

TOPIC 1 – INTRODUCTION

Intro

- In return for the right to exclusively represent workers, trade unions are subject to a high degree of internal regulation in their financial and administrative affairs in Australia
 - The union is typically the party in an issue rather than the workers
 - Its motivation is to maximise employment or wage levels for its members
 - Today, union membership levels are only at around 18%
- Compulsory conciliation and arbitration officially abolished in 2006
- Collective (or 'enterprise bargaining') instead developed from around 1993 and replaced the former system
 - The process differs from conciliation and arbitration
 - The outcome is an enterprise agreement
 - Good faith laws oversee the bargaining process
 - Single-enterprise agreements are favoured over multi enterprise agreements
 - The latter is an agreement that covers many business

Definitions

- All of them are based on something to do with the relationship between and employer and a worker

Broad:

- The norms, processes, and institutions by which the state regulates or mediates relations between employers and employed

Individual and Collective Aspects

- Individual aspects include:
 - The individual contract of employment
 - Legislative intervention in the individual contract
 - Eg: Occupational health and safety legislation and discrimination legislation

- Termination of the employment contract and remedies for breach at common law and under industrial legislation
- Collective aspects include:
 - Enterprise bargaining and agreements
 - The legal regulation of trade unions and employee organisations
 - The right to join a trade union or employee organisation or not to join one
 - Industrial action and its legal consequences
- Industrial relations is more collective
- Employment law refers to the individual

History of Australian Employment Law

- The weekly minimum wage is currently \$17.29 per hour
 - Equates to \$656.90 as a weekly figure
- The FWA is largely based on the corporations power in s 51
 - And to the external affairs power to some extent

The FWA

- Returned some of the rights lost under work choices
- It set up a system of enterprise bargaining underpinned by legislated and award employment standards

Constitutional Limitations of the FWA

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Qld Rail [2015]

- FACTS: The Qld government attempted to transfer rail employees into a statutory authority that was set up to make little or no profit
- ISSUE: Did the new entity satisfy the definition of trading corporation under s 51(xx)?
- HELD: The corporation was a trading corporation
 - It was set up principally to supply labour

United Firefighters' Union of Australia v Country Fire Authority [2015]

- FACTS: A clause in an enterprise agreement that restricted the number of employable fire-fighters was struck down

- Because it infringed implied constitutional protection of states
- ISSUE: Was the clause valid?
- HELD: The clauses were valid as a consequence of being agreed to in the enterprise agreement
 - Even though they infringed the limitation on their face
 - The clauses were effectively consented to by signing the agreement

Labour Law Institutions

The Fair Work Commission

- The FWC carries on the role of the former bodies of:
 - The conciliation and arbitration commission
 - The Australian industrial relations commission
- It makes and reviews modern awards
- It is invested with authority to facilitate the enterprise bargaining process
 - Has powers to facilitate good faith bargaining and the making of enterprise agreements: s 171 FWA
 - It also has some arbitral powers on some occasions during the bargaining process: s 235(2)
- The commission generally has power to:
 - Resolve unfair dismissal claims
 - Assist with the resolution of industrial disputes
 - Assist in the bargaining process for enterprise agreements
 - Approve enterprise agreements
 - Set the minimum wage
 - Review, vary and create modern awards
 - Conciliate general protections claims
- The functions of the committee are carried out by the president and the members of the commission
 - The president is invested with the power to manage the tribunal in an efficient manner
 - Certain matters cannot be carried out by single members and must instead be considered by the full bench
- The commission is required to perform its functions in a way that is fair and just, quick, informal and without unnecessary technicality

- It is not strictly bound by the rules of evidence: s 591
 - Costs are not generally awarded in tribunal proceedings

Unions

- Are the default bargaining representative for their members in enterprise bargaining negotiations
- Union reps may gain right of entry to workplaces
 - But this is subject to the required permit being granted by the FWC

The Federal Court

- Circuit court will likely hear initial proceedings in general protection claims
- Federal court may hear matters on appeal from:
 - The circuit court
 - The president of the Commission on a question of law

