Topic 3- Rights And Responsibilities Under an Employment Contract

Types of Contracts:

Fixed Term Contracts:

- Where the parties expressly agree upon the term of the employment and the date of termination
- Can be regarded as having temporary jobs
- Often 2 year contracts and the worker works at the same place of employment for 2 years
- A true fixed term contract must run for the period specified at the time of entering the contract
- Annual leave and sick leave are given

Casual employment:

- An agreement to work for a specific period with no obligation to continue the relationship
- Same dismissal entitlement are granted
- Employees who work under arrangements characterized by 'informality, uncertainty and irregularity': ***Read v Blue Line Cruises Ltd (1996)***
- A casual is hired when and for as long as work is available
- Separate contract may exist for each period over which work is performed, even I there is some expectation that the employer will continue to offer work and the employee will accept
- Is unable to accrue any significant length of continuous service to obtain long service leave, even if they regularly perform the same work for the same employer: ***Neil v Cameron 1977***
- Failure to re-engage such worker does not amount to a 'dismissal' or 'termination' which would trigger the jurisdiction of a tribunal to review the employer's decision
- Casuals are generally not entitled to severance pay on redundancy: ***ASU v Auscript (1998)***
- Long term casuals with at least a year's regular service with the same employer will be entitled to a period of unpaid parental leave
- Awards and registered agreements require a loading (between 15 and 25% of the regular wage rate) to be paid to casuals in order to compensate them for the absence of the various benefits they must forego

Ongoing employment:

- Indefinite type of employment that can be terminated by either party by giving the proper notice at law
- Contracts may be terminated by employers

Contractual Terms

1. Contractual Terms
    - Terms implied in fact
    - Incorporation of Terms by reference
    - Terms implied by law (duties)
2. Duties of employees
    - Duty of obedience and not to engage in misconduct
    - Duty of Fidelity, Loyalty or Good Faith
    - Duty of Confidentiality
3. Duties of employers

4. Emerging duty of mutual trust and confidence- not in Australia since- *Commonwealth Bank of Australia v Barker*
5. Breach and Remedies

Express terms

- Terms actually agreed to by the parties, whether orally or in writing.
- Ostensibly negotiated terms are unilaterally determined by the employer and imposed on a 'take it or leave it' basis with limited scope for bargaining on peripheral matters
- Overridden by any better terms that may apply by law because the employee is covered by an industrial award or enterprise agreement
- May be incorporated by reference into an employment contract such as Human Resource Policy documents ***Goldman Sachs JB Were Services Pty Limited v Nikolich***
    - **Human Resource Policy and manuals**
        - ***Riverwood***
        - ***Goldman Sachs JB Were Services Pty Limited v Nikolich***
    - Issues
        - Whether the policy is incorporated into the contract of the employment so it becomes a contractual terms
        - The language used in policties
            - Is it contractual creating mutual obligations?
            - Is it just the feel good statements relating to values?
- Have been the source of employee rights and employers (where they have not complied)

***Riverwood International Australia Pty Ltd v McCormick* [2000] FCA 889**

Facts

- The plaintiff (McCormick) entered into an oral contract of employment in a packaging company. Company was owned by different entities associated with same principal. Business sold to unassociated company (MMP), which created separate corporate entity (Riverwood) to run the packaging systems division where McCormick worked. Riverwood then sent McCormick a letter of offer of employment. The letter was a 'take it or leave it' offer which contained matters regarding remuneration, superannuation, annual leave etc. relevantly it also contained a heading of 'company policies and practices', stating '**you agree to abide by all <u>Company policies</u> and practices currently in place, any alterations made to the them, and any new ones introduced'**. McCormick signed and returned the 'acceptance' of the letter of offer, which read 'I hereby agree and accept employment with Riverwood Packaging Systems Pty Ltd under the terms and conditions above.'

- Subsequently, **redundancy agreement** executed with the union and later placed in MMP's **'Human Resources Policies and Procedures Manual'**, a document which is continually updated over time. MMP and Riverwood sold later and redundancies resulted. McCormick made redundant after almost 37 years of work under various companies. He claimed a substantial redundancy payment was owed.

Trial

- Trial found letter was a loosely drafted and ambiguous. Held that an agreement to 'abide by' company policies should be construed as a contract made in good faith to impose the obligations contained in the policy of the company.

Appeal

- Decision held that the manual was expressly incorporated by reference into the contract of employment through the letter of offer. North J viewed the 'abide by' language as meaning 'acceptance and **continuing to observe'**. Thus it was a mutual obligation. Mansfield J held that the policy clause in the letter of offer was not clear on its fact and thus it was reasonable to assume that, as the drafter of the documents in question, the company intended to be contractually bound by both documents.

- In dissent, Lindgren J thought that plain meaning of letter was that the company sought the employee's acknowledgement 'of the right of management to manage', subject to the rights specified to employee in the letter.

Goldman Sachs JB Were Services Pty Limited v Nikolich

Facts

Fromer financial advisor developed a depressive disorder following a long dispute with management over the way clients were allocated. He was ultimately terminated. He claimed the company had breached his employment contract by not adhering to the provision of its 'Working With Us' (WWU) policy which set out a wide range of procedures and corporate HR values, including grievance handling procedures, the company's goals in providing a healthy and safe working environment, strict policies against bullying and harassment of staff, and a code of conduct dealing with 'integrity'.

Trial

Justice Murray Wilcox found that company breached the employment contract by not following the procedures in the policy.

Appeal:

Trial largely upheld. Some parts overturned. GSJBWS were still found liable in breach of **contract principally relating to the OHS clauses** in the WWU policy. Thus the language used on the clause were important – need to be certain and promissory

Romero v Farsted

Ms Romero received a letter of engagement referring to her need to comply with the policies. Taken to assume that the policy was part of the contract.
Full Federal Court decided that the policy formed part of the contract.

Tony Selak and Woolworths Limited
Mr Selak was a store manager for 20 years who had gone out to lunch with another employee of the store. He had drank two beers at this lunch then returned to work. Woolworths later sacked him on the spot for serious misconduct and for not complying with the company's zero tolerance policy.

Trial
This policy was found to have been incorporated into the contract of employment.

Appeal
Upheld trial decision. HR policy was used by the employer to dismiss an employee. Generally speaking an employer does not need to prove that an HR policy has been incorporated into the employment contract in order to take action against an employee as they can rely on other implied duties. However in most cases if the policy is part of the contract it strengthens the employer's claim against an employee

Implied or presumed Agreements:

Terms implied by law (Duties)

- Employees must obey all reasonable and lawful directions given by the employer, work with diligence and act in accordance with the principles of good faith and fidelity.
- Employers have a duty to protect the employees' health and safety
- Also called legal duties of employers and employees
- Terms which the common law implies into every contract of employment unless the are expressly excluded by the parties
- A term is implied in law wherever the common law determines that it ought to be included in a given category of contract, provided it is consistent with the terms otherwise agreed by the parties and with any applicable award or statute
- Terms implied by law are, in general, implied in all contracts of a particular class or which answer a given description
- Many of the terms now said to be implied by law in various categories of case reflect the concern of the courts that, unless such a term be implied, the enjoyment of the rights conferred by the contract would or could be rendered nugatory, worthless, or, perhaps, be seriously undermined
- For a term to be implied in law, it must be:
    - Applicable to a **defined category** of contracts.
    - Suitable in a way which allow it to be implied in **all** contracts in that category.
- The test of **necessity** is often used - a term can only be implied if its omission would entail that the rights of the parties under the contract were significantly diminished.

