MLL342: Workplace Law

Summary & Revision Notes

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Topic 1: Introducing Workplace Law

What is Labour Law?

- the "*norms, processes and institutions by which the state regulates or mediates relations between employers and employed", and the way the subject might be taught in law schools…*
- Study of labour law in Australia essentially about regulation of the relationship between workers and employers
    - fits concept of "protcting the weak" – an aspect of Australian legislative system
- What is difference between "labour law", "labour relations", and "industrial relations"?
- There is a close relationship between politics and labour law. This is shown starkly by the Work Choices period in 2005-07
    - During that time an **agreements-based** industrial system framed around **market ideology** was fixed in place **without** many of the **safety nets** that previously formed part of the Australian system.
    - It is undoubtedly the case that Work Choices was a principal factor in the Howard government lost office in 2007

Individual and Collective Aspects

The distinction is helpful in analysing the development of the law historically and understanding new directions into the future.
The Fair Work Act 2009 (Cth) introduced many individual rights.
Individual aspects include:

- the individual contract of employment – what are its terms?
- legislative intervention in the individual contract, for example, 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 and the right to join a trade union or employee organisation or not to join one; and
- industrial action and its legal consequences.

The Role of the State as a Feature of Labour Law in Australia

- It was always assumed that an **independent tribunal** would exist as part of the Australian system acting in the **public interest.**
- This body was conceived as an aspect of the "new province for law and order" in the language of Higgins (note extract of Rothman, 1.22E).
- Tribunal acting to resolve dispute independently of the parties.
- The tribunal (originally a court) given status of superior court of record.
- The requirements of formal arbitration system necessitated formation, incorporation, and recognition, of Federal trade unions.

Significance of Conciliation and Arbitration in Australian System

- Nature of award system (with underlying statutory emphasis) and impact on common law. **Parties unable to contract out of award regulation.**
- Participation in system – gave power to collective organisations – **unions** and **employer bodies**.
- System of state regulation (1.25) and the system also involved the existence of **sanctions to enforce compliance** with agreed or arbitrated standard.

Enterprise Bargaining

- The shift to enterprise bargaining was arguably a product of a **deregulation** of the labour relations system (1.26) and attempts to introduce **flexibility** and **efficiency** into Australian industrial relations (1.25).
- This trend to **individual contracts** was **halted** by the Fair Work Act (FW Act).

- On its face the FW Act sought to reintroduce "fairness" into the legislative dynamic although this is always likely to be open to debate.
- What are some of the chief FW Act changes?
    - focus on collective bargaining (with removal of AWAs and emphasis on good faith bargaining principles); and
    - an **approval test** for agreements requiring that that **employees as a class must be better off overall than if covered by relevant award** (similar to **no disadvantage test** that applied before Work Choices).
    - reintroduction of **full unfair dismissal protection** that applied prior to Work Choices;
    - **10 National Employment Standards** – some being new rights for all employees;
    - **modernisation of awards**; and
    - strengthening of "**General Protections**" provisions – allowing employees to maintain claims that workplace rights adversely affected or else discriminated against
- One important matter that is expressly mentioned in the objects of the FW Act is the concept of "**social inclusion**".
- This is possibly regarded as an **aspect of fairness** – the idea that the role of the legislation should go **further than protecting the rights of those in "paid work"** – it may be about **increasing incentives for those not in paid work** to seek employment (1.37).

Institutions and their Impact on Work Arrangements

- Traditionally, the Australian system was a "collective" one – involving collective disputes between employers and unions (collective groups of employees).
    - The idea of collectivism has gradually **eroded** with the advent of **individual rights** like unfair dismissal protection and "general protections" (adverse action provisions). These enable individual workers to maintain claim against their employers (3.8).
- The functions of the tribunal are carried out by the **President**, and various members of the Commission.
    - The President invested with power to **manage the tribunal** in an efficient manner (3.9).
- **Some FWC functions** can be carried out by **single members** (s 612), but **not creation of modern awards**, or **4-yearly review of awards**, or **Annual Wage Review**. These matters **must be considered** by the **Full Bench** (3.11).
    - The **General Manager** of the FWC has broad functions of **conducting research** and **preparing reports** (3.10).
    - The FWC required to perform functions in a way that is "**fair and just**", "**quick, informal, and avoids unnecessary technicality**" (s 577) - must take account of the objects of the Act e.g. "**equity, fairness and the merits of the matter**".
- The **FWC** is **not strictly bound be the rules of evidence** (s 591), and as a general matter costs are not awarded in tribunal proceedings (3.12 and 3.13)