TOPIC 3 – THE COMMON LAW CONTRACT

Intro

- Sources of the rights and obligations:
 - General law
 - Legislation
 - Industrial instruments
 - Collective agreements
 - Minimum national standards
 - HR policies and manuals

Contract Formation Issues

- Offer, acceptance and consideration
- Lawful objects
 - Contracts can only be made about promises which are lawful to perform and otherwise consistent with public policy
- Intent to form legal relations
 - See *Dietrich v Dare* (1980)

Types of Contracts

- 3 types:
 - Fixed-term contracts
 - Parties expressly agree upon the term of the employment and the date of termination
 - Casual employment
 - Ill-defined term
 - Workers work under arrangements characterised by informality, uncertainty and irregularity
 - Ongoing/continuing employment
 - Most common form
 - Can be full or part time
 - Indefinite
 - Can be terminated by either party with proper notice

Sources of Entitlements

- Terms of an award (from a tribunal etc) are not automatically a part of an employment contract
 - *Byrne & Frew v Australian Airlines* (1995)

- The terms of the award must be expressly incorporated or implied by way of established tests at law

Contractual Terms – Express and Implied Terms

Express Terms

- The terms actually agreed to by the parties
- Can be overridden by any better terms that may apply by law because the employee is covered by an industrial instrument

Incorporation by Reference

- Express terms can be incorporated by reference into an employment contract (*Nikolich*)
 - If the contract refers to another document (such as a policy manual) then the terms of that document become express terms of the contract
- The question is what the intention of the parties was at the time of contracting

Saad v TWT Ltd [1998]

- FACTS: Employee told (over the phone) that when she moved to Wollongong she would have her old client list back
 - This did not occur
- ISSUE: Did the content of the representations form part of the contract?
- HELD: The statements were made in the context of offer and therefore contractual in nature

Riverwood International Australia Pty Ltd v McCormick

- F: M signed a contract under a new owner of his company that stated he would abide by all company policies currently in place, any alterations to them, and any new ones introduced
 - When M was made redundant after the company was sold to a new firm, he claimed that he was owed a large redundancy payment
- I: Did the contract have the effect of incorporating the manual by reference?
- HELD: The manual was incorporated by reference into the contract through the letter of offer

- The 'abide by' term meant acceptance (in a contractual sense) and continuing to observe
- The majority interpreted this as a mutual obligation as related to the company policies
- RULE: The document does not need to be expressly and specifically referred to in the contract in order to be incorporated

Goldman Sachs JB Were Services (GSJBWS) Pty Ltd v Nikolich [2007]

- FACTS: The employee claimed that the company had breached the HR policy when they fired him
 - They had given him a HR document at the time of hiring
- ISSUE: Whether the HR policy was incorporated by express reference into the employment contract
- HELD: The policy document in general was contractual because it was handed to employees at the time they were employed
 - One clause in the document was considered to be incorporated into the contract, another wasn't
- RULE: 2 step process:
 - Is the document incorporated into the contract?
- Look at how closely connected the document and the contract (or the circumstances in which the contract is made) are
 - What parts of the document are actually contractual in nature?
- The language used in the contract will influence whether a document is incorporated
 - Harder language such as 'will' and 'shall' make the document more likely to be incorporated
- Apparently now (because of Nikolich) almost all employment contracts state expressly that certain documents and terms do not form part of the employment contract in any way

Romero v Farstad Shipping (2014) (subsequently overturned on appeal)

- FACTS: The employee received a letter of engagement referring to her need to comply with the company policy
- HELD: The fact that the employee received a letter noting her requirement to obey the policy was enough to make the policy contractual

- The situation now
 - The court has a right to incorporate a policy into a contract when there is some sort of requirement of the employee to read the policy document
 - Or even (at a minimum) some reference to the document in the contract

Tony Salek and Woolworths Ltd [2007]

- FACTS: The employee, against company policy, had two beers at lunch before returning to work
 - He was fired on the spot but disputed the claim
 - HELD: The company policy on alcohol was incorporated into the employment contract
 - One case where the policy document actually benefited the employer rather than the employee