Terms Implied in Fact

- Terms presumed to have agreed to certain terms and conditions without them being spelled out

- Term that are implied from custom and practice
- Rely on a conclusion that the particular parties whose transaction is in question must be presumed to have agreed to the inclusion of a particular provision
- Terms will be implied to give the contract **business efficacy**

Criteria for implying a term depend on the type of contract: *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*

1. it must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it
2. it must be reasonable and equitable
3. it must be so obvious that 'it goes without saying
4. it must be capable of clear expression
5. it must not contradict any express terms of the contract

Test:

- Whether 'implication of the particular term is necessary for the reasonable or effective operation of a contract of that nature in the circumstances of the case

Terms Implied by usage or custom

Some terms may be implied by established custom or usage.... Other terms may satisfy the criterion of being **so obvious that they go without saying,** in the sense that if the subject had been raised the parties to the contract would have replied 'of course

- Test in **Byrne and Frew v Australian Airlines Ltd (1995) 185 CLR 410**
    - Contract of 2 baggage handlers. They were found stealing in the airport. They were dismissed for doing so. They claimed unfair dismissal. The right arose out of their award. However, the real issue was whether the particular right was part of the contract of employment for Byrne and Frew.
    - Court held that it was because the award is so important to employment contracts.
    - High Court overturned. Awards not part of contract employment unless expressly written into the contract. E.g. "such award is part of the contract"
    - 'Must be so well-known and acquiesced in that everyone making a contract in that situation can reasonably be presumed to have imported that term into the contractor'.
    - "Crystallized custom"
- Could a clause in an **award** be implied into the contract?
        - Clause 11(a): "Termination of employment by an employer shall not be harsh, unjust or unreasonable."
        - B and F dismissed for serious misconduct.
            - Did that breach Clause 11(a)?
              No implied term in this instance

Terms implied by law

- By law implied into every contract of a particular type
    - Otherwise known as 'implied duties of contract of employment'
        - Developed by the common law over time

- Implied into every contract of employment unless expressly agreed not to follow
- Origin – Master/Servant laws
- The test of **necessity** is applied to develop further implied duties at law – *CBA v Barker; UWA v Gray*
    - ***UWA v Gray***
        - Same as business efficacy test in implying terms in fact.
        - BUT – NECESSITY IN THIS CONTEXT HAS DIFFERENT MEANING.
        - It rests upon general considerations relating to policy rather than the test of necessity relating to the contract. This is because it must be implied into all contracts of a particular type as it has a much wider impact

Variation of terms:

- Like contracts, terms of employment contract can only be varied by mutual agreement (remember rights can come from other sources such as enterprise agreements)
- Employer may make minor changes that the employee is obliged to accept. This is often referred to as 'management prerogative'.
- If the employer alters an employee's terms and conditions significantly without the employee's agreement, the employee may be justified in resigning immediately on th grounds that the employer has repudiated the contract: **Quinn v Jack Chia (1992)**
    - Variation of employment contract may be so substantial that it may be argued that the old contract was terminated and replaced by a new one
- Significant variation to the contract (i.e. a change in role) may amount to a brand new contract: ***Quinn***
- Conversely, Where a manage is offered a formal contract to replace a verbal contract, the result is a variation not a substitution: **Concut v Worrell (2000)**
- Unless the employer is a public sector authority with statutory power to set and change employment conditions as it sees fit, variations to contractual right and duties may not be imposed unilaterally
- Unless expressly authorized to do so the employer cannot transfer a worker t oa different job or to a lower grade, impose a pay cut or alter agreed hours of work
- Certain amount of flexibility is implicit in the employer's power to give 'lawful and reasonable' instruction as to how work is to be performed
- Employers may include an express power in the contract to vary certain conditions

Quinn v Jack Chia

Facts

Jack Chia employed Quinn in January 1985 as an assistant to the construction manager of the Chia Group. The contract was terminable by either party on month's notice. In August 1985 Quinn appointed to the positions of Construction Manager and General Manager at a substantially increased salary. In March 1987, he was given one months notice of termination. He sued for breach, arguing that the one month provision did not apply as he was entitled to 'reasonable notice' of termination.

Held

VSC held that the change of position when he was appointed as Construction and General Manager was exceptional and far reaching and went beyond what was contemplated under the first contract.

The appointment was in fact a new contract and not a variation of the old contract. An implied term of any contract of employment does not specify any notice period is that the employer shall give 'reasonable notice' of termination. Reasonable depends on a range of factors including seniority of position, age etc.

The court said that the reasonable notice in the circumstances was 12 months' salary, subject to Quinn's duty to mitigate his losses.

Illegality and Public Policy:

- A contract may not impose penalties upon each other in the event of a breach of contract
- An employment contract may be unenforceable to the extent that it requires the performance of an illegal act or is linked in some way to an illegal conduct
- If illegality exist, a party may be precluded from taking the benefit of a statutory entitlement or procedure
- Courts have allowed worker compensation claims by sex industry workers and illegal migrants on the basis that neither the relevant legislation nor public policy considerations required those actions to fail.

Other sources of terms and conditions and legal obligations in employment:

- Industrial instruments covering groups of employees and their employers in the same industry or enterprise i.e. **Awards and certified agreements**, which deal primarily with terms and conditions of employment and pay rates;
- Obligations imposed by legislation i.e. Long service leave, superannuation guarantee payments, equal opportunity, occupational health and safety, minimum notice, unfair dismissal

Awards:

- Impose obligation upon employers rather than worker- deal with matters such as payment of wages and allowances, provision of leave, notice of termination of employment and severance pay
- No way of obtaining compensation if loss is suffered as a result of an award breach, especially one that does not involve the payment of money and nor is there provisions for the grant of an injunction to restrain future breaches.

- Existence of a contract of employment is a necessary prerequisite to the operation of an award obligation as between employer and employee
- Award obligations operate as minimum standards other than in the case of 'paid rates' awards: ***Comalco Aluminum (Bell Bay) Ltd v O'Connor (No 2)*** (1995)
- A contract that offers less than award conditions is clearly unenforceable (TCFUA v Givoni Pty Ltd 2002) regardless of whether the worker has genuinely consented to the arrangement
- An employee cannot be estopped from asserting their award entitlements even if they have led the employer to believe they will accept below-award conditions and the employer has relied on that to their detriment: ***Walsh v Commercial Travellers' Association 1940***

Do awards become terms of the contract?

