

- he had to wear a company uniform
- he had to carry out all reasonable orders from any competent servant of the company
- he had to maintain the lorry at his own expense and pay its running costs
- there was a mutual intention that Mr Latimer was an independent contractor.

Other facts found were

- he did not work set hours and had no fixed meal break
- the company did not tell him how to drive the truck or what routes to take
- the nine owner-drivers in the depot arranged the dates of their own holidays to ensure that only one driver was away at any time and between them. They engaged a relief driver contributing equally to his weekly wage of £25.
- during the busy season the company engaged three or four additional drivers under contracts of service.

Decision

The Minister decided that Mr Latimer was employed under a contract of service but, on appeal to the High Court, MacKenna J held that he was running a business of his own. In summing up MacKenna J said that Mr Latimer was a “small business man” and not a servant. He concluded that the contract was not one of service but of carriage.

Commentary

In his judgment, MacKenna J considered what is meant by a contract of service. He said

“A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other’s control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service. As to (i) there must be a wage or other remuneration. Otherwise there will be no consideration, and without consideration no contract of any kind can be created. The servant must be obliged to provide his own work and skill. Freedom to do a job by one’s own hands or by another’s is inconsistent with a contract of service, though a limited or occasional power of delegation may not be....”

This established that in order for there to be a contract of service

- The worker has to be subject to a right of control. If there is no right of control of any kind then you will not have a contract of service. However, it was also made clear in the judgment that, although a right of control is an important factor in determining employment status, it is not necessarily a determining factor;
- Personal service must be given. However, the court did make the important point that a limited right of delegation was not inconsistent with a contract of service.
- The other factors present are consistent with a contract of service. Factors such as ownership of significant assets, financial risk and the opportunity to profit are not consistent with a contract of service.

SMALL BUSINESSMAN TEST

In the absence of an agreement to the contrary payment of wages shall be assumed to be in respect of a forty eight-hour week and hours worked in excess of forty eight hours per week shall be regarded as "overtime hours".

Length of working hours per week section 53

The maximum working hours per week shall be forty eight hours but the employer and employee may agree that the maximum working hours per week shall not be less than forty eight or that the normal working hours shall be more than forty eight hours per week. Hours of work shall not exceed ten hours per day or fifty six hours per week except where persons are employed in shifts when they can work for more than ten hours a day or forty eight hours in any one week but the average number of hours over a period of three weeks should not exceed more than ten hours a day and fifty six hours a week.

There will be a thirty minute break granted to employees for every eight hours worked.

For overtime, employees shall be remunerated at the minimum rate of one and a half times (an hour and half for every hour worked) of the normal hourly rate if the overtime is on a normal working day and at two times the hourly rate paid for two hours for every hour worked) where the overtime is worked on gazetted public holidays.

The minister may after consultation with the Labor Advisory Board regulate the maximum number of working hours and may by order provide for temporary exceptions in extra-ordinary situations where the public interest so requires.

Annual leave and public holidays section 54

All employees who have performed continuous service for the employer for a minimum period of six months or who normally work under a contract of service for not less than sixteen hours a week or more are entitled once every calendar year to a holiday with full pay. Employees shall also be entitled to a holiday with full pay on every public holiday during their employment or payment at double rate in lieu of the holiday.

Any agreement, to forego annual leave or otherwise and receive compensation for it shall be null and void.

Upon termination of a contract of employment an employee shall be entitled to their holiday proportionate to the time worked or compensation in lieu of the holiday.

Sick pay section 55

An employee who is normally employed for at least sixteen hours a week and has completed more than one month continuous service shall be entitled to full wages and every other benefit stipulated in the contract for the first month of absence but at the expiry of the second month the employer is entitled to terminate the contract upon compliance with the terms of the contract up to the time of termination. However for the employee to be entitled to sick pay they must the employer of their absence and the reason for it and produce if requested by the employer a written certificate signed by a qualified the incapacity for work and the duration of the incapacity.

Maternity leave SECTION 56

All female employees shall have a right to maternity leave of a period of sixty days away from work of which at least four weeks shall follow the child birth or miscarriage.

The employee shall also have the right to return to the job which she held or to a reasonably suitable alternative on terms and conditions not less favorable than those which applied to her previous job.

It is important that the notice must be properly given. The Act provides that it must be in writing. It must also be clear and specific, as any ambiguity will be interpreted against the person giving it. In particular it must state the duration of the notice and if necessary how that duration is to be computed. It should be noted that the duration of notice starts running from the date the notice is communicated to the other party.

A proper notice shall not be retroactive or be back dated and the contract of employment terminates at the expiry of the notice.

TERMINATION UPON BREACH

This occurs when an employee has lawfully breached a term in his employment contract. It may be a term written in the contract of employment or one implied under the common law.

A breach is fundamental if it amounts to a repudiation of the contract. Such a breach confers on the innocent party an immediate right to terminate the contract. A breach is fundamental if it deprived the innocent party of the benefit of the contract and entitles to treat the contract as ended.

Apart from summary dismissal at common law, Human Relations manuals, contracts of employment, disciplinary codes of conduct entered into between labor unions and employers normally provide for grounds of dismissal. Cases of theft, embezzlement of company funds and bribery normally attract instant or summary dismissal/ Otherwise most offences by employees such as lateness, absenteeism from duty, leaving work without permission, fighting at work, failure to carry out lawful orders, reporting for duty while intoxicated, careless damage to property are normally preceded by warnings and suspension before dismissal.

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Page 21 of 21