Terms Implied by Fact

- Parties may be presumed to have agreed to certain terms and conditions
- A term implied in fact is with reference only to the particular contract, not a legal obligation generally
- The term must be
 - Reasonable
 - Able to give business efficacy
 - Obvious enough to go without saying
 - Clear
 - Not inconsistent with an existing term in the contract

Terms Implied by Custom

- Also a very high standard
- Every contract in the industry must contain the term as a matter of custom

Terms Implied by Law

- The common law implies certain terms into every contract of employment
 - Unless they are expressly excluded by the parties

- If it is implied by law, it is implied regardless of the circumstances

UWA v Gray

- HELD: Necessity in the context of implied terms in law has a different shade of meaning

Variation of Terms

- In general, significant terms of an employment contract can only be varied by mutual agreement
- The employer can make some minor changes that an employee is obliged to accept
 - This is called management prerogative
- Significant changes require consent from the employee
- Terms from other sources like enterprise agreements do not need agreement from the parties as such

Quinn v Jack Chia (1992)

- FACTS: Q was originally employed under a contract where only 1 month notice had to be given before termination
 - He was employed to a new position and then terminated on the 1 month notice
 - He argued that his new contract required more than 1 month notice
- ISSUE: Had the contract been changed so substantially that it could be assumed that it was a whole new contract?
- HELD: The new position was exceptional and far reaching and beyond what was contemplated under the first contract
 - So the appointment was actually a new contract and not a variation of the old one
 - Therefore no notice before termination was stipulated and reasonable notice was required

Concut v Worrell (2000)

- HELD Where a manager was offered a formal contract to replace the original verbal contract, it was actually a variation of the contract not a replacement

Impact of Non-Contractual Sources of Legal Obligations

- Numerous sources of legal obligations:
 - Industrial instruments
 - Obligations imposed by legislation
 - Eg: long service leave, superannuation etc

Implied Duties of Employees

- Terms can be implied:
 - In law
 - A legal incident of a particular class of contract
 - In fact
 - A term necessary to give business efficacy to the contract
- Terms tend to not be implied if the parties have agreed to what appears to represent the totality of the agreement
- It appears to be possible to exclude implied terms under contract using clear and express language
 - *Duncombe v Porter* (1953)
- The intentions of the contracting parties are considered
 - *Castlemaine Tooheys v Carlton and United Breweries* (1987)

Australian and International Pilots' Association v Qantas Airways

- FACTS: A pilot claimed that he had depression, so Q asked for further information from him
- HELD: It was necessary to imply a contractual right of Q to require its pilots to provide medical evidence
 - The terms of the agreement were not details and were unclear about when Q could require employees to undergo med exams
 - The collective agreement was not exhaustive of the rights of Q

Duty to Obey Lawful and Reasonable Orders

- A lawful order is also one that is considered to be within the reasonable scope of the employee's employment
- Disobedience of a lawful and reasonable order does not always give rise to a right to terminate the contract

- It is only if the disobedience is considered to be fundamental to the performance of the contract of employment
 - Trivial disobedience will not give rise to the right

Lawfulness

- *Ottoman Bank v Chakarian* [1930]
 - HELD: The order to move the employee to the Constantinople was unlawful as it would place his life in danger
 - RULE: The lawfulness of the instruction is to be considered with reference to the scope of the contract

Reasonableness

- Decided on a case by case basis
 - *R v Darling Island Stevedoring and Lighterage*
 - Factors:
 - Nature of the employment
 - Established usages affecting the employment
 - The common practices existing
- *Australian Telecommunications v Hart* (1982)
 - Telecom could instruct one of its employees not to come to work dressed in a caftan and thongs

Sim v Rotherham Metropolitan Borough Council [1986]

- FACTS: Teacher ordered to cover the classes of the other teachers who had gone on strike
- HELD: Order was reasonable considering the nature of the employees' professional obligations
 - It went beyond merely imparting academic knowledge to students
 - Each teacher had a professional obligations to cooperate the running of the school

Consequences

- Differ between cases
- A serious breach may give rise to the right to dismiss the employee

- Serious breaches are those that go to the heart of the contract
 - Those that repudiate the contract or violate a fundamental term of the contract