- It is open to parties to agree expressly for this to be the case
- Such agreement should not be inferred because a written contract or letter of appointment refers to the employee's terms of employment being 'governed' or prescribed' by an award: ***BHP Iron Ore Pty Ltd v AWU 2000***

What if there is no express agreement?

- P may claim that as the award provision was a term of the employment contract, a breach of the award amounts to a breach of contract: ***Gregory v Phillip Morris Ltd (1988)***
    - The above view was rejected in Byrne v Australian Airlines Ltd (1994):
        - Damages cannot be obtained for breach of an award which has not expressly been given contractual force: ***Byrne v Australian Airlines Ltd***
- A term requiring incorporation of at least some award provision should be implied into all employment contracts as a matter of law
- Incorporation of award terms could not be seen as a necessary incident of the employment relationship

Registered Collective Agreements

- an agreement between an employer and a labor union produced through collective bargaining: 'labor contract' at contract
- Prevails over a contract unless that contract is more beneficial to the employee
- Terms of such an agreement will not form part of the contracts of those to whom it applies unless expressly incorporated: ***Christie v Qantas Airways Ltd (1996)***
- Once an agreement is made, it entirely displaces the employment contract between the parties: ***Hastings v JH Corporate Security Services Pty Ltd (2000)***
- Contract style remedies are enforced of such agreements including damages and injunctive relief

Unregistered Collective agreement:

- Arrangements negotiated by management and labour which have never been formally lodged with or certified by an industrial authority
- Must be shown that the incorporation of the terms flow from the implied agreements of the parties in question: ***Gregory v Phillip Morris Ltd 1987***
- Not all terms of a collective agreement will be suitable for incorporation into individual contracts of employment
- Provision relating primarily to collective labour/ management relations or to procedural matters will not be considered sufficiently 'individuated' to warrant the status of individual employment obligation: ***Young v Canadian Northern Railway Co 1931***

Doctrine of Incorporation of Terms by Reference

- Goldman Sachs **JB Were Services Pty Limited v Nikolich [2007] FCAFC 120**
    - N given a booklet entitled "Working with Us" which outlined policies (eg with culture, code of conduct, grievance procedure, OH&S)
    - Firm would "provide and maintain, as far as practicable, a working environment that is safe and without risk to health".
        - Was this incorporated into the contract?
            - Engaged as investment advisor- given letter of offer setting out pay, leave entitlements and importantly a booklet when given the letter of offer entitled 'working with us' outlining GS's policies, code of conduct, grievance procedure, and OHS.
            - In this booklet, it states, the employer would as far as practicably possible maintain a safe workplace- Nikolich had serious disagreements and subject to distress at work- he made a complaint with regard to the grievance procedure and the complaint was not properly investigated- suffered psychological problems and was let go- could not get another job as a result of these issues.
            - Bought several claims- breach of contract- was the booklet and the policies regarding a safe workplace incorporated into the contract?
            - First instance held they were incorporated into the contract.
            - Appealed that the OHS part was not incorporated.
            - FCFCA held that this provision **was incorporated** into the contract.
            - The letter of offer did not refer to the booklet, but as it was given with the letter of offer.
            - Also looked at the wording of the terms of the booklet and were written in a contractual manner giving rise to obligations on both the employer and the employee.
            - Ultimately implied into the contract.

The Common Law of Employment and Implied Duties

- Plays a major role in 'fleshing out' the employment relationship by imposing obligations on both employer and worker
- Common law is a source of implied contractual obligations
- They can be excluded by express agreement
- Parties to an employment contract have not adverted to a particular matter and made express provision to the contrary, the common law may imply a term to govern that issue, provided also that the term is not inconsistent with the provisions of any relevant statute or industrial instrument
- Existing implied terms are said to reflect 'the concern of the courts that, unless such a term be implied, the enjoyment of the rights conferred by the contract would or could be rendered nugatory, worthless or seriously undermined: ***Byrne v Australian Airlines Ltd (1995)***

Implied duties of the Employee

- Common law implying duties and obligations to both parties once the relationship commenced.
- Employee has more onerous duties as the **employer is the more vulnerable** party as the employee has access to IP, client base, information they are acquiring etc.

1. Duty of Obedience
2. Duty of Co-operation and proper conduct
3. Duty of skill and care
4. Duty of fidelity, loyalty or good faith
5. Ownership of intellectual property in employment relationship
6. Duty of confidentiality

The Duty to Obey Lawful And Reasonable Orders

Basically, orders must be obeyed by an employee if they are:

1. Lawful
2. Within scope of employment
3. Reasonable

- The principal authiruty for the view that contracts of employment must be lawful was in the HC decision of ***Adami v Maison de luxe Ltd*** "the lawful commons of an employer which an employee must obey are those which fall within the sope of the contract of service and are reasonable"
- This is the hallmark of the employment relationship and the hierarchal nature of the employment relationship.
- Inherent to master and servant relationship. Must obey all reasonable and lawful requests.
- General duty is imposed into every employment contract to obey the employer's lawful and reasonable directions: ***R v Darling Island Stevedoring Lighterage Co Ltd; ex parte Halliday and Sullivan (1938)***
- Lawful order: the employer cannot demand performance that would involve unlawful behaviour or expose the worker to personal danger: ***Bouzourou v Ottoman Bank 1930***
- Employee can only engage in tasks which 'properly' appertain' to the job which they have been engaged to do: ***Commissioner for Government Transport v Royall (1966***)

R v Darling Island Stevedoring & Lighterage (1938)

- The lawful commands of an employer, which an employee must obey, are those which fall within the scope of the contract of service and are reasonable. "If a command relates to the subject matter of the employment and involves no illegality,

the obligation of the servant to obey it depends at common law upon its being reasonable. But what is reasonable is not to be determined in vacuo (in a vacuum). The nature of employment and established usages, the common practices which exist and general provisions must be considered. -

***Australian Telecommunications Commission v Hart* (1982) 43 ALR 165.**

- **Held** that it was reasonable for Telecom to instruct one of its employees not to come to work dressed in a caftan and thongs.

***Pettet v Readiskill LMT Mildular* [2001] VSCA 21**

- **Held** it was reasonable for the employee to comply with an express term in the contract with respect to directions as to the use of the time clock at work

- Employees have a broader duty to 'co-operate' with their employer
- Duty to co-operate is one implied as a matter of law into every contract
  - Where employees are concerned, the notion of co-operation plainly extends to avoiding any conduct which undermines the employer's business
- Employees must not be insolent towards or swear at supervisors, assault other workers, or engage in acts of dishonesty or theft at the employer's expense: ***Farley v Lums 1917; Quinn v Australian Stevedoring Industrial Authority 1960; WD HO Wills Ltd v Jamieson 1957***
- Conduct in the employees private life may constitute a breach of duty: ***Orr v University of Tasmania (1956)***
- Employees are obliged to provide truthful answers to questions put to them by employers provided they are reasonable and fair in the circumstance: ***Bell v Lever Bros (1932)***
- Employees may be dismissed for untruthfully answering a question put to them prior to being offered employment: ***Lane v Arrowcrest Group Pty Ltd 1990***

Adami v Maison de Luxe (1924) 35 CLR 143

Adami held a position at a workplace and also ran a bookmaking business which was very busy on a Saturday- A delegated some work to another person because of his interest in another business, and was summarily dismissed as a result. Dismissed on the spot for misconduct in not obeying directions. Sued to recover wages had he been given a reasonable time for notice.