- Initially in its history the **Federal "Court**" was **not** a **separate body** from the "**arbitral tribunal**" (3.14).
- Since the *Boilermakers* decision in 1956, **Federal courts** (now the Federal Circuit Court and Federal Court) have existed quite **separately** as part of Australia's **industrial jurisdiction** (3.15).
    - The **Federal Circuit Court** is likely to hear **initial proceedings** in **general protections claims** – e.g. discrimination on the basis "a workplace right" or trade union membership (3.16).
    - The **Federal Court** may hear matters on **appeal** from the Federal Circuit Court, or else when a matter has been referred to it on ***a question of law*** by the **President of the FWC** (s 608, FW Act) (3.15).
- Certain **employer bodies** have **criticised** the **Full Bench decisions** of the FWC on the grounds of "**inconsistency**" – arguing there should be a new appeals body established to address this issue (3.20).
- The **FWC** itself **questions the need** for such a body.

The Law of Employment in the Global Era

international regulation of labour through the ILO and the response to globalisation.

- The relationship between labour law and corporate law has theoretically become much **closer** as the Australian labour relations system relies for its legal justification on the corporations power in s 51(xx) of the Constitution.

- Authorities like Ron McCallum have questioned whether the corporations power should be relied upon as the legislative basis for the working arrangements of "flesh and blood" employees (1.40).
    - One question is whether employees should have a role in the proper governance of the corporate employer's business. Do they have a similar stake as shareholders in the way the business is run (1.41)?
- Other apparent frontiers of labour law (or workplace law) – are **discrimination** and **occupational health and safety** - because these kinds of issue can arise in workplaces (1.44).
- Equally there are matters like **immigration** (1.45) and **human rights** (1.46). All these matters can become relevant due to the various **international treaties** and **conventions** to which Australia is a party.

The History of Employment Law in Australia

1901 – Federation and Commonwealth Constitution
1904 – Conciliation and Arbitration system was set up after Australian Constitution was drafted and Federation
1988 – Industrial Relations Act (Hawke ALP)
1993 – Industrial Relations Reform Act (Paul Keating introduces enterprise bargaining)
1996 – Workplace Relations Act – (Howard Coalition - Brand new act- introduces AWA)
2006 – Work Choices (Howard; It is the same name as 1996 act but act totally changed and renumbered
2009 – Fair Work Act 2009

- Collective/enterprise bargaining
- Floor of comprehensive individual workplace rights

Other **challenges** to be faced in the labour law context:

- changing nature of work;
- increase in non-traditional models of work;
- changing way of performing work through technological change and telecommuting;
- globalisation – with economic challenges; and
- diminished role for unions.

Institutions and their Impact on Work Arrangements

- Australian system based on role played by tribunal (**Fair Work Commission** (FWC)) and **various courts** (3.2).
- **Tribunals** traditionally exercised **powers of arbitration** over "**industrial disputes**", while **courts** had ***enforcement* role.**
- Role of **FWC** somewhat **different** under FW Act (3.2) – to **resolve unfair dismissals**, **making agreements, awards** (in the **absence of "dispute**").
- **Jurisdiction** of the FWC often raises questions of the "**public interest**" – this will be raised later in discussions about **approval of agreements**, and **allowing forms of industrial action** (3.5 and 3.9).
- Unions remain a **central feature** of the Australian industrial system, and they are the **default bargaining representative** (BR) for their members in **enterprise bargaining negotiations** (s 176(1)(b)(ii)) (3.6).
- Union representative may also gain **right of entry to workplaces** – but this is subject to required permit being granted by FWC (3.7).

