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51 SOCIAL SECURITY Reporter

Including Student Assistance Decisions

Opinion

How mutual is mutual obligation?

On two occasions in the last year the writer has acted for participants on the 'Work For The Dole Program' who each sustained serious injuries in the course of their work for NSW based sponsors. 'Sponsor' is the term used to describe the supervising organisation under the Program. In both cases the NSW workers compensation insurers have denied liability for workers compensation on the basis that participants in 'Work For The Dole' are not 'workers' within the definition of s.4 *Workplace Injury Management and Workers Compensation Act 1998*.

In the first case a 50-55 year old man was allocated the task of demolishing a brick wall with a large hammer, presumably in the belief that either there were many skills to be acquired in this undertaking or that a bit of hard work may be good for his soul. Unfortunately he tripped over some of bricks he had knocked out of the wall and suffered a rupture of a disc in his back for which he was hospitalised and underwent an operation. The second case involved a 20-year-old man who was allocated the task of digging postholes with a large petrol-driven two-man posthole digging machine. Neither he nor his fellow machine operator had any previous experience or training in the use of the machine. Unfortunately he was allocated to dig the posthole in the compact soil adjacent to a road. When the machine failed to penetrate the compact soil it spun out of control and the metal handles protruding from the side of the machine smashed the young man's arm, shoulder and ribs.

When injuries occur in the course of employment an injured worker has two potential causes of action open. If it appears that the injury occurred by reason of the negligence of the employer (including unsafe working conditions) then the injured worker may bring proceedings at common law in the Supreme, District or Local Courts. The employer will have insurance in place for this contingency. In order to succeed with the claim the injured worker has to establish both the negligence on the part of the employer and that the injury arose out of this negligence.

The second option is a workers compensation claim. This may be pursued by an injured worker whether or not there was any negligence on the part of the employer associated with the injury. Workers compensation schemes do not require the proof of fault on the part of the employer and apply to workers

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injured at work whether or not negligence is present. Workers compensation will pay for the medical costs arising out of the injury, lost wages, attendant care, death benefits and, if the worker has suffered a non-trivial permanent loss of use of a part of the body, it provides a lump sum. In the great majority of instances of workers injured at work there is no negligence involved and so the only remedy for a great majority of injured workers is their workers compensation rights.

Workers compensation is mandatory in all States and Territories in Australia for workers although the details of the scheme vary between jurisdictions. Workers compensation rights extend to a range of voluntary workers who would not normally fall within the definition of a worker or employee under the workers compensation legislation or at common law, for example, bushfire fighters, golf caddies, ministers of religion.

The present problem stems from the form of the definition of 'worker' which is applied in the workers compensation legislation of most States and Territories and which is really an endeavour to adopt the test developed by the common law. In NSW the definition reads:

> worker means a person who has entered into or works under a contract of service or apprenticeship with an employer (whether by way of manual labour, clerical work or otherwise, and whether the contract is expressed or implied, and whether the contract is oral or in writing).

The common law has traditionally distinguished a 'contract of services' from a 'contract for services'. The former are employees and the latter are contractors. Although there has been much judicial ink expended in attempting some precision in this differentiation, ultimately it comes down to balancing a range of factors in a fairly subjective and not always consistent manner. Traditionally there have been three particularly significant factors:

(a) What the parties themselves intended their relationship to be (WIU of Australia v Odco 1991 99 ALR 755);

(b) The control test (Stevens v Brodribb Sawmilling Co P/L 1986 60 ALMJR 194) ie to what extent could the 'employer' direct the activities of the 'employee' as to the specific of what was to be done and how it was to be done;

(c) The business integration test which looks at how central or integral the functions performed by the 'employee' are to the business operations of the 'employer' (Sgobino v State of South Australia 1987 46 SASR 292).

In the case of participants on 'Work for Dole Programs' the problem lies in factor (a) and (c).

The problem with factor (a) stems initially from the Commonwealth's insistence that participants are not to be acknowledged as workers by program sponsors. The material provided by the Commonwealth to sponsors makes it an explicit term of the funding to sponsors that they are not to enter into an employers/employee relationship with the participants. The sponsor does not pay the participant who continues to receive New Start Allowance subject to satisfactory participation on the Program.

There have been a number of cases decided on whether voluntary workers can be workers at common law or under the workers compensation definitions and in each case the answer was in the negative on the basis that the essentially charitable motivation on the part of the sponsor was seen to negate any intention to enter into the formal legal relationship of employer/employee with its various obligations. The leading case is that of the High Court in *Dietrich v Dare* (1980) 30 ALR 407. In this case the defendant offered the plaintiff a few hours work painting his house at a nominal pay. The plaintiff was a man with a significant disability and the defendant's offer was based on benevolent motives with little actual gain to the defendant. The plaintiff was injured attempting the job. The Court found that the plaintiff was intending to treat the exercise as a trial to see what he could do and that he probably could not have completed the task satisfactorily even had the accident not occurred. The Court held that the absence of any real gain to the defendant, the charitable motives underpinning the transaction and the lack of commitment to see the job through by the plaintiff indicated the absence of any employment contract.