Failing to be there on the Saturday showed he did not want to be bound by the employment contract and therefore he was dismissed as a result- he deliberately and intentionally disobeyed and so could be lawfully terminated. Note 1924 case- in this day and age people do have other obligations- clear principle can still be taken away for obligation to obey lawful directions.

HC Held that the plaintiff's conduct was clearly in beach of the duty to obey orders and that summary dismissal was warranted.
Isaacs ACJ said "any conduct of an employee which is not merely inconsistent with some particular obligation involved, and possibly not striking at the root of the matter, but which is inconsistent with the relation established, is just cause for the employer's termination of the relation.

Pastrycooks, Employees, Biscuit Makers Employees & Flour and Sugar Goods Workers' Union (NSW) v Gartell White* (1990) 35 IR 70 – *page 191 do NOTES
Decision of the Industrial Commission of NSW.

Issue of dismissal. About to leave work, they had clocked off. They asked to do late delivery and refused. Later dismissed.

Held: Didn't justify summary dismissal. The point wasn't lawfulness. The point was consequences of refusing. One should not receive such repercussions for refusal to make late delivery. Conduct justifying summary dismissal arises where the employee **willfully** failed to obey the lawful and reasonable orders of the employer in such a way that amounts an intention by the employee no longer to be bound by the central condition of employment. In assessing an employee's intent consideration needs to be given whether they are acting reasonably.
Court said the employee clearly didn't have an intention to terminate relationship, they merely just wanted to go home for the day. Moreover, it was not part of the contract of employment to do work outside work hours.

In *The Ottoman Bank v Chakarian* [1930] AC 277
Employee was asked to deliver a confidential letter to the a country where his life could have been in danger. He asked to be transferred to a branch outside Turkey but he was refused.

Brough action for wrongful dismissal .

Held: the Privy Council held that an employee can refuse to transfer to a geographical area where the employee would be at personal risk. It was implicit to their Lordship's reasoning that the order was not lawful because it was also not reasonable.

***Sim v Rotherham Metropolitan Borough Council* [1986] 3 WLR 851**
Facts: Teachers refused to "cover" classes when other teaches were absent from work, as part of an industrial campaign (a strike).

Issue: Was refusal reasonable?

Held: Found that teachers' role extended beyond imparting academic knowledge to students, and obliged them to comply with cover arrangements. The headmaster is entitled to require teachers to do work other than that for which they be engaged, provided that the request is reasonable.

Note that teachers have a wider obligation when comparing ***Pastrycooks***

Woolworths Ltd (T/as Safeway) and Cameron Brown **PG 204**
Facts: Butcher, commenced in 1996. Commenced working fulltime in 2000. In 2002 commenced TAFE course but continued working at safeway on casual basis. In 2002 had eyebrow ring inserted and required to where band-aid whilst working. Safeway argued breach of dress policy.

Breach of employees policy as basis to terminate employment agreement.

- Examples of reasonableness-
    - Direct an employee to use a time clock when recording their hours
    - To undertake a medical examination to determine if they are fit for work
    - To impose dress standards on employees
    - A number of cases demonstrate these lawful directions

Duty of cooperation

- Implied as a matter of contract law
- Implicitly underpins interpretation and application of other duties such as duty of obedience, and duty of loyalty
- However, issue as to whether it is established as a separate duty whether it underpins other duties
- Established as a general rule of contract that each party agrees by implication to do all the things necessary to enable the other party to have benefit of the contract: *Butt v McDonald* (1896)

Duty Of Care And Skill

- Employee is obliged to perform work with a reasonable degree of competence or skill, the requisite standard varying according to the type of work in question
- Duty operates only in relation to any skills which the employee makes no claim to expertise in relation to the work which they have been asked or instructed to do.
- Where **no claim** is made to expertise in relation to the work which they have been asked or instructed to do, the employer cannot complain if the work is done incompetently by the standards that might be expected of one skilled in the relevant craft.
    - Such unskilled worker will possess the skills matched to the standard of reasonable person.
- All employees must **exercise reasonable care** not to cause injury or loss in the course of performing their work***: Lister v Romford Ice and Cold Storage Co Ltd (1957)***
- Employee must indemnify the employer for losses he caused due to his wilful negligence***: Boral Resources (Queensland) Pty Ltd v Pyke (1992)***; Insurance Contracts Act 1984 (s 66)
- Some Legislation prevents employers insurer from seeking indemnity from the employee unless the latter's actions were willful. Hence liability cannot be subrogated to the employee by the insurer: ***Rowell v Alexander Mackie College of Advanced Education(1988);*** NSW and SA and NT legislations.
- Where the employee is an officer of a corporation (e.g. director) there is a statutory duty to exercise the degree of care and diligence that a reasonable person in a like position in a corporation would exercise in the corporations circumstances: s 180 Corporations Act (2001)

Duty of Mutual Trust and Confidence

- The implied term means that both the employer and employee should behave in such a way as to not undermine the employment relationship
- *Commonwealth Bank of Australia v Barker* [2014] below - found that an such implied term is not part of common law contract of employment in Australia.

Duty of Fidelity, Loyalty or Good Faith

- Employee must serve employer faithfully and act in the interests of the employer and not against them
    - This fundamental duty is variously expressed as a duty of fidelity , a duty of loyalty, a duty of to act in good faith or duty to provide faithful service. In essence, the employee must serve the employer faithfully and act in the interests of the employer and not against them. This is both a contractual and equitable fiduciary duty. Although the extent to which a particular employee has fiduciary obligations depends on the employee's seniority and the particular responsibilities of the positions). ***Blyth Chemicals v Bushnell*** **(1933) 49 CLR 61**
- Employment relationships are fiduciary in nature: Hospital Products Ltd v United States Surgical Corp (1984)
- Employees have a duty to avoid situation in which there is any possibility of conflict of interest
- It is legitimate for the parties to pursue their own self-interest, at least within the bounds of the obligations they have accepted: Finn 1989
- Whilst it is appropriate to assign this duty to proper employees (i.e. one in a senior managerial role), it is inappropriate to apply such standard to an ordinary employee who is paid to do nothing more than provide labour. Employees who misappropriate their employer's property or dishonestly secure benefits at their employers expense may well have a 'fiduciary' obligation to account for their gains imposed upon them: ***Angus v Coote Pty Ltd v Render 1989***
- Employees are permitted to consider their own self interests when negotiating their contract of employment: ***Stoelwinder v Southern Health Care Network (2001); FSU v Australian New Zealand Banking Group Ltd (2002)***
- Employees must do nothing to undermine their employer until after the employment relationship has come to an end.
- To take the employers clients to switch to the new business or to remove, copy or memorise any of the employers valuable information or recruit other staff who are presently working for the same employer is unlawful: ***Wessex Dairies Ltd v Smith 1935; Schindler Lifts Australia Pty Ltd v Debelak 1989***
- Duty comes to an end with the termination of the employment contract.
- No implied term in the contract that the employee must not compete with the employer after he or she leaves the employment. Restrictions may be imposed by:
    - A restraint of trade clause in the contract
    - The duty of confidentiality, which protects certain confidential information that belongs to the former employer
- What is meant by serious misconduct in the context of duty of loyalty, fidelity and good faith
    - Conduct which in respect of important matters is incompatible with the fulfillment of an employee's duty, or involves an opposition, or conflict between his interest and his duty to his employer, or impedes the faithful performance of his obligations, or is destructive of the necessary confidence between employer and employee, is a ground of dismissal ***Blyth Chemicals v Bushnell*** **(1933) 49 CLR 61**