Objectives

1. Explain the differences between **individual** and **collective** aspects of workplace law
2. Explain the **general history** of **workplace regulation** in Australia and understand it in its **constitutional setting**
3. Explain the **key concepts** which underpin workplace regulation

Topic 3: Terms of the Common Law Contract

Introduction

Often it is the human resource manager or general management that supervises or directs the performance of an employee in the workplace. It is important to note that these are long standing principles established by the courts over a long period of time and will **rarely be subject to change**. The sources of rights and obligations include:

- the general law – made up of common law and equity
- legislation
- industrial instruments made up of awards and enterprise (otherwise known as collective) agreements
- minimum national standards
- human resources policies and manuals.

Contract formation issues

Even though employment contracts by their nature will **not often be void for lack of certainty** (inasmuch as they may be characterised by oral agreements, informality, or uncertain terms), that **does not** mean that any and all work arrangements may be **properly deemed contractual**.

- Where **issues of contract formation** are questionable, it is wise to consider whether the parties have **actually engaged in making a contract** or whether they have the **capacity** to do so.

You should consider general contract law principles with regard to contract formation issues, such as:

- offer, acceptance and consideration
- lawful objects
    - contracts can only be made about promises, which it is lawful to perform and are otherwise consistent with public policy
- voidability of contract
    - at the option of the potentially injured party) due to mistake, unconscionability, misrepresentation, or lack of capacity
- intent to form legal relations
    - whether the parties intended a formal business relationship such that it would give rise to contractual rights and obligations
        - See Dietrich v Dare (1980) 30 ALR 407.

Types of contracts

At general law, there are three types of employment contracts:

1. **Fixed-term contracts** – where the parties expressly agree upon the term of the employment and the date of termination.
2. **Casual employment** – an ill-defined term at common law. Workers work under arrangements characterised by informality, uncertainty and irregularity.
3. **Ongoing/continuing employment**. This is the most common form of employment and can be full or part-time. This type of employment is indefinite and can be terminated by either party by giving the proper notice at law.

Types of terms

Express terms

Express terms are the terms **actually agreed** to by the parties, whether orally or in writing.

- They may be **overridden** by any **better terms** that may **apply by law** because the employee is covered by an **industrial instrument**.

- All express terms attach to the particular contract at issue.

Express terms incorporation by reference – The case of Human Resources

Express terms may also be **incorporated by reference** into an employment contract (i.e. the contract refers to other documents, such as personnel procedures, employee handbooks, etc., the contents of which ***may*** **become express terms**).

The **terms of documents** incorporated by reference are then **legally binding** on employers, as well as employees.

- See *Riverwood International Australia Pty Ltd v McCormick* [2000] FCA 889.
- Whether a document is incorporated by reference **depends** upon the **facts** of **each case.**

The real issue here is, in what circumstances can it be interpreted that the documents/policies have been incorporated by reference as part of the contract of employment?

- Remember, if they are **incorporated**, this **creates a right in contract**. The consequences of this is, if the term in the policy is **not followed** the **aggrieved party** can go to court and **sue on the basis of contract law principles**.
- Potentially there could be a **claim for damages** in court that usually means **greater awards** of money if the employee is successful.

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

Facts:

- The P (McCormick) entered into an oral contract of employment in a packaging company.
- Over the years, the company was owned by a series of differing corporate entities associated with the same principal.
    - The business was then sold to a third (un-associated) company (MMP), which then created a separate corporate entity (Riverwood) to run the packaging systems division where McCormick worked.
- The Riverwood entity retained close ties to MMP. Although his duties had not changed, 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, notice, etc.
    - Relevantly it also contained a heading of 'company policies and practices,' stating: '**You agree to abide by all Company Policies and Practices currently in place, any alterations made to them, and any new ones introduced**.'
    - McCormick signed and returned an '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 outlined above.'
- Subsequently, a redundancy agreement was executed with the union and later placed in MMP's 'Human Resources Policies and Procedures Manual', a document which was updated over time. Both MMP and a substantial part of
- Riverwood were sold some years later to a NZ firm and redundancies resulted. McCormick was made redundant after almost 37 years of work at the same job under the various companies.
- He claimed a substantial redundancy payment was owed him under the policy.

