

# FORMING AN EMPLOYMENT CONTRACT

## Formation of employment contract

To form a contract, the following elements must be considered: Nb. No requirement K be in writing.

1. **Must be an intention to create legal relations (objective test)**
  - In commercial contexts, presumed there is an intent. Presumption shouldn't be applied strictly, decided on the facts (*Ermogeneous v Greek orthodox*)  
With family arrangements – presume no intent to give rise (here, engagement of minister of religion).
  - Consideration –**
  - A **work-wages bargain** (*Kaseris v Rasier Pacific V.O.F*) – Mutual obligation for employee to provide work required and employer to pay for work performed  
Lack of work-wages bargain b/c driver free to perform as much or as little work as liked + receive % of fee charged. Held to be IC
  - Productive activities vs observation, learning, training, skill development
2. **Certainty and completeness of terms**
  - Contract must have terms that are certain and complete
  - Eg. If employee partake in bonus scheme, if details not certain, court *doesn't* speculate nor enforce since essential terms not agreed upon
3. **Illegality**
  - Non-citizens – Aren't entitled to employment protections (policy issues)
4. **Vitiating factors**
5. **Lack of capacity**
  - Minors/mentally disable/intoxicated
  - In state, statutory protections exist for minors.

If the contract provides for conditions over and above those set by NES, fine. But contract can't exclude NES. \*NB The minimum conditions prescribed by NES can't be excluded nor displaced by employment K (s61)

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|--|---|
| <b>Full-time</b>                                       | Average 38 hours week –Depends on agreement with employer/MA/RA   |
| <b>Part-time</b>                                       | Average, less than 38 hours per week. Regular hours. Same benefits as full-time but on pro rata basis. Permanent employee or on fixed-term contract   |
| <b>Casual</b>  | Casual loading – 20%-25%. 2 days unpaid carer's leave and 2 days unpaid compassionate leave per occasion. Unpaid community service leave<br>After 12 months regular employment, and likely employment continue, can: <ul style="list-style-type: none"> <li>• Request flexible working arrangements</li> <li>• Take parental leave + No paid leave or notice of termination or pilon (s123)</li> </ul>  |
| <b>Fixed term</b>                                      | Employed for specific period. Usually full time or part time  |
| <b>Shiftworkers</b>                                    | Works shifts and gets paid extra payment for working shift hours  |
| <b>Daily hire/weekly hire</b>                          | <i>Daily Hire</i> : 1 day notice to terminate (Tradesperson, 1 hr to collect tools). 'Follow the job' loading to compensate for time not working b/w jobs. FT or PT hrs. <ul style="list-style-type: none"> <li>• <u>Only</u> tradespersons and labourers may be hired as daily hire employees (Building and Construction Award)</li> <li>• <u>Only</u> employees under plumbing and mechanical classification. NOT apprentices. (<i>Plumbing award</i>)</li> </ul> <i>Weekly hire</i> : Full-time (38), part-time (<38), inc apprentices. Regular hours of work <ul style="list-style-type: none"> <li>• Apprentices <u>must be employed FT (<i>Plumbing award</i>)</u></li> </ul> |
| <b>Probation</b>                                       | Assess if employee suitable for role. Same entitlements as someone who isn't on probation (paid leave etc). If employee doesn't pass probation, still entitled to receive notice when employment ends and have unused annual leave paid out <ul style="list-style-type: none"> <li>• FT and PT employees entitled to take sick leave as soon as its accrued</li> </ul>  |
| <b>Outworkers</b><br>(eg. Textile, clothing, footwear) | Contractors or employees who perform work at home or place that wouldn't normally be thought of as business premise (Minimum entitlements in NES/MA or national min wage) <ul style="list-style-type: none"> <li>• Award conditions <b>still apply</b> even when RA in place.</li> <li>• If award/agreement doesn't contain outworker terms, outworker gets the same conditions as any employee</li> <li>• Outworkers in clothing, textile, footwear covered by <i>Textile Award</i></li> </ul>   |

## Casual vs Permanent employees

Not defined in FWA. Casual employees excluded from a number of minimum conditions in exchange for a loading of 20-25% of the normal hourly rate for work