- Confidential information will survive the employment relationship. The equitable duty of confidence extends depending on the information. Trade secrets will apply, general information will not attract the equitable duty of confidence.

Some examples of breach

- Setting up business in competition, or work for rival business in spare time
- Soliciting clients during employment
- Earning secret commissions
- Conducting fundamentally incompatible with the nature of the position, for example teacher having sexual relationship with student (*Orr v University of Tasmania* (1956) Tas sr 155.
- Unauthorized use of confidential information during employment

The duty stops operating when contract of employment ends – can solicit clients in absence of restraint of trade clause.

***Blyth Chemicals v Bushnell* (1933) 49 CLR 61**

Facts

Senior manager who worked for chemical company in Vic. He went and bought another company which was manufacturing something in the same industry but not with same chemicals. Company was going insolvent so he obught for good price. Directors found out and thought he was trying to set up in competition. Dismissed him when he refused to sign contractual obligations refraining him from competing against the original company. Company argued they may enter the industry later.

Held

Couldn't find that he had breached anything. It was not in the same direct industry. Didn't necessarily compete with the company he originally worked for. Didn't breach duty of fidelity. Court said you cant act on anticipated breach.

Stoelwinder V Southern Health

The applicant, Stoelwinder (S) was CEO of Southern Health. He sued to recover money owed, under the contract, namely the cash value of sick leave not taken during employment under a clause in contract with his previous employer, Monash Medical Centre (which amalgamated with other hospitals to forth SH)

Issue as to whether it is enforceable and, if it is, whether S must disgorge the benefits to which he is entitled to under the provision.

Clearly the employee is in a fiduciary relationship. Issue as to whether S had a duty to disclose the amount owed to him

Held he did not have to disclose such information. The employers power, in particular through obligations of faithful service, does not extend this far. Thus S was entitled to his money. "It would be unjust to impose on the employee a duty of disclosure"… "it would be unjust because the negotiations are conducted at arm's length, and each party should expect the other to be selt-interested.

Employees are likely to breach this duty where they:

- Set up business in competition with the employer, or work for a rival business in their spare time: ***Hivac v Park Royal Scientific Instruments 1946***
    - Issue: whether, in undertaking the activities, the worker is 'knowingly, deliberately and secretly doing in his spare time something that would inflict harm on the employers business?
- Earn secret commissions or otherwise profit personally from the position
- Conduct themselves in a way that is fundamentally incompatible with the nature of the position e.g. a teacher having a sexual relationship with a student

Colour Control Centre Pty Ltd v Ty **(1995)**

Facts

Concerned a claim by the Plaintiffs against 2 former senior employees and their company, formed against the plaintiffs. They also diverted opportunities away form the company they worked for, for their own benefit.

Held

Ms Rando clearly breached her fiduciary obligations and her implied duty of fidelity to the P's. Ms Rando became aware only by reason of her position as employee and when so employed, thus it was an opportunity available to the plaintiffs.

Damages were calculated and quantified on the basis of the loss of the chance. Thus it is the breach of profits they would have made if they had secured and retained the work themselves.

Preparing to compete – *Independent Management Resources v Brown* [1987] VR 605
Employee who, whilst still with employer, made plans to compete against it fir a tender contract. She left employement and was successful in obtaining tender. There was no breach as the employee relied on her generic skills and did not use techniques or information of a confidential nature in applying contract in her own right.

Duty of fidelity ends with termination of employment contract. No implied term in contract that the employee must not compete with employer after he or she levaes the employment. However can be r**estricte**d by:

- Restraint on trade clause in contract
- Duty of confidentiality that protects certain confidential information belonging to the former employer

Duty Of Confidentiality

- Protects information that is not publically available, information that is jealously guarded.
- Applies during employment and therefore ***overlaps with the duty of fidelity***
- Employment relationship is a fiduciary relationship whereby duties extend to avoiding breach of confidence and not profiting from his or her position there is no breach of confidentiality if disclosure is made to the proper authority: ***Lion Laboratories v Evans 1984***
- An employee must not improperly use any information acquired in their capacity as an employee, or to gain advantage for themselves or someone else, or to cause detriment to the corporation: s 183 Corporations Act 2001
- When the employment relationship comes to an end, so does any fiduciary obligation arising out of that relationship: ***Attorney-General (UK) v Blake 1998***
- Imposes the requirement of confidentiality (non-disclosure) upon the employee on certain information, documents, intellectual property
    - misuse of secret information
    - I.P
    - Customer/Client lists
- BASIC RULE IS THAT EMPLOYEE CAN KEEP AND EXPLOIT INFORMATION THAT IS CONSIDERED THEIR STOCK-IN-TRADE OR KNOW-HOW
- Where the employer has made no particular effort to prevent information from freely circulating within or outside the enterprise, acclaim against an employee who remembers that information and subsequently uses it will fail: ***Faccenda Chick Ltd v Fowler 1986***

Faccenda Chicken v Fowler [1987] 1 CH 117,
Facts
F sold chicken to wholesalers and F was a sales manager- F had idea of how to expand business by selling directly to people and wholesaling which was adopted and was highly successful. In completely unrelated circumstances to the case, F was arrested and after trial resigned. Once he resigned he set up own chicken business in a similar way to F. He advertised for staff, and half the staff of F went to work for fowler. He went to the same places as F had been going to, used similar routes and similar vans directly competing with former employer Faccenda.

Proceedings were bought for using confidential information by using the same route and clientele of Faccenda which was bought by equitable duty of confidence. Faccenda had to show this information was confidential, **and at fist instance it** was held the employees and Fowler breached the duty.

Held on appeal

The English CoA held the information was not a trade secret or a material which was of a highly confidential manner. Knowing where chickens were sold was not information of this type, it would be acquired elsewhere. Information was given to Fowler and other employees so they could do their job. They were not told to keep it a secret. The court also held that the duty whilst employed it quite broad, but once employment terminates it is quite narrower, but in Del Casele questions this proposition- in that case they NSW CoA held that the duty does not narrow, rather the equitable duty of confidence takes over. Once it is ended the court needs to look at what information is confidential.