Decision:

- The **trial judge** found that the letter was a '**loosely drafted'** and somewhat **ambiguous commercial document** and that the words '**abide by'** in the letter imposed obligations linked to the manual. Although the manual primarily contained detailed employee entitlements rather than obligations, the judge 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 on the company.**
- **On appeal, the Full Court in a 2:1** 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'. This, he reasoned, should be interpreted as a **mutual obligation** as related to the company policies even if the employee was not specifically burdened by them.
- Mansfield J held that the policy clause in the letter of offer was not clear on its face and that it was reasonable to assume that, as the drafter of the documents in question, the **company intended to be contractually bound by the documents.**

- Lindgren J (in dissent) considered that the plain meaning of the letter was that the company sought the employee's acknowledgement '**of the right of management to manage'**, subject to the rights specified to the employee in the letter.
    - He noted that there was no consultation of employees regarding the establishment or alteration of the policies in the manual. In essence, he felt that to construe the letter differently under the circumstances would alter practical commercial arrangements.

Issues:

- The company resisted the redundancy agreement as they argued that it was not a contractual term.
- Any term that is contractual must be followed by the parties, if they do not, there are legal ramifications including compliance with the term and/or damages.
- Barristers for the P argued it was a contractual term (the redundancy agreement) and that the company had to abide by it.
- The Full Court (2-1) **held** in favour of the P
    - "abide by" is a contractual term that is **promissory in nature**
        - Suggests an **obligation** i.e. they must adhere (they cannot exercise discretion)
    - The letter of offer did not mention the reciprocal obligations of the company.
        - Can a contract make only one party obliged to abide by the policies, but not the other?
            - The court held you cannot – the contract is a **relationship of mutual obligation**
                - The court read the company policies carefully and noted that there were in fact some reciprocal obligations contained within them.
                    - These could not be interpreted in a **one-sided way**
- The HR policy referenced in the letter of offer bound any future alternations made as well
    - **Note:** if it did not refer to future alterations, those future alterations could never have been incorporated into the contract for employment.

Goldman Sachs JB Were Services (GSJBWS) Pty Ltd v Nikolich [2007] FCAFC 120

Facts:

- The court upheld on appeal that an employer's workplace HR policies were **incorporated by express reference** as part of workers' employment contracts.
- A former 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 provisions 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'.
    - These were not expressly mentioned in the letter of employment offer, but the policies were accompanied with the contract at the time it was signed.

Held:

- Justice Murray Wilcox found that **the company had breached the employment contract** by failing to follow the procedures in the policy. The Court ordered damages of $515,000 to the employee for past and future loss of income and general damages for breach of contract.
- This trial judge's decision was **largely upheld** on appeal by a full court (but not all). Some parts of the original decision made by Wilcox J were overturned on appeal.
    - The were statements/policies made in aspiration and were not considered promissory in nature
        - If they create promissory obligations they are more likely to be contractual in nature.
- However, GSJBWS were still **found liable in breach of contract** principally relating to the OHS clauses in the WWU policy.
    - See CJ Black's judgment in the appellate decision.

Romero v Farstad Shipping (Indian Pacific) Pty Ltd [2014] FCAFC 177

Another Full Federal Court decision also accepted that the **policy formed part of the contract.**

- Allsop CJ, Rares and Mckerracher JJ reviewed the decisions on this issue at [33]-[48].
- The consideration as to why the policy formed part of the contract can be found at [49]-[63].

- Ms Romero received a letter of engagement referring to her need to comply with the policies. The letter of engagement together with reference to the relevant parts of the policy can be found in the judgement at [26]-[32].
- This was taken to assume that the policy was a part of the contract.

(a) Look for letters of offer/engagement
(b) If none are in place, look at the contract and what it says
    a. Does it refer to policies?
    b. What does it say about those policies?
    c. What do the parties have to do in relation to those policies?
    d. Are the words "**strong**" enough to incorporate a contractual obligation?
        i. Are the words similar to the ones found in *Riverwood* i.e. "abide by"?
        ii. Or are they softer? E.g. "we aspire to", "we believe" etc.
        iii. Do they appear **certain** or do they appear **vague**

The test here is what does the reasonable people think in these circumstances to what the intentions of the parties are.

