

# EMPLOYMENT LAW EXAM NOTES

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## CHAPTER 1

**Purpose:** Principles of law that govern the relationship between employers and their employees.

**Improvements:** Statutes that mandate minimum wages and conditions of employment.

**Industrial Action:** Chapter 3 of the *Fair Work Act 2009* (Cth) – a right to take protected industrial action. The regulation for legitimate industrial action is in Chapter 3.

**Compulsory Arbitration:** The *Conciliation and Arbitration Act 1904* (Cth) created a highly centralised federal compulsory conciliation and arbitration system which depended its effective functioning on high levels of industrial representation of employees by registered trade unions.

### **FAIR WORK ACT 2009 (Cth): page 6**

- Mandatory terms and conditions of employment
- The Act empowers the Fair Work Commission to set minimum wages

**Fair Work Commission** – supervises the regime, does not exercise any judicial functions but administrative power to determine unfair dismissal applications.

**Fair Work Ombudsman** – a separate agency exercising important enforcement functions and advising parties on their rights and responsibilities.

### COMMON LAW AND STATUTE:

- The sources of law are not separate and independent; they exist in a symbiotic relationship – *Brodie v Singleton* (2001). Parties to employment contracts do not enjoy complete freedom of contract. Employers and employees cannot contract out of their statutory obligations. Pg 11
- Statutory rights have been built upon the common law contractual framework, so that whilst the contract is of diminishing importance as a direct independent source of rights, it remains central to the operation of statutory provisions. Pg 18

### **CONTRACT OF SERVICE (Employee)**

### **CONTRACT FOR SERVICES (Independent Contractor)**

### **LIABILITY:**

- An employer is liable for the wrongdoing of an employee acting within the course of employment but generally not liable for the wrongdoing of an independent contractor.

- HENCE: There is an incentive for employers to explore alternatives to engaging employees. Less responsibility in contractors vs employees.
- EG: Hollis v Vabu Case: Employees for the purpose of vicarious liability. Pg 21

### **COURT INTERPRETATION: Hidden Purpose**

- Courts and tribunals are swayed FAR LESS by contractual clauses inserted to avoid creating an employment relationship than the reality of the relationship.
- Nearly all employment contracts are made on a 'take it or leave it' basis
- If there is a misrepresentation of an independent contractual relationship but in reality it is an employment relationship, the **sham** contracting provisions of the *FAIR WORK ACT 2009* (Cth) may apply. Pg 21 – See 2.100 in Textbook

## **CHAPTER 2**

# **TYPE OF EMPLOYMENT**

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### **CASUAL: Pg 23**

- Either Long term or Short Term
- Page 23 Employer can elect to offer employment on a particular day and the employee can elect to work.
- Informality, uncertainty and irregularity
- Extended period of time: series of separate employment contracts each time but may be 'continuous service' for the purpose of statutory entitlements/long service leave
- MAINLY differentiation in work entitlements – lack of training/career opportunities, security, irregular hours, fluctuating pay and marginalisation in decision-making
- Lack bargaining power/ lack of job security
- Less opportunities to negotiate employment terms and conditions
- Miss out on termination notice, paid annual, sick, compassionate leave
- EMPLOYERS Perspective: Flexibility & ability to employ labour when needed.

### **DISGUISED EMPLOYMENT: Pg 26**

- As seen in Hollis v Vabu, courts are not bound by the labels the parties give to the agreement. Instead, they will examine the existing system and work practices to assess whether the person is an employee.
- Sham contracting provisions of the *Fair Work Act 2009* (Cth) – s357 – 359
- Frequently arises where the intention is to exclude an employment relationship
- Page 26: At common law a contract is not enforceable where both parties intend to give a false appearance HOWEVER – UK have a more liberal test – page 27: **Bargaining** power must be taken into account & the **reality** of the relationship
- Courts adopt a contextual approach as stressed in Hollis v Vabu...NEED TO EXAMINE THE TOTALITY OF THE RELATIONSHIP

## SHAM PROVISIONS: Fair Work Act 2009 (Cth) s357 – s359

S357 - Misrepresents to existing or future employees that they are contractors

S358 – Dismisses employees for the purpose of re-engaging them as contractors

S359 – Knowingly makes false statements to persuade employees to become ind. Contractors

**Defence:** Employer did not know!

**Avenues** available to employees: A complaint can be made to Fair Work Ombudsman to breaches under the Fair Work Act 2009 (Cth). FW Ombudsman can perform an educative role and be proactive in auditing areas where sham contracting is more likely to occur.

### DEPENDENT CONTRACTORS: Pg 28

- A person not being an employee but dependent on the employer
- Who frequently work for and economically depend upon one single employer
- Most but not all attributes of an employee
- Self-employed workers take more risks and may be under greater pressure to achieve targets than employees
- There is recognition of dependent contractors in the taxation legislation
- The *Independent Contractors Act 2006* (Cth) may provide a remedy for harsh and unfair contracts IF the person is deemed a contractor and not an employee

### DEEMED EMPLOYEES: Pg 30

- Those deemed in excluded or doubtful groups can be deemed employees
- The purpose is to broaden the protection of beneficial legislation to groups that are seen as vulnerable to exploitation
- Where the worker is clearly an employee BUT IT IS NOT CLEAR WHO IS THE EMPLOYER – one person or entity is deemed or declared to be the employer
  - EG: pg 30 – Sex Discrimination Act or Anti-Discrimination Act s4B – deemed employers – eg. Police
- A person can be deemed to be an employee for statutory reasons and an independent contractor for other reasons
  - EG: Employee for purposes of workers compensation legislation but this would not make them an employee for purposes of vicarious liability

### INDEPENDENT CONTRACTOR: Pg 31: Comparison to Employees

- Primary distinction: A contract **for** service is an independent contractor (self-employed) and a contract **of** service is an employee.
- **Employees:** provide their personal services, are more highly regulated, in a subordinate relationship and subject to directions and control by their employer.