Mr Fowler could use the information he learnt about the company after he left to profit from it as long as it was from his memory. If he had copied down the information in a document then this document would be caught by implied duty of confidentiality post employment. The court would ordered the document be given and an account of profits.

The CoA listed the following factors that lead to a clear conclusion that neither the information about prices nor the sales information as a whole had a degree of confidentiality.

1. Sales information was not confidential
2. Information about prices not severable from sales information
3. Neither the sales information was sensitive or secretive
4. Sales information was acquired by workers so they could do their work. Such information could be committed to memory
5. Sales information was generally known among the van drivers who were employees – not top level management
6. No evidence of express instructions that the sales information was confidential

- Obligation does not extend to cover all information which is given to or acquired by the employee while in their employment, duty may not cover information which is only confidential in the sense that an unauthorized disclosure of such information to a 3rd party while the employment subsisted would be a clear breach of the duty of good faith: ***Faccenda Chick Ltd v Fowler 1986***

Wright v Gasweld Pty Ltd

Has challenged the *Faccenda* limitation on the use of a restrictive covenant. Judgment factors the view that a restraint can be used to prevent use of information that does not fall into the category of trade secret.

Facts
Restraining former employee who set up in business in competition with her.

Kirby J set out list of factors for identifying truly confidential information:
- How much skill and effort was expended to acquire the information?
- Has the employer jealously guarded the information?
- Did the employer communicate the confidential nature of the information to the employee? Must prove secrecy
- Is there any industry practice in keeping this kind of information confidential?
- Has access to the information been restricted only to senior staff?

Court held that only trade secret, or the exercise of improper personal influence over customers, which can be protected or restrained after the termination of employment by an express covenant appropriately designed for those purposes.

NP Generations Pty Ltd (Trading as LJ Hooker) v Fenely **[2001] SASC 185**
Facts
P resigned from LJ and set up a new business in partnership. She contracted many f her former clients, whose properties she managed, and they placed their business with her. LJ claimed damages on the ground that she had breached confidentiality. Employee copied out significant portions of LJ's rent roll in the address book.

Held
Nothing wrong with employee contacting former clients after she had left employment. However judge did order former employee to give back her 'address book' to LJ Hooker. Court said that if the 'address book' was kept by the former employee, the rent roll would not be protected. The rent roll had been compiled over many years by employees working for LJ. It was effectively a customer list. However, former employee was allowed to keep her 'diary' even though it contained some information relating to previous clients. this was because the 'diary' was considered to be part and parcel of the employee's personal knowledge and know-how or personal 'stock-in-trade'.

The common law will not restrict a former employee in using their own skills to earn money after employment

- Even where an employer can show some confidential material has been taken, this does not guarantee that a remedy will be forthcoming from a court:
    - No injunctions are granted unless the employer can specify the precise material that is to be covered by the order: ***Secton Pty Ltd v Delawood (1991)***

- To claim damage in respect of breach, the employer must be able to show:
    - that any loss of business it has suffered to a rival firm that now includes the ex-employee is properly attributable to the information that was misused, rather than the personal expertise of the ex-employee or other in the rival business: ***Universal Thermonsensors Ltd v Hibben 1992***
- **Ansell Rubber v Allied Rubber [1967] VR 37**
    - Ansell used machines to develop rubber gloves, the design of those machines was a secret and employees were obliged to keep people away from the factory. Ashcroft was an engineer and established a competing business using a machine to make rubber based on a machine he had used and was experienced using whilst working for Ansell. Was assisted by another Ansell employee who later resigned. Found to be in breach of the duty of confidence, and the liability also attached to the competing company they had set up. They used tightly held, secret information that was being guarded. One of the orders the court made was that they had to dismantle the machine they had created and bring it to Ansell so they were satisfied the machine never existed.
        - Compare this to general know how- the kind of information you could pick up from an employer and a competitor.
- **Del Casale and Ors v Artedomus (Aust) Pty Ltd [2007] NSWCA 172**
    - In Del Casale the question was the source of a building stone which accounted for 30% of A's business. D was terminated and he and another collegue set up another business, in doing so they travelled to Italy to source the stone. They were able to do so and set up a rival company to import the stone. The question is did D breach the equitable duty of confidence by going to Italy and finding the source of the stone. The court held it was not a breach was not that type of information and was general know how. Anyone could have gone to ital and took the time to find the stone could have found it with general know how.

'Whisleblowers' disclosure

At common law, it is a breach of confidentiality and loyalty for an employee to disclose information about her employer.

Corporations Act 2001 (Cth):

- s 183 states that they must not improperly use any information acquired in their capacity as an employee (or as a director or officer) to gain an advantage for themselves or someone else, or to cause detriment to the corporation
- s 184 imposes a criminal penalty for dishonest use of information or position

Intellectual Property In The Employment Relationship/Inventions

- Creations, inventions or product improvements by employees that are developed <u>within the course and scope of employment</u> are the property of the employer, unless there is express agreement to the contrary: ***Cameron v Potter Partners Group Ltd 1989***
- Independent contractors are generally not subject to this unless they expressly agree otherwise in a contract

UWA v Gray **[2009] FCAFC 116**

Facts:

Dr Gray, a professor of surgery at UWA invented treatment method for tumours affecting people

Issue:
Should Dr Gray or his employer benefit from the proceeds of the invention. G set up company to hold intellectual property rights in the invention.

Held:
Full court found in favour of Gray. There is 'no duty to invent' implied in the contract of employment. "The mere existence of the employer/employee relationship will not give the employer ownership of inventions made by the employee during the term of the relationship. And that is so even if the invention is germane to and useful for the employer's business, and even though the employee may have made use of the employer's time and resources in bringing the invention to completion. Certainly all the circumstances must be considered in each case, but unless the contract of employment expressly so provides, or an invention is the product of work which the employee was paid to perform, it is unlikely that any invention made by the employee will be held to belong to the employer"

- To claim any patent the Employer must establish:
    - The duties of the employee in creating the intellectual property fell within the scope of their employment: ***Victoria University of Technology v Wilsons (2004)***
    - Making the invention fell within the duties that the employee had been hired to perform: ***Victoria University of Technology v Wilson 2004***
- In the absence of express agreements, a term is implied that any invention created by the employee in the course of employment is to be held on trust for the employer, to whom any patent obtained must then be granted on request: ***Sterling Engineering Co Ltd v Patchett 1955***
- Regardless of not having an express agreement, employees are bound by a duty of fidelity during the period of the employment relationship not to damage the employer's interests by disclosing or using information acquired in the course of employment: **Gooley v Westpac Banking Corp (1995)**

Exception

- Moral rights accorded to creators of copyright material: Copyright Act 1968 (Cth) Pt 9
- Can only be exercised by individuals, not firms, and remain with creators even if they do not own, or have transferred away, the copyright in their work
- Allow creators to insist on being recognized as the authors of the work they create: the right of attribution and to object to derogatory treatment of that work, including mutilation or alteration.