- **Objective test** i.e. manufactured/artificial test of intention, not subjective.

Tony Selak and Woolworths Limited **[2007] AIRC 786 (26 October 2007)**

- Mr Selak was a store manager for 20 years who had gone out to a 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.
- This **policy** was **found to have been incorporated** into the contract of employment.
- This decision was later **upheld** **on appeal** in early 2008.
- In this instance the 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 certainly strengthens the employer's claim against an employee.

Implied duties at common law

Terms implied by fact

The parties may be **presumed** to have agreed to certain terms and conditions, even though they did not spell them out.

- Terms may also be **implied in fact based on custom and practice.**
- We consider the **legal tests** for determining whether the law should imply a particular term into a contract.
    - **Note** that a term implied in fact is **with reference to a particular contract only** and **does not** **represent a general legal obligation.**
    - Terms implied on a **case by case** basis
- We also look at the **basic legal test** for **implying terms** into all contracts called the '**business efficacy test**'.
    - This legal test was established in the decision of BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 52 ALJR 20; 16 ALR 363.
        - see **page 76 of TB** under heading 'Implied Term'
    - To be necessary to give **business efficacy** to the contract
    - To be **reasonable** and **equitable**
    - To be **so obvious** that it goes without saying
    - To be capable of **clear expression**
    - Not contradict any express terms of the contract
- We also mention a **recent case** where an employee successfully argued that an implied term existed using the business efficacy test, see Ware v Amaral Pastoral Pty Ltd (No 5) [2012] NSWSC 1550.

Terms implied by custom

- See discussion 'crystallised custom' **page 77-78 TB** from the *Byrne & Frew* HCA decision
- **Test: terms '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 contract'.**

Terms implied by law

Terms implied by law are also called **legal duties** of employers and employees.

- Terms the **common law implies into every contract of employment unless they are expressly excluded by the parties**.
  - otherwise known as 'implied duties of contract of employment'
- Developed by the common law over time
  - **Origin** – Master/ Servant laws
- The **test of necessity** is applied to develop further implied duties at law - CBA v Barker ; UWA v Gray

- Test – see UWA v Gray [6.31C]
  - The element of the test are **broadly the same** as the **Business Efficacy test** used for **implying terms in fact BUT**
- **NECESSITY** 'in this context has a **different shade of meaning'** – UWA v Gray, see p 237 TB
- Rests upon **general considerations** relating to policy
- This is because it **must be implied into all contracts of a particular type** it has a much **wider impact**.

Variation of terms

Like contracts generally, the terms of an employment contract can **only be varied by mutual agreement** (but remember that rights and obligations that come from other sources like **enterprise agreements** or **legislation** may change **without** the '**agreement'** of the parties).
The employer may be **able to make minor changes** that the employee is **obliged to accept**.

- This is often referred to as '**management prerogative'**.
- This concept is underpinned by notions of **property** and **contract law**, in particular the employer's right to **issue lawful and reasonable orders** that the employee is then obliged to obey.
- They are not like other commercial contracts where a variation to be valid must be made by consent and consideration must attach to the variation.
- In employment contracts **minor variations** are assumed and 'have to' be **accepted** by the employee.
- But 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 the grounds that the employer has **repudiated the contract**.

Quinn v Jack Chia [1992] 1 VR 567

- The variation of an employment contract may be **so substantial** that it may be argued that the **old contract was terminated and replaced by a new one.** This argument succeeded in this case.

Fact:

- 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 **one month's notice**. In August 1985, Quinn was appointed to the positions of Construction Manager and General Manager at a **substantially increased salary.**
- In March 1987, he was given one month's notice of termination.
- He sued for **breach**, arguing that the **one month provision did not apply** and he was entitled to '**reasonable notice'** of termination.

Held:

- The Victorian Supreme Court held that the change of position when he was appointed Construction and General Manager was **exceptional** and far reaching and **went beyond what was contemplated under the first contract**.
  - herefore, the appointment was in fact a **new contract** and not a variation of the old contract.