Cooperation and Proper Conduct

- General implication that each party agrees to do whatever necessary to enable the other party to have the benefit of the contract
 - *Butt v McDonald*

Behaviour Away from Work

- Treated as if it were within the work environment
- Obligations for employees and employers both remain

Duty of Skill and Care

- Originally a common law duty, but is largely governed under statute nowadays
- An employee has an implied duty to act with reasonable care so as not to cause loss to the employer: *Lister v Romford* [1957]
- Implication that the employee has reasonable skills and is competent to carry out the work concerned
- If an employee represents that they have particular knowledge or skill, their negligence will be judged against that standard
 - Otherwise it is against the standard of a reasonable person
- The employer is vicariously liable for the acts of employees done in the course of employment
 - But the employee must indemnify the employer for losses incurred by the employee's negligence
 - Unless this obligation is removed by statute in some jurisdictions and circumstances
 - It is usually when the employer's insurance can cover it

Duty of Fidelity. Loyalty or Good Faith

- Both a contractual and an equitable fiduciary duty
- See *Blyth Chemicals v Bushnell* (1933)

- The breach comes to an end at the termination of the employment contract
- The duty does not prevent an employee from acting in their own best interests if they can do so without prejudicing the employer

Colour Control Centre Pty Ltd v Ty

- FACTS: Employee misled employer into believing that she was resigning from her work when she actually planned to set up in competition
 - Gained information in order to divert the business activities for her own benefit
- HELD: There was a breach of duty
- RULE:
 - Senior employees are likely to be under more significant duties

Examples of a Breach of the Duty:

- Setting up a business in competition with the employer
 - *Independent Management Resources v Brown* (1987)
 - Employee who competed against her employer for a tender was not in breach as she did not use confidential skills or techniques in applying for the contract
- Working for a rival business in the worker's spare time
 - *Hivac v Park Royal Scientific Instruments* (1946)
 - There was no general prohibition in the contract for working privately but the employees knew that they were harming the employer's business
- Earning secret commissions or otherwise profiting personally from the situation
- Conduct that is fundamentally incompatible with the nature of the position
- Using confidential information gained through employment without authorisation

Duty of Confidentiality

- The only duty that also applies after the termination of the contract

- Can be seen as a fiduciary relationship (the employee is the fiduciary for most purposes)
- You have to distinguish between:
 - Information that is in the nature of a trade secret
 - Information which is merely confidential
 - This information may be considered to be part of the employee's stock-in-trade (skills and knowledge that they have developed themselves) and can be used in other positions
 - Unless there is a contractual agreement to the contrary

NP Generations Pty Ltd v Feneley [2001]

- HELD: There was nothing wrong with the employee contacting her former clients after leaving her employment with P
 - The addresses that the employee had copied out of the customer list had to be returned to the employer
 - At least without a restraint of trade clause
 - However, the general information that the employee had written down about clients in her diary could be kept
 - Because it was part of her general knowledge that she had developed herself
- RULE: Information obtained from the employer specifically must remain confidential, however information gained as a result of work carried out by the employee can be transferred
 - So the skills developed by the employee as a result of the employment are able to be transferred to other positions

Faccenda Chicken Ltd v Fowler [1987]

- F: Employee set up a new business using similar vans and routes as the former employer, and also information relating to each specific customer
 - There was no restraint of trade clause
- I: Was the information about the former business confidential?
- H: The information was not confidential
 - It was not a trade secret
 - It was known at a junior level in the business

- No express instruction was ever given to maintain the confidentiality of the information
- During the employment, the information would have been protected
- R: The court will not imply the duty to prevent the employee from using information that is in their brain

Post-Employment Restraint Clauses

- Can restrict an employee in:
 - Time
 - Geography
 - Activity
- Employers can put a clause in the contract restricting an employee from establishing a rival business on leaving employment
 - Or from making use of certain information acquired during employment
- The employer may also prohibit the employee from working for a rival company while the contract is in effect
- The clauses must be reasonable to protect the legitimate interests of the employer
- *Curro v Beyond Productions*
 - The TV presenter employee agreed not to enter in any engagement that might interfere with her service agreement with the employer
 - She went to pursue a career with another TV network
 - Held that this was a reasonable restraint of trade
 - It was a common term in the entertainment industry
 - She had proper legal advice before entering into the contract