Post Employment Restraints: Restraint of trade clauses

- Restrain of trade caluses expressly included in contracts of employment to restrain employees after they leave employment
    - Can also operate during employment
    - TEST – WHAT IS REASONABLE TO PROTECT LEGITIMATE INTERESTS OF EMPLOYER
- Information somewhere in-between trade secrets and general knowledge- at common law they are unlawful by restricting freedom to contract, use their skills and make a living- will

only be upheld if employer has legitimate interest in keeping the restraint of trade clause in, and if the scope of that clause is not too broad (how long it extends, when it applies etc)

- Employers may protect themselves against unfair competition from former employees by including a clause in the employment contract restricting an employee from establishing a rival business on leaving employment, or from making use of certain information acquired during employment.
- Employer may prohibit a current employee from working for a rival company whilst the contract is on foot with the aim of preventing an employee from every getting into a position from which to threaten the employer with the use of secret information.
- An employer cannot use post-employment restraints merely to stifle competition as such.
- Covenants in restraint of trade are unenforceable unless shown to be reasonable in the interests of the parties and of the public: ***Nordenfelt v Maxim Nordenfelt Guns Ammunition Co ltd (1984)***
- Employers may impose a post employment restriction on:
    - employees who can be shown to have had access to confidential information and who may be in a position to use that knowledge to the employers detriment once their service ends: ***Brightman v Lamson Paragon Ltd 1914; Rentokil pty ltd v Lee (1995)***
    - on employees who have had personal contact with the employer's customers: ***Herbert Morris LTd v Saxelby (1916)***
- Principle: if the scope of the covenant exceeds what is considered reasonable, in general it will not be enforced: Lindner v Murdock's Garage (1950)
- Exception:
    - An express power on courts to enforce them to the extent they are reasonable provided there has not been a manifest failure by the drafter to attempt to keep the restriction within reasonable bounds: ***Orton v Melman (1981)***
    - If the covenant is set out in a form which imposes a series of overlapping restraints, those which go beyond what is reasonable may be served by the court, leaving the employer free to enforce the remaining restraints: ***JQAT Pty Ltd v Storm (1987)***
- ***Curro v Beyond Productions Pty Ltd (1993) 30 NSWLR 337***
    - Question in Curro was: could Beyond Productions rely on the clause to prevent Curro working for 60 Minutes?
        - TV presenter Tracey Curro, at the time agreed to go and work for a show that was being produced by beyond productions who were producing a TV show called beyond 2000, became very popular, in the contract there was a clause that stated she wouldn't't engage in other professional activities including making adds, being on other TV shows, without getting permission- restraint of trade clause. Accepted offer from Ch 9 to appear on 60 minutes, sought injunction to prevent working for Ch 9 and to enforce the contract. Curro argued it was unreasonable, it was against public policy and it was a restraint of trade. CoA noted in the entertainment industry there are used often, she also had legal advice when signing the contracts and so upheld the restraint of trade. It was also upheld in the first instance.
            - The question that must be asked is whether those restrictions exceed what is reasonably necessary for the protection of the legitimate interests of Beyond. The onus of establishing the reasonableness of the restraint lies upon the party seeking its enforcement. The validity of the restraint is to be tested at the time of entering into the contract and by reference to what the restraint entitles or requires the parties to do rather than what they intend to do or have actually done." (344 per Meagher, Handley and Cripps JJA citations omitted)

Implied duties of employers

1. **Duty to pay wages**
2. **Duty to provide work in limited circumstances**
3. **Duty of care for employee's health and safety (duty to provide safe workplace)**

Duty To Pay Wages

- Most fundamental obligation of an employer
    - If employee has performed the work he has contracted to do employer has a duty to pay agreed amount – FUNDAMENTAL
- Often a term of the contract
- Where a rate of pay is not specified (highly unusual) the employee should be paid what is reasonable, judged by prevailing rates for similar work
- The employer is not obliged to pay unless the employee performs the work required under the contract- the wages/work bargain: ***Unilever Australia Ltd v Food Preservers Union 1992***
- The work the employer can require is defined by reference to the range of lawful and reasonable orders that the employer may give the employee
- The employer could insist on employees performing the work lawfully demanded of them and pursuant to this should pay.
- *Duty to pay wages when there has been incomplete performance*
    - 'no work no pay' – common law right to refuse - this occurs where partial work bans or limitations are imposed by employees in the course of industrial action.
    - Statutory law provides protection of wages. Whether an award will prevent will prvent employer from making deductions depends on award. When an employee is covered by federal award to the benfit of an award, employee may recover wages under FW act.
    - S 324 permits refucstions from pay for the employee's benefit where authorized
    - S 326 provides that terms permitting deductions have no effect where deductions are for employer's benefit and unreasonable.

Duty To Provide Work- A Very Limited Duty

- Employers have no general implied obligation to provide work as long as wages are paid:***Collier v Sunday Refereeing Publishing Co (1940)***
- **However,** there is an issue when employer keeps employee but cannot or will not provide them work

Exceptions:

- Professions or trades where an crucialpart of the contract is that they get given work or else they lose their skills. ***Curro v Beyond Productions***
- Some contracts stipulate that the employer provide a certain amount or type of work
- There may be a term implied in fact that a certain volume of work be provided e.g. where an employee works mainly on commission: ***Bauman v Hulton Press1952***
- There is a duty to provide work under theatrical and analogous contracts: ***Bunning v Lyric Theatre 1894***

Curro v Beyond Productions Pty Ltd **(1993)**

Facts:

Curro on television – TV presented. She was working on channel 7. They axed show she was working on during life of contract. However, still kept her to her contract.

She then went to another station and broke contract. She argued implied obligations that the station must provide work or she would lose employability in the future. It kept Miss Curro's talents 'sterilized' for up to three years.

Critical point that it was in the entertainment industry that she needed to keep her name and talents before viewing in the public.

Held: There was a presumed intention of the parties was that Beyond impliedly contract to give Miss Curro a reasonable opportunity of performing services of the kind undertaken. She was entitle to be given work of appropriate quality to keep her name and talents before the public with reasonable frequency.

In the courts opinion there was no contractual right, of Beyond, to sterilize Miss Curro's service and keep her away from the pubic viewing.

Mann v Capital Territory Health Commission **(1981)**
Facts: Senior general surgeon claimed that the health commission failed to provide him with sufficient work to maintain his skills and experience

Issue: whether employee might be able to argue the existence of an implied term that the employer provides sufficient work to maintain an employee's special skills

Held: Found that no express provision made to this effect, and unable to imply a term that satisfied the *BP Refineries* test (term implied in fact)

Majority in Federal Court held in the circumstances of the case 'the vicissitudes attending the employment were too many and too varied to allow the term to be implied.

Blackadder v Ramsey Butchering Services Pty Ltd (2005) 221 CLR 539

- Blackadder- B worked at abattoir and was ordered to perform hot neck boning work and had not been trained to perform the work and was injured.
- Once he returned he said he would not perform the work and was dismissed.
- Claimed statutory unfair dismissal and the court agreed and ordered he be reinstated.
- He was ordered reinstatement and compensation. A series of disputes then ensued resulting in the employer then telling B not to come to work and to stay at home and they will continue to pay him. Went back to the FC and tried to get the order of reinstatement enforced. Agreed. Went to the HC. HC said workers need to be given actual work to do, it is something more than just simply being there in the workplace, they need to perform a task.

