationship would be one of principal and independent contractor.

In *Australian Mutual Provident Society v. Chaplin*,<sup>21</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

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<sup>20</sup>(1978) 21 ALR 388.

<sup>21</sup>(1978) 18 ALR 385.

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>22</sup>

*C*<sub>12</sub>: *Massey v. Crown Life Insurance Co.* [1978] 1 WLR 676 (“*Massey v. Crown Life*”)

- A*<sub>1</sub>: the employer directed the manner in which the work was to be done.
- A*<sub>2</sub>: the worker was allowed to use her/his own discretion in doing an aspect of the work that was not specified beforehand.
- A*<sub>3</sub>: the worker was an integral part of the employer’s business.
- A*<sub>4</sub>: the worker neither owned the tools nor provided the transport with which she/he performed the work.
- A*<sub>5</sub>: the employer would make a profit/loss if the work performed by the worker cost less/more than expected.
- A*<sub>6</sub>: the work was performed on the employer’s premises.
- A*<sub>7</sub>: the employer neither supervised nor inspected the work.
- A*<sub>8</sub>: the worker was in business on her/his own account.
- A*<sub>9</sub>: the worker was allowed to employ others to assist with her/his work.
- A*<sub>10</sub>: the worker was not obliged to work only for the employer.
- A*<sub>11</sub>: the worker was required to work at specified times.
- A*<sub>12</sub>: the employer paid the worker by time.
- A*<sub>13</sub>: the money that the employer paid to the worker was not stated to be a “fee”.
- A*<sub>14</sub>: the money that the employer paid to the worker was not stated to be “wages” or “salary”.
- A*<sub>15</sub>: the employer did not deduct PAYE tax instalments from the worker’s pay.
- A*<sub>16</sub>: the employer paid the worker sick pay or holiday pay.
- A*<sub>17</sub>: the employer and the worker did not express any intention that the relationship would be one of employer and employee.
- A*<sub>18</sub>: the employer and the worker expressed an intention that the relationship would be one of principal and independent contractor.

In *Massey v. Crown Life Insurance Co.*,<sup>23</sup> a 1977 decision of the English Court of Appeal, Massey was the manager of a branch of Crown Life. He had been an employee for two years, then he and Crown Life entered into a new agreement whereby Massey continued to perform the same duties as before, but was self-employed. This arrangement had tax advantages for Massey. After a further two years, Crown Life terminated the agreement

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<sup>22</sup>ibid. at 391.

<sup>23</sup>[1978] 1 WLR 676.

and Massey sought compensation for unfair dismissal under the Trade Union and Labour Relations Act 1974 (UK). Compensation was only payable if Massey was employed under a contract of service.

Lord Denning MR stated that “if the true relationship of the parties is that of master and servant under a contract of service, the parties cannot alter the truth of that relationship by putting a different label upon it.”<sup>24</sup> However, Lord Denning (and the rest of the Court of Appeal) held that the agreement was genuinely intended to establish Massey as being self-employed; he was an independent contractor.

*C*<sub>13</sub>: *Stevenson Jordan and Harrison Ltd v. Macdonald and Evans (1)* [1952] 1 TLR 101 (“*Stevenson v. Macdonald (1)*”)

*A*<sub>1</sub>: the employer did not direct the manner in which the work was to be done.

*A*<sub>2</sub>: the worker was allowed to use her/his own discretion in doing an aspect of the work that was not specified beforehand.

*A*<sub>3</sub>: the worker was not an integral part of the employer’s business, but was accessory to it.

*A*<sub>4</sub>: the worker neither owned the tools nor provided the transport with which she/he performed the work.

*A*<sub>5</sub>: the employer would make a profit/loss if the work performed by the worker cost less/more than expected.

*A*<sub>6</sub>: the work was not performed on the employer’s premises.

*A*<sub>7</sub>: it is not known whether the employer supervised or inspected the work.

*A*<sub>8</sub>: the worker was not in business on her/his own account.

*A*<sub>9</sub>: the worker was not allowed to employ others to assist with her/his work.

*A*<sub>10</sub>: the worker was not obliged to work only for the employer.

*A*<sub>11</sub>: the worker was required to work at specified times.

*A*<sub>12</sub>: it is not known whether the employer paid the worker by time.

*A*<sub>13</sub>: it is not known whether the money that the employer paid to the worker was stated to be a “fee”.

*A*<sub>14</sub>: it is not known whether the money that the employer paid to the worker was stated to be “wages” or “salary”.