Ownership of Intellectual Property in the Employment Relationship

- Creations, inventions or product improvements by employees that are developed within the course and scope of employment are the property of the employer
 - Unless there is express agreement to the contrary
 - Or if the worker is an independent contractor

- The employer must show that the duties undertaken by the employee to create the product were within the scope of their employment
 - *Victoria University of Technology v Wilson* (2004)
 - Programs that the employee created at the behest of the employer, the employer owned the intellectual property in them
 - *University of WA v Gray* (2009)
 - The invention belonged to the employee as, even though he invented it at work, he was only employed for the purposes of 'research'
 - There was no express duty to invent anything
 - Nor was there any necessity to imply that a duty was to invent
- *Redrock Holdings Pty Ltd v Hinkley* (2001)
 - H did not have a fixed roster and worked whenever and wherever required
 - Programs developed by him at the employer's request belonged to the employer
 - Another program developed by H at his own initiative belonged to him

Employee Whistleblowers and Disclosure

- Only legislative protection for employees who disclose information that is in the public interest (such as criminal activity)
 - Whistleblowers protection Act 2000 (Vic)
 - Both protections and penalties apply for whistleblowers
- *Public Interest Disclosure Act 2013* (Cth)
 - Protects those who work in the public service

Implied Duties of Employers

Duty to Pay Wages – The Wages/Work Bargain

- The most important term for an employee and usually an express term

No Work, No Pay

- At common law, the employer is not required to pay unless the employee performs the work under the contract
 - Legislation now varies the rule for things like sick leave etc
- The employer may waive the right to insist that the employee performs the full range of duties
 - *Welbourn v Australian Postal Commission* (1983)
- Deductions made from wages that are not in accordance with the FWA are illegal

Automatic Fire Sprinklers Pty Ltd v Watson (1946)

- F: Employee wrongly terminated, but continued to turn up for work
- H: He was not entitled to wages for the hours that he was at work

Duty to Provide Work

- There is no general implied obligation to provide a certain amount of work
 - *Collier v Sunday Refereeing Publishing Co* [1940]
 - But it can be included in a contract
 - *Mann v Capital Territory Health Commission* (1981)
- A small portion of the workforce are able to argue that they are owed such a duty in exceptional circumstances
- Applied on a case by case basis

Curo

- HELD: The employer did not have a right to sterilise the work of the employee
 - Either give her some work or allow her to go somewhere else

The Duty of Mutual Trust and Confidence in Australia

Commonwealth Bank of Australia v Barker (2015)

- FACTS: B made redundant and blocked from his emails and work mobile number
 - One term of the contract contemplated redeployment for B rather than just dismissal

- Bank contacted him regarding new positions but did so on the work email so he never replied
- ISSUE: Was there a duty on the bank to not damage the trust and confidence of the employee?
- HELD: There was no reason to imply the term into the contract in law
 - It could not be implied on the basis of necessity
- RULE: The implied obligation of trust and confidence is not to be implied into all employment contracts in Australia
 - It is not necessary in all contracts of employment
 - An implication involving complex policy considerations such as this one is best left to the legislature
 - The door was left open to the implication of an obligation to act in good faith in the performance of contracts

Discussion of the *Barker* Case

- Important to understand that in the UK the obligation of trust and confidence is implied into all employment contracts
- The door was expressly left open for a duty of good faith to be implied into all contracts
 - So another court may be the first in 100 years to imply a new duty into contracts

Duty of Care for Employee's Health and Safety

- Common law duty to take reasonable care for the health and safety of all employees
 - But largely superseded by OH&S legislation now
- Closely related to the tort of negligence
- It is a duty to take a positive action rather than just refrain from acting dangerously
- Any psychiatric injury that is reasonably foreseeable imposes a duty on the employer to prevent it from developing
 - If psychiatric injury results, the employer may be responsible for anything that results from it
 - As they would be for physical injury

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