Duty Of Care For Employees' Health And Safety

- Long standing common law duty but largely taken up by OHS and Worker's compensation legislation

- Employers have a common law duty to take reasonable care for the health and safety of their employees
- Common law and contractual obligation
- One of the more onerous duties for employers- if they don't then employees can stop work and not resume until it is safe to do so
- Employees are also under a duty to take care of themselves. *Liftronic Pty Ltd v Unver*

Cotter v Huddart Parker Ltd

Established employers owe duty to exercise reasonable care in 3 aspects

1. Other employees are competent
2. Premises is safe
3. General system of working is also safe

Kondis v State Transport Authority

Held that the duty is not merely personal, but non-delegable. So independent contractor has not effect

Does this duty extend to the duty to take reasonable care to avoid psychiatric injury to an employee?

- Employer breaches duty to provide safe work environment when one employye, who left to secure large premises at night, was held-up by an armed rober. ***Rosstown Holding Pty Ltd v Mallinson***
- **However, *Koehler v Cerebros (Australia) Ltd* HCA –** Held that it was not foreseeable that employer could foresee risk of psychiatric injury. The majority held that the question invites attention to the nature and extend of the work being done by the particular employee.

Employer's duty to indemnify

- 'Employer is under a duty to indemniy the employee in respect of expenses properly incurred by the latter in and about carrying out of his duties' 0 ***Labour Law In Australia*** **Prof. E I Sykes**

Duty Of Trust And Confidence

Don't confuse this duty with the duty of trust the employer has in the employee – this is the duty of fidelity

Commonwealth Bank of Australia v Stephen Barker [2014] HCA 32

Background

- On 2 March 2009 the Bank advised Mr Barker (a senior executive) by letter that his position was to be made redundant from the close of business that day. The letter stated:
    - It is the Bank's preference to redeploy you to a suitable position within the Bank and we will explore, in consultation with you, appropriate options.
- In the banks HR policy manual there was a redeployment policy
- Mr Barker was further advised that if he was not redeployed within the Bank, his employment would be terminated on 2 April 2009. Mr Barker subsequently had his employment terminated by reason of redundancy.

- When he was terminated he was excluded from the office- his company issued phone was taken off him, email access barred and in doing so the redeployment officer could not reach him for a lengthy time
- The bank prevented him from making use of the redeployment policy and so he alleged a breach of mutual trust and confidence
- Mr Barker was successful in proceedings against the Bank. The Bank appealed, but was unsuccessful. The Bank then sought special leave to appeal, which was granted by the High Court. The appeal will be heard in 2014.

Federal Court And Full Court Decisions

- The primary judge Besanko J held that there was a term of mutual trust and confidence implied into the employment contract which would be breached if a party had, without reasonable and proper cause, engaged in conduct likely to destroy or damage the relationship of trust and confidence. He considered that the Bank's failure to take meaningful steps with respect to redeployment was a serious breach of the redeployment policy and therefore a breach of the implied term.
- The Full Court of the Federal Court by a majority also held that the term of mutual trust and confidence was implied by law. It adopted the language of the House of Lords in ***Malik v Bank of Credit and Commerce International SA (in compulsory liquidation)*** and held that the term required that *"the employer will not, without reasonable cause, conduct itself in manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee"*. The Full Court considered that failure by the Bank to take positive steps to consult with Mr Barker about alternative positions and give him the opportunity to apply for them constituted breach of the implied term.
- Jessup J dissented, finding that the term was not to be implied and could not, amongst other things, be justified as a mutualisation of an employee's duty of fidelity or as a principled development of the implied duty at law of co-operation between parties to a contract.

High Court Decision

- The High Court in *Commonwealth Bank of Australia v Stephen Barker [2014] HCA 32* ruled Australian employers do not owe an implied contractual duty to refrain from engaging in "trust-destroying conduct".
- Prior to this decision, Australian courts had recognised a duty implied into all employment contracts which prevented the parties from engaging in conduct likely to undermine the trust and confidence relationship underpinning the employment contract. The trust and confidence term was said prevent an employer from such conduct as:
    - engaging in conduct designed to force an employee to resign
    - wrongfully suspending an employee
    - conducting disciplinary proceedings improperly
    - engaging in discriminatory behaviour.
- In Barker's case the High Court noted the arguments in support of the recognition of the term were predicated on a contemporary view of the employment relationship, being one involving common interests and akin to a partnership.
- It was deemed a step too far to imply the term
- Given the recognition of the term favoured a particular view of social conditions and desirable social policy, its recognition should be determined by parliaments not courts.
- The Court <u>concluded an employment contract does not need to impose a positive mutual trust and confidence obligation on the parties in order for the employment contract to operate.</u>
    - Held that the implied term was too vague
- A key question for determination was whether the employment contract between Mr Barker and the Bank required for its efficacy, the implication of a term of trust and confidence.

- Kiefel J determined that it did not require the implication of such term as the actual terms of the contract were quite clear as to the obligations of the Bank and needed no additional term to be implied in order to be given effect. She further held that contracts of employment in general do not require the implication of a term of trust and confidence for their effective operation.
- The recognition of the term would create uncertainty.
    - For example, given it would be imposed on employees as well as employers, you might have a situation where an employee breaches his or her implied duty of mutual trust and confidence by conduct which was neither intentional nor negligent, but objectively caused serious disruption to the conduct of their employer's business.

The Employer's Duty Of Reasonable Treatment

- Duty to provide a reference: Spring v Guardian Assurance plc 1995
- No general duty on an employer to provide a reference for an employee unless there is an express term in the contract or an enterprise agreement.
- Collective agreements are more likely to require a simple statement of service from the employer, stating the positions the employee has held and the nature of his or her duties
- Where employers agree to provide employees with a reference they have a duty to take care: ***Spring v Guardian Assurance PLC 1995***

Employees and privacy:

- Information about individuals must be collected fairly, for a lawful purpose and with the person's knowledge and consent: Privacy Act 1988 (Cth)
- Principles have been extended to the private sector: Private Amendment (Private Sector) Act 2000
- Employers are obliged to respect the confidentiality of any information provided by their employees: ***Prout v British Gas plc 1992***

Duty to pay wages during temporary illness or incapacity

Common law of Australia as to the duty to pay wages during termporary illness or incapacity as in *Paff v Speed* (1961) – 'servant is entitled, in the absence of an express or implied term to the contrary, to be paid his wages during periods of temporary illness or incapacity'

STRUCTURE TO ANSWER PROBLEM

1. **Contract of employment has express and implied terms**
2. **Look for express terms fitst**
    a. **Are there any issues regarding incorporation of other documents such as HR policies**
3. **Then look for issues relating to breach of implied terms**

Do the facts relate to any of the established implied duties at law?