*A*<sub>15</sub>: it is not known whether the employer deducted PAYE tax instalments from the worker’s pay.

*A*<sub>16</sub>: it is not known whether the employer paid the worker sick pay or holiday pay.

*A*<sub>17</sub>: the employer and the worker expressed an intention that the relationship would be one of employer and employee.

*A*<sub>18</sub>: the employer and the worker did not express any intention that the relationship would be one of principal and independent contractor.

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<sup>24</sup>*ibid.* at 679.

In *Stevenson Jordan and Harrison Ltd v. Macdonald and Evans (1)*,<sup>25</sup> a 1951 decision of the English Court of Appeal, Evans-Hemming was an accountant who had been employed (first as a servant, then as an executive officer) by Macdonald and Evans. Shortly after he left them, he wrote a textbook on business management and submitted the manuscript to Stevenson Jordan and Harrison (a firm of publishers). He died before the book was published. Macdonald and Evans claimed that the book was written while Evans-Hemming was their employee, and so they owned the copyright in the work under s. 5(1)(b) of the Copyright Act 1911 (UK).

The book was divided into five sections. The first section consisted of the text of three public lectures that Evans-Hemming had given while employed by Macdonald and Evans. The Court of Appeal held that he had given these lectures as an independent contractor. As Denning LJ said, “under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business; whereas, under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it . . . The lectures were, in a sense, part of the services rendered by Mr Evans-Hemming for the benefit of the company. But they were in no sense part of his service. It follows that the copyright in the lectures was in Mr Evans-Hemming.”<sup>26</sup>

*C*<sub>14</sub>: *Ready Mixed Concrete (South East) Ltd v. Minister of Pensions and National Insurance* [1968] 2 QB 497 (“*Ready Mixed v. Minister*”)

*A*<sub>1</sub>: the employer did not direct the manner in which the work was to be done.

*A*<sub>2</sub>: the worker was allowed to use her/his own discretion in doing an aspect of the work that was not specified beforehand.

*A*<sub>3</sub>: the worker was an integral part of the employer’s business.

*A*<sub>4</sub>: the worker owned the tools or provided the transport with which she/he performed the work.

*A*<sub>5</sub>: the employer would not make a profit/loss if the work performed by the worker cost less/more than expected.

*A*<sub>6</sub>: the work was not performed on the employer’s premises.

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*A*<sub>15</sub>: the employer did not deduct PAYE tax instalments from the worker’s pay.

*A*<sub>16</sub>: the employer paid the worker neither sick pay nor holiday pay.

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<sup>25</sup>[1952] 1 TLR 101.

<sup>26</sup>ibid. at 111.

$A_{17}$ : the employer and the worker did not express any intention that the relationship would be one of employer and employee.

$A_{18}$ : the employer and the worker expressed an intention that the relationship would be one of principal and independent contractor.

In *Ready Mixed Concrete (South East) Ltd v. Minister of Pensions and National Insurance*,<sup>27</sup> a 1967 decision of the Queen's Bench Division of the English High Court, 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.

$I_{\text{Contractor}}$  (the ideal case in which the worker is an independent contractor):

$A_1$ : the employer did not direct the manner in which the work was to be done.

$A_2$ : the worker was allowed to use her/his own discretion in doing an aspect of the work that was not specified beforehand.

$A_3$ : the worker was not an integral part of the employer's business, but was accessory to it.

$A_4$ : the worker owned the tools or provided the transport with which she/he performed the work.

$A_5$ : the employer would not make a profit/loss if the work performed by the worker cost less/more than expected.

$A_6$ : it is not known whether the work was performed on the employer's premises.

$A_7$ : the employer neither supervised nor inspected the work.

$A_8$ : the worker was in business on her/his own account.

$A_9$ : the worker was allowed to employ others to assist with her/his work.

$A_{10}$ : the worker was not obliged to work only for the employer.

$A_{11}$ : the worker was not required to work at specified times.

$A_{12}$ : the employer did not pay the worker by time.

$A_{13}$ : the money that the employer paid to the worker was stated to be a "fee".

$A_{14}$ : the money that the employer paid to the worker was not stated to be "wages" or "salary".

$A_{15}$ : the employer did not deduct PAYE tax instalments from the worker's pay.

$A_{16}$ : the employer paid the worker neither sick pay nor holiday pay.

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<sup>27</sup>[1968] 2 QB 497.

$A_{17}$ : it is not known whether the employer and the worker expressed an intention that the relationship would be one of employer and employee.

$A_{18}$ : the employer and the worker expressed an intention that the relationship would be one of principal and independent contractor.