In *Hogan v NSW Dept of Education* (1965) WCR 76 the NSW Workers Compensation Court held that a trainee teacher undergoing a work placement at a school was not an employee of the school for similar reasons. In *Birkett v Tubbo Estate Co P/L* (CC 31224/95) the NSW Compensation Court held that a student undergoing a work placement at a Merino Stud was not an employee. In *Drzyga v G. & B. Silver P/L* (1994) 10 NSWCCR 191 the NSW Compensation Court held that a labourer undergoing unpaid training was not an employee.

The problem with factor (c) of para.7 above stems from the fact that usually the sponsors are community organisations which are not undertaking any particular business enterprise for which the participants on the program are recruited. Rather the sponsors will find or arrange work expressly for the purpose of keeping the participants occupied.

The fact that participants on 'Work For The Dole Programs' may not be workers at common law, or under the definitions in the workers compensation legislation, does not mean that the respective State and Territory Parliaments cannot remedy this situation. In NSW the Parliament enacted cl.19 to the First Schedule to the *Workplace Injury Management and Workers Compensation Act 1998* which expressly provided for regulations to be made to deem people on training programs to be workers, and thereby covered by the Act. To give effect to this provision the relevant Minister in NSW needed only to enact the regulations prescribing 'Work For The Dole' participants to be workers for the purposes of the Act. Unfortunately the Minister has not done so to the detriment of the two people referred to above.

The Commonwealth does have the power to solve the problem by simply changing the terms of its program to require sponsors to explicitly undertake an employer/employee relationship with the participant. The Commonwealth has chosen not to do so.

The Commonwealth has made a feeble effort to deal with the issue of injured participants. Sponsors are required to have a public liability policy in force. However this only covers claims arising from negligence and does not extend to the great majority of workplace injuries which do not arise out of negligent circumstances. The Commonwealth then requires sponsors to take out a particular policy of insurance provided by a particular commercial company which it described as 'Insurance Brokers to Department of Employment, Workplace Relations and Small Business'. This policy provides a lump sum benefit to injured participants on what is commonly called the 'The Table of Maims'. In order to claim, the injured participant needs to have suffered the amputation of various parts of the body or to have lost the total use of those parts of the body. The probability of being able to claim under this policy is small and neither of the above two men qualify. The policy only pays for those medical treatments which are not available under Medicare and so will not assist for hospitalisation, specialist, operations etc.

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his mother for survival. Vu's father provided no support and his mother had no means of support and was prevented from working because of her non-resident status. Vu and his mother were in temporary refuge accommodation. The Tribunal found that Vu was dependent on his mother for survival and as an infant Australian citizen of a non-resident parent, Vu required a level of income support that recognised his need for a carer.

The Tribunal found that the appropriate rate of SB for Vu was the maximum amount that can be paid up to the ceiling indicated by s.746(2), being the rate of newstart allowance payable to a person who is single, 21 or over and with a child ($386.90 a fortnight).

Current departmental policy

The *Vu* decision marks a significant departure from earlier cases that tried to fit each applicant into an appropriate 'benchmark' group based on age. It allows the Department to consider the child's circumstances rather than having to decide which category of youth allowance payment most fits the child's situation.

The Department's current policy in relation to the appropriate support for these vulnerable citizen children is unclear.

At the time of writing, the Department's Guide to the Act states at 3.7.2.80:

> **SpB for Australian citizen Children in the Custody of a Non-permanent Resident ...**
>
> **Determining the rate of payment**
>
> A child who is granted SpB when in the custody of a non-permanent resident, should be paid at a rate equivalent to the amount of FTB (Part A) that would other wise be payable to the parent in respect of the child. This may also include RA, however the total rate paid should not exceed the 'at home' rate of YA
>
> Explanation: this rate is comparable with the level of assistance available for the support of other Australian children of the same age

It is clear that despite the above 'explanation', the rate recommended in the Guide is in no way comparable with the level of assistance available for the support of other Australian children of the same age. Both family tax benefit and the 'at home' rate of youth allowance are *supplementary* benefits, they are paid for the support of children whose parents have other income support from either employment or Centrelink benefits. The citizen children of non-resident parents are at an enormous disadvantage compared with other children as they need to provide financial support to their parents to enable their parents to nurture and support them. The *Vu* decision is, therefore, very important as it goes some way towards alleviating this disadvantage.

Full implementation of the *Vu* decision would not have a large impact on the social security budget. However, it would have an enormous positive impact on those families to whom it applies. These children rarely rely on SB for more than two years and there are only small numbers of them. The rate of SB can be reviewed at the time that the citizen child's parent's residence status is resolved, or at the time of any other relevant change.

Jackie Finlay

Jackie Finlay works for the Welfare Rights Centre, Sydney

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There is no good reason at law why participants on 'Work For The Dole Programs' should be denied the basic right that all workers in Australia take for granted. When this matter was taken up with the office of the then Minister, the writer was told rather bluntly that it was not a priority for the government. A letter was subsequently received from the Department arguing that the above insurance cover should be adequate for participants and that in essence the points made above are 'unfounded'.

Alan Anforth

Alan Anforth is a Canberra barrister