- Previously, defined as "casual employee for the purposes of the Federal instrument that applies to the employee" (*Telum Civil v CFMEU*)
  - If EA or MA applies -> Regard must be had to the definition of "casual employee" in it, usually "engaged and paid as such"
  - If Award/RA applies -> doesn't matter if casuals work regular and systematic hours on long term basis or any other indicia, won't impact characterisation of employment for purposes of FW Act
  - *Telum NOT required to pay redundancy for terminated employee as properly characterised as casual*
- In *Workpac v Skene*, Court held that the '**essence of casualness is an absence of a firm advance commitment to work**'. Court rejected notion that a casual employee's definition reflected in the relevant Federal Instrument as this ignored the existence of employees not classified under EAs or Awards. Further, the FWC predated MAs and EAs so cannot inform on 'casual employee' definition in FWA.
  - MA or EA classification will merely be a contributing factor to definition under FWA.
- Other important factors:
  - Irregular work patterns
  - Uncertainty of duration
  - Intermittency / lack of regularity
  - Uncertainty
  - Lack of systematic hours
  - Express payment of casual loading (employers should state what the loading % amount is and each component %)
  - (ie **Not** long-term advance commitment to working set hours)

## Penalty rates

- June 2017 – FWC issued decision finalising transitional arrangements for the reduction in penalty rates to phase in from 1 July each year, at the same time Annual National Wage Case decision has increased
- Decision confined to hospitality, restaurant, retail, pharmacy awards (*General Retail Award 2010*)
- Arguments for: Was too much of a penalty on Sunday and holiday work, increased services and trading hours
- Consequences: Up to half million emp could lose \$6,000

## Internships/Vocational placement

May take on different forms in different industries and be entered into a for a number of reasons, which include giving a person experience in a job/industry or to assess a person's job skills.

## Regulatory Approach

A person undergoing a vocational placement is not an employee under the FWA (s13). Unpaid work under such a placement/internship will be lawful if it is a vocational placement as defined under the FWA and there is no employment relationship.

- A vocational placement is placement that is: (s12)
  - (a) undertaken for an employer without pay
  - (b) as part of an education or training course
  - (c) authorised under law or administrative arrangement of the Cth, State, Territory
- If elements not satisfied, doesn't necessarily mean person is employee. Must consider whether or not employment relationship (see above)

## Benefits of vocational placement

- Students provided with the opportunity to apply theory and skills they learned while studying in a professional workplace
- Students may gain skills they need to transition successfully from study to work, while giving industry the opportunity to enrich students learning experiences and increase the number of work-ready graduates

## Voluntary work

- **Example:** Not for profit board (**EXC.** For profit boards that pay a stipend), Charitable work, volunteer work
- Lawfully unpaid where there is a (a) lack of intention to create legal relations and (b) lack of 'consideration'
- **Entitlements:** workplace health and safety/ Some cases – Workcover/ Bullying/ Anti-discrimination

## Flexible work arrangements

[Employee] may request flexible arrangements by making a request in writing setting out details of change sought and reasons for change (s65). May request eg: Reduction in hours of work/pattern of work/ start or finish time/ location of work (from home)

To be eligible, following elements must be satisfied:

### (1A) Standing to apply

- (a) Parent/carer of child school age or younger
- (b) Carer
- (c) Disability
- (d) 55 or older
- (e) Experiencing violence from member of family, or provide care or support to immediate family who exp
- (f) Provide care/support to immediate family or someone in household
- **OR** (1B) parent/carer returning to work after taking leave re: birth/adoption of child, may request to work part-time to care

### (2) Eligibility

- (a) Completed 12 months of continuous service
- (b) casual - regular systematic basis for 12 month on reasonable expectation of continuous employment

(4) Employer must make decision in 21 days, if refuse, (6) must provide reasons

- **(5;5A)** Employer may refuse on reasonable business grounds, inc:
  - (a) Cost
  - (b) Impracticality – eg can't change other employees' working arrangements
  - (c) Efficiency
  - (d) Lost of productivity
  - (e) Customer service

### Alternative:

- Discrimination legislation – failure to provide reasonable adjustments
- Cf. Employer may argue failure to meet inherent requirements to attend team meetings