- An **implied term** of **any** **contract of employment** that **does not** **specify any** **notice period** is that the employer shall give '**reasonable notice'** of termination.
    - What is reasonable depends on a **range of factors** including the seniority of the position, the age of the employee etc.
        - The court acknowledges that a position of this type has considerable sacrifice by the employee and jobs of this level are harder to obtain.
        - Lower-level employees suffer under this principle as they can attain similar employment much more readily.
- The Court said that reasonable notice in the circumstances was 12 months' salary, subject to Quinn's duty to mitigate his losses.
- In **contrast**, see Concut v Worrell [2000] HCA 64.
    - The High Court concluded that when a manager was offered a formal contract to replace the verbal contract he was initially engaged under, this resulted in a **variation** of the contract, **not** **a substitution**.

Implied employee duties

These duties are not always precise or clear, leaving them open to arguments and interpretation from both sides.

Duty to obey lawful and reasonable orders

This duty is also a hallmark of **managerial prerogative** (the modern version of the **master-servant relationship** in the common law). Obedience on the part of the servant/employee is considered to be a **natural incident of the contract of employment** as it flows naturally from the master-servant relationship.

- However, must an employee obey **every order** the employee gives?
- Employees are **not bound** to obey orders that are **not** **lawful**.
- When will an employer's order not be lawful? See, for example, *Ottoman Bank v Chakarian* [1930] AC 277.

A **lawful order** is also one that is considered to be within the **reasonable scope** of the **employee's employment**. See Dixon J. in the extract below.

An **employer's orders** must also be **reasonable**. The classic statement for determining whether an order must be followed was stated by Dixon J in *R v Darling Island Stevedoring and Lighterage Co Ltd; Ex parte Halliday and Sullivan* (1938) 60 CLR 601 at 621–622:

> *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. In other words, 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 … But what is reasonable is not to be determined, so to speak, in vacuo. The nature of the employment, the established usages affecting it, the common practices which exist and the general provisions of the instrument . . . governing the relationship supply considerations by which the determination of what is reasonable must be controlled.*

The question of what is reasonable in any given work situation will give rise to debate.

It is decided upon a **case-by-case basis**. The issue of **reasonableness** in many areas of law is an **elastic concept**. It is assessed in the light of community standards at the time the case is heard.

Australian Telecommunications Commission v Hart (1982) 43 ALR 165

- the court held that it was reasonable for Telecom (now Telstra) to instruct one of its employees **not to come to work dressed in a caftan and thongs**.
    - **Note:** there may be some applicable **statutory limitations** to this right to require dress codes. Compare Woolworths Ltd v Dawson (1999) 45 AILR 4–012 (unfair to dismiss long-term employee over failure to comply with new dress code prohibiting more than 2 earrings when she had worn more for years with no complaint) and Heilbig v Bundaberg Christian College [2003] QADT 13 (15 May 2003) (sex discrimination to prevent male staff from wearing earrings but not females).

- For a more recent example in Victoria see *Pettet v Readiskill LMT Milduar* [2001] VSCA 211 (14/11/01) where it was 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 a time clock at work.

Not all disobedience of lawful and reasonable orders will give rise to a right on the part of the employer to **terminate the contract** of employment (i.e. dismiss the employee). The disobedience of the order **must** be considered to be **fundamental to the performance of the contract** of employment. It **must not be trivial**.

- See *North v Television Corporation Ltd*.
- Also see *Pastrycooks Employees, Biscuit Makers Employees & Flour and Sugar Goods Workers' Union (NSW) Gartrell White (No. 3)* (1990) 35 IR 70 – *decision of the Industrial Commission of NSW*. Many employers have come unstuck in this area when they have dismissed an employee for disobedience in '**trivial**' circumstances.

Co-operation and proper conduct

The duty to cooperate is one **implied** as a **matter of contract law** into **every agreement**, though its **precise extent** is **not always clear**.[1] It has been expressed 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 the benefit of the contract**: *Butt v McDonald* (1896) 7QLJ 68.

Does this mean that employees have a legal duty of cooperation?

- It seems that this duty implicitly underpins other duties and decisions regarding the type of employee behaviour which could be classified as misconduct.
- However, the extent to which it overlaps with other duties such as the duty to obey and the duty of loyalty or fidelity means that it is not often described as a separate duty.

Note that such a duty **inevitably conflicts** with the practice of **industrial relations**, where a central tactic of unions is to disrupt the employer's business in order to get action on industrial demands.

The **duty to co-operate** was also discussed in *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169.

Duty of skill and care

Lister v Romford Ice and Cold Storage [1957] AC 555 is authority for the general rule that an employee has an **implied duty** to act with reasonable care so as not to cause loss to the employer.

- There is an implication that the employee has reasonable skills and is competent to carry out the work concerned, **unless** there is an **express term** to the **contrary**.

Where the employee represents that s/he possesses particular knowledge or skill, that **employee's negligence** will be judged **against a standard of one skilled or knowledgeable in that area**.

- Where there is **no general nor particular representation of ability** (such as where a prospective employee directly denies a particular skill), the employee is judged against the **standard of a reasonable person**.
- If the employer knows an employee does not possess the requisite skills, then the employer takes the **risk** that the work is done incompetently or they have to train them:
    - see *Printing Industry Employees Union of Australia v Jackson & O'Sullivan Pty Ltd* (1957) 1 FLR 175.

Employer is vicariously liable for the acts of employees done in the **course of employment** that **causes loss to third parties**. At common law the **employee must indemnify the employer for losses incurred by the employee's negligence**.

- Legislation in some jurisdictions **prevents** the employer or the employer's insurer from seeking indemnity from the employee unless the employee's negligent conduct was wilful.
- The High Court in *FAI General Insurance Co Ltd v AR Griffiths & Sons Pty Ltd* 71 ALJR 651 opined that legislation was preferable to overcome this deficiency in the common law, rather than reform of the common law itself.

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1 See *Australis Media Holdings Pty Ltd v Telstra Corp Ltd (1998) 43* NSWLR 104, at page 353.

Duty of fidelity, loyalty or good faith

This fundamental duty is variously expressed as a duty of fidelity, a duty of loyalty, a duty to act in good faith or a 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 position).
- *Blyth Chemicals v Bushnell* (1933) discusses the general nature of the duty.

Blyth Chemicals v Bushnell (1933) 49 CLR 66

Facts:

- Senior manager worked for chemical company in Victoria
- Manger bought another company that was within the same industry but manufactured a slightly different product
    - The company was going insolvent and he bought it at a discount
- The directors found out about the manager's purchase and in thinking the manager was trying to compete with them, they tried to make him sign a contractual obligation that he would not compete with his workplace and to assure that any profits made from the newly purchased company would be handed to them.
- When he refused, the directors terminated his employment

Issue:

- What was the relevant principle at play here?

Found:

- They could not find that he had breached anything (by directly competing with them).
- One argument used by the company was that they may enter into this industry and produce similar products
    - Court said you cnnot act on anticipated breach, it has to be **actual.**

Comment:

- Look carefully at the business that is being setup by the employee

Colour Control Centre Pty Ltd v Ty (1995)

Facts:

- Preparing to compete in direct competition with the company they worked for
    - Actually lied to the employer and worked for AA when they actually planning to setup in competition
- Ms Rando was the employee she obtained details of work undertaken for a particular client for the Colour Control Centre with the intention of diverting business to her own benefit.

Comment:

- This discusses fiduciary obligations
- This case demonstrated a clear breach of the duty fidelity
- TB 219 – major part of the discussion detailing her breach
- Note: damages involved any profits made by Ms Rando (equitable remedy of account of profits, not a contractual remedy)
- You will not bring a claim unless you are aware of the remedy available to you

Stoelwinder v Southern Health [2001] FCA 115

Facts:

- The applicant was the CEO of Southern Health Care Network
- Had a contract and sued for recovery of money.
- That money was based on the interpretation of clause 6 of his contract (**TB 122**)
- Obligated the hospital to pay out all entitlements including sick leave - which is not usually the case (it's merely annual and long service leave that is paid out).